

SECOND CARNEGIE INQUIRY INTO POVERTY
AND DEVELOPMENT IN SOUTHERN AFRICA

Aspects of legal aid in divorces

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ASPECTS OF LEGAL AID IN DIVORCES

On the 1st November 1983 the Director of Legal Aid in Pretoria circulated to all legal aid officers in South Africa a directive that legal aid would thenceforth not be granted to litigants in the following circumstances:

- (a) civil appeals
- (b) divorce cases.

No date was given for the reintroduction of legal aid in either circumstance.

Prior to this directive legal aid in divorce cases was governed by paragraph 16 of the Legal Aid Guide which provides inter alia that social work reports must be produced which, prior to the award of legal aid, while aiding legal aid officers in exercising their discretion to grant legal aid, do not bind them. The social work reports are to deal with the matters set out in paragraph 16.1 and are directed as discovering whether there is a reasonable possibility of reconciliation; whether the divorce will substantially benefit the applicant; whether applicant's problems can be solved by administrative action on the part of a state or other institution; whether, if the applicant is a party to an adulterous union, the parties have the bona fide desire to marry; whether applicant has previously sued for and obtained a divorce with the Board's assistance and whether or not the applicant or the applicant's children are in danger of being physically assaulted by the other spouse.

The position since November, both from the point of view of litigants and from the point of view of the profession is not clear. It is the purpose of this paper to examine some of the effects of the cut back in legal aid on individual spouses and to look at some of the implications of the cut back on the provision of legal services by the profession.

During late 1983 and early 1984 I interviewed members of all firms of attorneys in Grahamstown, contacted the legal aid officer in Grahamstown, civil service, social work offices, the registrar of the Southern Divorce Court in King William's Town and conducted in-depth interviews with those persons who were directly

affected by the decision of the Legal Aid Board.

All these would-be litigants seeking divorces whom I interviewed as well as those about whom information was obtained indirectly through attorneys, were in employment. All fell just within the means test laid down by the Legal Aid Board (1). None was therefore a member of those groups most disadvantaged in South Africa. None would however have qualified to institute proceedings in forma pauperis in terms of Rule 40 of the Supreme Court Rules (2). However, none of these interviewed could with any sense of financial confidence embark on litigation which would result in substantial cost to themselves (even were they to be successful in having costs awarded to them.) All were supporting family members who were not dependent children and all had other financial commitments to meet, for instance in the form of hire purchase instalments.

So far as the institution of divorce proceedings by blacks is concerned the procedures and criticisms thereof have been extremely ably outlined by Sandra Burman in 'Roman-Dutch Family Law for Africans : The Black Divorce Court in Action' (3) and there is therefore no necessity to repeat material covered in her excellent article. However, I approached Mr Schmidt, the Registrar of the Southern Divorce Court in King William's Town as late as January 1984 enquiring what possible effects he believed that there might be as a result of the Legal Aid Board's November decision. He said that he had heard nothing about such refusal to grant legal aid. He also proffered his opinion that such refusal would have no effect on the number of divorces in his court as it was a perfectly simple matter for a spouse seeking a divorce to approach the Commissioner of the Department of Co-operation and Development who would deal with the matter expeditiously and far more cheaply than would an attorney. This is certainly true. A litigant is obliged to furnish the office of the Commissioner with R40 plus R2 for a revenue stamp and the matter, "takes off from there", said Mr Schmidt. But there are criticisms (4).

Staff at the office of the Commissioner in Grahamstown indicated that there is

surprise there at the numbers of blacks seeking divorces through the Southern Divorce Court who sought the aid of attorneys in the first instance rather than proceeding directly to the Commissioner. It does not as yet amount to unethical conduct on the part of an attorney to accept instructions from a client in circumstances in which alternative legal services are available. However, see Mashigo v Rondalia Assurance Corporation of South Africa Ltd 1977 (3) SA 431 (W) 438.

It must however, be pointed out that there have been considerable delays at the Commissioner's office in Grahamstown, although I was unable to elicit from their offices what was considered to be either an average or a reasonable delay. Grahamstown attorneys have indicated that although their clients are aware of the fact that divorces could be obtained solely through the agency of the Commissioner they were unwilling to approach them for several reasons. Without giving any specific details it was suggested that litigants found the 'attitude' of the Commissioner's staff 'unhelpful', that they felt that their cases would be greatly delayed and that as the Commissioner falls under the control of the Department of Co-operation and Development they felt that their cases would be dealt with far more adequately were their interests to be protected by the presence of an attorney (5).

However, the fact that an attorney has been instructed is not, unfortunately, a guarantee that one's legal problems will be sorted out with all due speed. Sandra Burman points out that attorneys dealing with black divorce work often have little experience of the complexities involved in such cases. "As a result, the client frequently is given no explanation of the procedure to be observed or the issues at stake ..." (6).

This was confirmed by one interviewee who during an in-depth discussion outlined his experiences with the firm of attorneys he had consulted. Towards the end of 1982 he had approached the firm and had had a brief interview with a partner in the firm. He was told that the firm would apply for legal aid, that there would be a delay and that he should "just wait". He waited; patiently. More than a

year later, in January 1984 he went back to the partner who then sent him to an articled clerk in the firm. I interviewed the clerk who was extremely embarrassed at the delay and explained that it appeared that nothing at all had been done about the plaintiff's case during 1983. Plaintiff and defendant had lived in Grahamstown throughout the period, and the relevant addresses had been supplied to the firm at the first interview in 1982. The plaintiff had not been called upon to make any contribution to his costs. Indeed he had not heard a word from his attorney from December 1982 to January 1984 and no explanation was proffered to him for this apparently palpal slowness.

Reaction of the legal profession to the cut-back in legal aid

Before any discussion of the reaction of attorneys to whom I spoke, reference ought to be made to the decision in Ntabeni v S.A. Eagle Insurance Co Ltd decided on the 18th of August, 1983 by Judge President Boshoff in the Witwatersrand Local Division but which has not yet been reported. Although the case was not concerned with a divorce action but involved an action for damages arising out of the alleged negligence of the driver of a vehicle, the plaintiff was receiving legal aid and the comments of Boshoff, J-P have relevance in other cases involving the award of legal aid to a litigant.

"When a party is granted legal aid, use is made of public funds to assist such party to bring or defend his case. Legal Aid is usually granted with the express instruction that the litigation should be undertaken or continued only if the party has a bona fide case. It is not to be used to harrass the opposing party with a case which has no substance. There is unfortunately a tendency amongst legal practitioners to use legal aid to run cases in which their clients have no bona fide claim or defence in order to put the opposing party in the invidious position

of having to litigate with a person against whom no costs can be recovered. The opposing party then has a Hobson's choice of either to litigate at great expense to himself or to settle and buy off the claim or defence of the person receiving legal aid. The person receiving legal aid and his representatives engage in such litigation without the risk of costs of litigation to themselves. The Court should be wary not to allow the abuse of process of the Court, Court proceedings and public funds in this way. The only way it can be stopped or prevented is to order the attorneys guilty of such conduct to pay all or some of the costs of the successful opposing party de bonis propriis." (7)

The Honourable Mr Justice Boshoff is the Chairman of the Legal Aid Board. As a direct result of this decision it is now obligatory for all attorneys who accept instructions from the Legal Aid Board to furnish a certificate probabilis causa before proceeding. This practice developed out of in forma pauperis proceedings and it means, in general, that before one may litigate as a pauper, the attorney who has had the matter referred to him by the registrar of the Supreme Court must assess whether the applicant has a "reasonable chance, in the light of all the circumstances disclosed and despite the counter-allegations made on respondent's behalf, of being accepted at the trial." (Kok v Guardian Assurance Co Ltd 1960 (2) SA 483 at 488)

Attorneys who were approached for their reactions to the reduction in legal aid for divorce voiced the opinion that since in any event a social work report would be a prerequisite in terms of paragraph 16 of the Guide before legal aid would ordinarily be granted, they saw no good reason for the total cut back in November. They conceded that if there were a shortage of funds at the disposal of the Board there could be justification in withholding legal aid in certain other circumstances: for example, in respect of criminal appeals, where the appellant had been represented at his or her trial as well as in respect of civil appeals.

It also appeared that attorneys were not at all clear as to the period during which legal aid for divorces is to be withheld. One attorney indicated that the first information about such reduction in legal aid had emerged after instructions had been taken from a client. Summons had been drawn up but it appears that once it became clear to the client's attorney that legal aid would not be forthcoming, summons was not served on the defendant. The firm had, some time before, represented the defendant in a criminal matter and had not been able to recover their costs from him. It may be that in the later divorce case the firm had determined not to compound its earlier loss? It is, however, a breach of the duty of an attorney to a client to withdraw from a case once instructions have been taken, unless the client is advised that he or she may appear in person or make other arrangements (8). The attorney in question was, apparently, advised by the Grahamstown Legal Aid Officer to 'try again in May'.

Other attorneys were also unclear as to when they ought once again to make applications for legal aid and whether indeed, they ought to take instructions from clients who would require legal aid. One firm had decided not to take any instructions in such cases until the legal aid position became clear. One attorney said that he thought that the denial of legal aid would last until the end of the Board's financial year (31st March); one attorney said July, one said May, one said that his firm had not given the matter much thought but that they would imagine some time in the mid-year and would not be taking instructions in legal aid divorce cases until they had heard officially from the Legal Aid Officer.

Attorneys, unlike advocates are not bound by the 'cab-rank' rule and are not obliged to take instructions from all comers. Only two of the attorneys approached indicated that despite the withdrawal of legal aid they would appeal to the Director against his refusal. These cases

fell into two broad categories' those in respect of which attorneys had already incurred costs and made disbursements prior to discovering that there had been a cut-back and those in which it was believed that considerable prejudice would be likely to be caused to persons seeking divorces as a result of the absence of funds. (See below.)

The directive from Pretoria made in November appears to remove all discretion in the granting of legal aid. Most attorneys therefore rightly believed that the provisions of paragraph 16 had been removed and that therefore there was no point in appealing in terms of paragraph 19.1 of the Guide to the Director of Legal Aid in Pretoria.

When I approached the Legal Aid Officer in Grahamstown she indicated that she had no further information that that contained in the November directive and that all enquiries ought, therefore, to be directed to the Director in Pretoria. The Director, Mr J.J.A. Mostert, indicated in response to a query from me that

"... legal aid to institute non-urgent divorce actions and civil appeals has been suspended temporary [sic]. This suspension will hopefully last only until the end of the current financial year." (9)

This information has not been made available to those most immediately affected by the decision of the Board, namely, prospective litigants and attorneys. Furthermore, the civil service social workers in Grahamstown had also not been informed (by January 1984) that the suspension would only apply in respect of non-urgent divorces nor that the suspension would "hopefully" last until the end of the financial year. One social worker expected that it would be reasonable to 'apply again in July' although she could give no clear explanation for this choice of date. In any event it appeared from

discussion with her that when filing reports she would never recommend legal aid where a woman "merely" wanted to leave her husband for another man unless there was "assault or something like that". This appears to conflict with the guidelines provided in paragraph 16(1)(d)(10).

Previous suspension of legal aid in divorce cases

It has been observed that when legal aid in divorce cases was suspended by the Legal Aid Board from 1st April 1977 until 4th October 1978 there was a significant increase in the number of in forma pauperis actions. However, as mentioned above (page 1) and this is reinforced by S.J. Basson (12), "... in some instances a person who would have qualified under the legal aid test, does not qualify in terms of the in forma pauperis rule". Rule 86 of the Supreme Court Rules of 1902 provided that in order to sue as a pauper one should possess no more than £25 property. This amount was increased by Govt. Notice 2462 of 6th October 1950 to £50 and has stayed there ever since.

Furthermore, the legal profession has become used to the institution of state legal aid in South Africa. Attorneys approached for comment indicated that, particularly in divorce cases where both parties are indigent, there may be practitioners who would be loath to accept in forma pauperis cases. Not only do they have to act gratuitously, but even if their client is successful, the practitioner may be unlikely to be able to recover his or her costs from an indigent defendant. It is also accepted that the profession ought not to have to act as a surrogate for the state in providing adequate legal services for its citizens, whether these be in criminal or civil law.

Effects of cut back on people seeking divorces

Here the consequences may be more or less serious depending at least in part on the assiduity with which a consultant's legal adviser is prepared to seek legal remedies.

One interviewee, a "Coloured" woman with 2 small children had sought to institute divorce proceedings against her husband on the 15th December 1983, shortly before he was to stand trial on charge of malicious injury to property. His conviction and subsequent sentencing to 12 months imprisonment was only the most recent in a long line of previous convictions for assault, assault with intent to do grievous bodily harm and malicious injury to property. This most recent conviction arose out of a domestic quarrel in which it was found that he has initially assaulted his wife who fled from their house and sought refuge in her sister's home nearby when the crime for which he was convicted took place. He had criminally assaulted his wife on numerous occasions, and one, having stabbed her several times and seriously cut her head open, was sentenced to four years imprisonment.

"Hy't geweet, voordat hy nou vir die laaste keer in die hof was dat ek will skei. Ek het al die jare probeer met hom en toe vir hom gesê dat ek dit nie meer kan verdra nie maar hy't altyd my gesoebat en gesê dat ek moet net aanhou; ek sal sien dat dinge weer beter sal gaan met ons. En verder, hy't altyd my gedreig. Nou die dag, net na hy begin sit het vir die twaalf maande (en ek weet hy sal nie die hele tyd in die tronk wees nie) het sy suster se man hom in die tronk besoek en my man het vir hom 'n boodskap gegee dat as ek nou aangaan met hierdie besluit om te skei gaan hy my moord as hy uitkom. Hy't verder gesê dat ek moet net weet dat die lawyers, die magistraat, en ook nie die miljoenêrs my protection sal gee nie".

The interviewee had heard that it was possible to get police protection if her husband were subject to a binding over order and thought that at least this might keep him away from her when he came out of jail even if the divorce had not come through. (he will probably be released in May). She was terrified when informed that this would not be possible while still married to her husband. (13). She urged that her fears were not simply for herself but also for her 7 year old daughter and four year old son.

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"Ek will hê die lawyer moet asseblief probeer om 'n bevel te kry om hom te waarsku. Jy sien, my meisiekind is so verskriklik op haar senuwees, want as sy eers sien hy's dronk - haar maag werk en sy slaap nie lekker nie. En ook die een dag het hy my seuntjie met 'n sigaret gebrand. Hy't seker dit nie met opset gedoen nie maar diê dag het hy met my begin baklei. Ek het gesien hy's dronk en dat my kleintjie was saam met hom op die sofa. Ek het probeer my seuntjie van hom weg te kry maar hy't met my gesukkel en jy weet dit lyk nie mooi om sommer al die tyd voor die kinders te baklei en toe het ek niks verder gesê nie. Later, toe ek weer inkom van die kombuis af en ek sien hy slaap op die sofa en my seuntjie het stilletjies gehuil dan sien ek eers daar's 'n brandkol op my seuntjie se wang. Soos ek sê, hy't seker dit nie on purpose gedoen nie, dit was seker net die drank. Maar soos ek al klaar vir die lawyer gesê het, wat help dit? Dis klaar gedoen".

Her attorney is at present appealing to the Director of Legal Aid and may well be successful in the light of the clarification by the Director.

However, a client is always to a large extent at the mercy of his or her legal adviser. Where an attorney is astute in protecting and advancing the cause of the client there may be little cause for alarm. But this is not always the case. Furthermore, it cannot be expected that members of the profession ought, reasonably to pursue a remedy, i.e. appeal that appears prima facie, not to exist.

All of those interviewed were extremely anxious that their divorces should go through as quickly as possible, though of course, it is recognised that this is a plea made by all people seeking divorce. But as one woman put it, "Can you tell me why the tsotsis can get a lawyer and I can't? I've never been in trouble with the law. I've never even been in the court. I've got a job, I'm maybe one of the lucky ones. But now you tell me that because I've got a job and because I've worked hard and saved and I've got my kitchen suite and my hi-fi that I can't get

that divorce. They say a person must work and then they say that because you work you can't get divorced. It doesn't make sense. And now I must sit with that rubbish husband who made himself sick with the drink and the dagga and now he's got a disability. He gets R93 every month, I never see any of that. He sits in the lounge and sleeps and watches the TV that I'm still paying off and he goes to the herbalist all the time and has this snaakse little bag with the white powder stuff that looks like mealie meal that he holds on his stomach. And what is that? Hey? Is it muti, like he says, or is it poison? I tell you he hates me he keeps telling me that he hates me and I've got to pay for the groceries for him and now I can't get the divorce because I've got this job. I walked the streets of Grahamstown for months before I got this good job. Nee, it doesn't make sense to me. I sleep in the one room, he sleeps in the other room; he fights me if I want to have friends round, he doesn't talk to me, but I've got to be there. You know even the psychiatrist [psychiatric social worker] told me he's mad. And now I can't even finish my H.P. on the suite. My life is passing me by because of this man. He won't move and this has gone on for too long even in the time when my spastic boy was with me and I had to clean him, even his nappies, my husband pushed him out of the house and I had to drag my son away and my sister and me we carried him to her house. He died when he was 18, two years ago."

Comment and suggestion

One of the most obvious comments that may be made about what is a limited and presumably temporary diminution in legal aid, is that a curtailment of this kind, made without warning and without any certain indication of the date of resumption of legal aid, induces, at the very least, a sense of uncertainty in the community immediately affected thereby. Furthermore, it tends to undermine whatever confidence prospective litigants may have in the legal services available to them, by suggesting that the machinery created in terms of the Legal Aid Act 22 of 1969 is at once precarious and subject to curtailment, at any time, by the exercise of the absolute discretion of the Director of Legal Aid. Such withholding of legal aid is clearly not consonant with the development of a national legal aid scheme

on a sound financial basis which can withstand demands placed upon it without massively reducing its commitment to the public. (14).

So far as the Legal Aid Board itself is concerned, its Report for the year 1982-3 (15) offers very little guidance to those interested in its operations. The Report contains reference to a meeting of the Board held in September 1982 convened to examine ways in which the Board could improve the operation of the legal aid scheme. No decision was made and the Report contains a somewhat succinct comment:

"As a result of the Chairman's subsequent, absence on long leave, the sub-committee could unfortunately not function." (16)

The Report, represents an extremely terse summary of the applications made to the Board for aid as well as its referrals and refusals. There is no interpretation of the breakdown of cases. The Board is in possession of a very full set of reports which attorneys who accept instructions in terms of the Legal Aid Act are obliged to submit. No analysis of these is provided in the Report. It is therefore speculative to attempt to gauge the policy of the Board vis à vis the numerous problems involved in directing a state scheme which mediates between the judiciary and the public, which uses private practitioners as well as civil servants in fulfilling its duties and which works in tandem with other legal services provided for outside the ambit of the Act. (17).

In another important area, not directly related to the subject matter of this paper, the 1983 Report of the Legal Aid Board is less than helpful. Earlier, in the 1982 Report, reference was made to "strongly motivated" representations made by the Association of Law Societies and the General Council of the Bar of South Africa for legal defence in respect of capital crimes to be brought within the ambit of the legal aid scheme. It is therefore startling to find in the 1983 Report, the following as the sole reference to this important problem:

"Also as far as this matter is concerned, a sub-committee under the direction of the Chairman was appointed.

As a result of the Chairman's absence, this committee also did not function. Useful information was, however, gathered in the meantime and the matter will be taken further".

The anomaly of having separate schemes was one which was recognised at the inception of the legal aid scheme in terms of the 1969 Act and at that time it was realised that it was a matter that would require resolution. In the 1970 Annual Report of the Department of Justice, the then secretary for Justice, Mr J.N. Oberholzer wrote,

"The extent to which the Board will take over legal aid services which existed and still exist additional to the other schemes [?], will have to be determined from time to time. These services include pro deo defence in capital crimes, the in forma pauperis procedures and prisoners' friend services."

Fourteen years later the problems adverted to above seem no nearer solution,

Funds available to the Board

It is recognised that the allocation of funds to the Board by central government is limited. The income of the Board during 1982-1983 was R2 538,000. Although this represents a 25% increase in the grant for 1979-1980 of R2,000,000, it is recognised as being inadequate to meet either claims actually made on it or those which might well be made were people subject to legal processes adequately represented (16). However, from a comparison of the figures given by the Board during 1979-1980 and 1982-1983 it appears that costs recovered by the Board during the earlier period; R156,610 represent 7,8% of its income from the state whereas that proportion had climbed during 1982-1983 to R267,106, representing 10.5% of its income from central government.

Procedures introduced in January 1984 which call for a certificate probabilis causa will now make it even easier for the Board to recover its costs, or an increasing proportion thereof. An attorney will clearly be extremely wary of being at the receiving end of an award of costs de bonis propriis. It is only to be hoped that this law requirement will not have the effect of dissuading attorneys from taking on legal aid cases for fear of such an order as to costs. As it is, an attorney who takes on legal aid cases must draft a bill of costs at the ordinary tariff. This bill of costs is then taxed by the taxing master (i.e. they are vetted). The attorney must then submit to the Legal Aid Board 20% of his or her recovered costs (see Guide). This procedure was introduced in 1981-82, see 1982 Annual Report p3.

Section 9(1) of the Legal Aid Act specifically provides that

"The funds of the board shall consist of

(a) moneys appropriated by Parliament in order to enable the board to perform its functions;

(b) moneys received from any other source."

and Section 9(3) further provides that the "board may receive donations, bequests or contributions from any person and shall utilize moneys so acquired for such purpose and in accordance with such conditions as the donors, testators or contributors may determine".

The pathetically modest amount of R4.00 is reflected in the 1982-1983 balance sheet of the Board under the heading 'Donations received'. There were no bequests or contributions. It ought surely not to be beyond the ingenuity of the Board and/or legal institutions beyond the Board to see that this sum be increased. Possibly ways analogous to those of the Legal Resources Centres funds could be sought to see that funds are forthcoming even from within South Africa?

McQuoid-Mason has discussed at length (18) the apparent antipathy of the Board towards any advertising of its services. He notes that from 1972 to 1980 the Board spent a total of R4,188 on advertising. In the year 1982-1983 nothing was spent on advertising. Perhaps this is because the board is unable to meet the claims made on its resources and is therefore not amenable to its existence and/or the range of its services being known to greater numbers of potential litigants?

It is probably true that one of the main reasons for so great a proportion of the funds of the Board being expended on civil rather than criminal cases (19) and that of the civil cases the greater portion are in respect of divorces, is that whereas it is possible, and indeed is a commonplace in our criminal justice system, for an accused to appear in the criminal courts without representation (albeit that one is more likely to be convicted without adequate legal representation than with it), it is not practicable to speak of an individual instituting divorce proceedings without legal assistance. Certainly there are isolated cases in which a plaintiff will appear in person but these are undefended cases where a consent paper has been produced, and where the plaintiffs are sophisticated and confident. Those who are socially and economically disadvantaged would be incapable of such a course of action. (20)

One possible avenue of improvement in this context could be the development in para-legal agencies of knowledge in the field of family law in general and divorce law and procedure in particular. Such institutions as Black Sash advice offices have tended, because of their overtly repressive nature to focus on administrative and labour law and the development of skills in combating injustices. It may be argued that those who staff advice offices often have greater knowledge of the implications of legal facts than any other non-lawyering institution.

Although those who work in advice offices tend to work piece-meal and are perhaps already swamped by the volume of work arising out of say, influx control problems, housing, unemployment insurance and workmen's compensation, it may well be possible for advice office workers to acquire skills in this area and to pass them on to those who may consult them. This process could aid in the diminution of the role of the legal adviser as paternalistic expert. What would therefore be important would be to ask the question, "would this kind of training (of advice workers and other community workers and their retraining of those who consult them) make this individual or this group of people more or less self-reliant?" It is understood that the kind of dependancy relationship for which lawyers are so often criticised is not peculiar to the legal specialist. Lay 'experts' as well, for example advice office workers, may and often do, by their educational if not by their social class, have certain advantages of privilege. Furthermore, this and the fact that they have access to knowledge, is known to confer on them the status of quasi-seer or at least unraveller of legal mystery.

This is not an easy thing to avoid, but it can be overcome with more or less difficulty. It may be argued, particularly by those who have skills for sale rather than skills given freely, that 'a little learning is a dangerous thing', but it may, on the other hand, be argued with some cogency, that in the majority of cases in which divorce orders are granted in terms of the Divorce Act of 1979, which are undefended, the legal principles are very simple. The procedures too, are not particularly complex although they will appear before de-coding to be replete with arcane secrets. The abolition of the fault principle and its replacement by the concept of ir retrievable breakdown has simplified enormously the substantive law relating to divorce itself, even though the fault principle is retained in the determination of maintenance and the settlement of property. I have not considered maintenance awards at

all in this paper for the reason that maintenance applications have not been affected by the Legal Aid Board decision and maintenance awards which form part of a divorce order are subsidiary to the award of the divorce itself.

If, therefore, the kind of training envisaged takes, and is seen to take, the form of conferring power and confidence on those affected by legal process(es) rather than exacerbating a pre-existing dependency relationship, it may well be a limited solution to the helplessness experienced by people such as those interviewed in this course of preparing this report.

Conclusion

From this very modest enquiry directed at persons in a small town, it is clear that those immediately affected by the cut back are not, conventionally speaking, destitute. Their incomes, though within the means test of the Legal Aid Guide exceed HSL figures for the area(21) They have nonetheless become at once confused and antagonistic towards what they perceive as discrimination in favour of those less deserving in moral terms than themselves. Whether they are justified in making this assertion is not in issue. What is crucial is that they are bewildered by what appears to be a legal system partial and unequal in its treatment of persons.

From the point of view of the legal profession there is the strongly held view that private practice ought not to have to 'carry the can' for the state's inability to create an ordered system of legal aid which is simultaneously resilient and able to cope with the reasonable expectations of its citizens for legal services.

There may, however, be some slight room for manoeuvre in the suggestions which have been made.

NOTES

1. Legal Aid Guide, July, 1983, Annexure D. The means test provides that single persons, whose calculated monthly income does not exceed R250 plus R50 for each dependent child are eligible for legal aid. The contribution of litigants in divorce cases is R35 no matter what their income below R250 per month. In cases other than divorce, the combined incomes of both spouses may not exceed R500 per month, with a similar additional allowance of R50 for each dependent child.

2. See J. Herbststein & L. de V van WINSSEN, Civil Practice of the Superior Courts in South Africa, 3rd ed, 1979, Ch 44 p 801 & ff.
D.J. McQuoid-Mason, An Outline of Legal Aid in South Africa, 1982, p17.

3. S.B. Burman, (1983) Acta Juridica, p171-

4. ibid., p172 and 184.

5. Similar points are made by S.B. Burman, ibid., p184-185.

6. ibid., p180.

7. These are costs which are awarded against someone who is not a litigant but who acts in a representative capacity, e.g. an executor, a trustee, a guardian or an attorney. When a court makes such an order against an attorney, it amounts to a severe penalty imposed because of shoddy work, a failure to pursue a client's interests, unreasonable conduct and/or bad faith in the process of litigation. See Herbststein & Van Winsen, op cit., p494-496.

8. Ex parte Culverwell 1921 OPD 71, S v Ndima 1977(3) SA 1095 (N)
9. Letter, dated 31st January, 1984.
10. For comment on the system involving civil service social workers' reports, see Burman, op cit., p175 and 181-82.
11. McQuoid-Mason, op cit., p62, S.J. Basson, 'Legal Aid and the State', 1977, Natal University Law Review, 32, 43.
12. ibid., p43.
13. See too, Burman, op cit., p177-178.
14. See the recommendations of the 1973 Legal Aid Conference in Legal Aid in South Africa, University of Natal 1973, and McQuoid-Mason, op cit., p121-125.
15. Report of the Legal Aid Board, published 21/12/1983.
16. ibid., p6.
17. See McQuoid-Mason, op cit., p70 for comparison with funds available for legal aid in developed countries.
18. ibid., p73-76.
19. See annual reports of the Legal Aid Board.
20. See Raymond Suttner, The Ideological role of the Judiciary in South Africa, paper delivered to the History Workshop Conference, University of the Witwatersrand, January/February, 1984.

21. 1982 Handbook of the S.A. Institute of Race Relations, p61.

These papers constitute the preliminary findings of the Second Carnegie Inquiry into Poverty and Development in Southern Africa, and were prepared for presentation at a Conference at the University of Cape Town from 13-19 April, 1984.

The Second Carnegie Inquiry into Poverty and Development in Southern Africa was launched in April 1982, and is scheduled to run until June 1985.

Quoting (in context) from these preliminary papers with due acknowledgement is of course allowed, but for permission to reprint any material, or for further information about the Inquiry, please write to:

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