Misgivings over Legal aid

In a remarkable 98-page report, dated 11 January 1995, the Canadian National Council of Welfare slammed the legal aid scheme operating in that country. The following _inter alia_ emerge from the report:

- It is alleged that the system is simply an industry run by lawyers for lawyers.
- Legal aid – according to the Council – has become an expensive guaranteed employment scheme for lawyers which does almost nothing to help solve the problems of the poor.
- The Council contends that the system promotes bill-padding, the lengthening of proceedings, and is generally less cost-efficient than a public defender system.
- The main problem with legal aid plans, according to the Council, “is that they are not governed in the interests of the poor” because they are dominated by the lawyers.
- Lawyers’ associations control judicare plans directly or indirectly, and their members, interests are diametrically opposed to those of low-income people, the report states.
- To allow lawyers’ associations to run legal aid plans is unconscionable, the report concludes.
- The Council recommends that legal aid plans should be independent of government and lawyers’ associations and should be accountable to independent watchdogs.
- The directors of the legal aid plans should be people who have a demonstrated commitment to defending the interests of the poor, says the Council.
- The Council also concludes that “if legal aid ceased to exist and the thousands of lawyers who earn money from it were forced to compete harder for paying clients, the nominal cost of all legal services might drop like a stone.”

The President of the Canadian lawyers association condemned the report as “shortsighted and discriminatory” (_The Lawyers Weekly_, 27 January 1995).

On the other side of the Atlantic the editorial comment in the _Solicitors Journal_ dated 4 March 1994, published in Britain, seems to confirm at least some of the findings made by the Canadian Council. It reads:

“Twenty-five years ago most firms of solicitors in England and Wales survived on a diet of private non-contentious work, with litigation and matrimonial work as poorly paid distant cousins. Crime was done by those who were young and thrusting and seeking to make a name for themselves in the locality. Legal aid and its growth has, over the intervening period, ensured that many more firms now do a great deal of litigation, as well as matrimonial and criminal work.”

The decline of profitable conveyancing work has reinforced this trend and at the same time has put enormous pressure on the importance of profitability in these other areas of work. Such profitability as has been achieved, however, has been at the cost of an ever-spiralling increase in the legal aid budget. Finally, those few private clients who can afford us are unable to fund the hourly charges that we demand. That is the unhappy picture confronting all practitioners in private client work.”

Note: In 1991/92 the total net cost of the legal aid to the British Government was £944 million (over R5 billion). This represented about £19 (R107) per head for the roughly 50 million people.

Allocations by the State to the Legal Aid Board in South Africa have
Legal Aid Board: Funding from the Treasury
1969–1994/95

JUTA PRIZE

Adv Johan Roos of the Cape Bar was awarded the 1994 Juta Prize for first time contributions to Consultus for his article “An eye for the facts” (1994) 7 Consultus 128.
increased tremendously over the years – see the accompanying graph prepared by the Board.

There is no doubt that the Legal Aid Board has done pioneering work in this field and that both attorneys and advocates have been rendering sterling services to the community. But having said that, Viator holds the view that the Government should not close its eyes to what has been found by the Canadian National Council of Welfare. Unfortunately it is so that in South Africa too, the legal aid scheme is “run by lawyers”, the Legal Aid Board being composed exclusively of lawyers. The further question is whether our scheme is also “run ... for lawyers”. If this means that the funds provided by the taxpayer mainly flow to lawyers, then the answer is in the affirmative. Accordingly, it could be argued that also in South Africa the legal aid scheme is “run by lawyers for lawyers”. If that is so, then the further question arises whether the scheme is run in such a way that “profitability” to lawyers is a major consideration or whether assistance to the poor in matters that are of real importance to them is the sole aim of the exercise.

Legal aid is an absolute necessity in South Africa. It goes without saying, however, that the Government should make quite sure that the funds are properly spent.

TV in Court

As was reported in previous issues of Consultus under Obiter... (April and October 1991 issues) it appeared that the courts in other jurisdictions were becoming sympathetic towards the televising of court proceedings. However, it now seems that the “OJ Simpson media circus” in the USA has caused a change of attitude, at least as far as trials in North America are concerned. For instance, a large majority of the Canadian Judicial Council concluded at its October 1991 issues it appeared that the funds provided by the taxpayer mainly flow to lawyers, then the answer is in the affirmative. Accordingly, it could be argued that also in South Africa the legal aid scheme is “run by lawyers for lawyers”. If that is so, then the further question arises whether the scheme is run in such a way that “profitability” to lawyers is a major consideration or whether assistance to the poor in matters that are of real importance to them is the sole aim of the exercise.

Legal aid is an absolute necessity in South Africa. It goes without saying, however, that the Government should make quite sure that the funds are properly spent.

In the United States, 47 states allow some form of television coverage, but the US federal judges voted in September 1994 not to renew a three-year-old project permitting coverage of some federal civil trials. (The Lawyers Weekly, 14 October 1994)

In Britain, legal history was made in April 1994 when the trial of Philip Gorman, who was charged with stealing a bus, was shown on Scottish television. Highlights of the trial, which lasted three-and-a-half days, were shown as part of BBC Scotland’s Focal Point Programme.

The Scottish move followed a decision two years ago by Scotland’s senior judge, Lord President Hope, to end the blanket ban on televising trials in Scotland. Trials can only be screened, however, under strict controls: all parties, including the accused, must agree; and live broadcasts and same-day highlights are banned.

In Gorman’s trial, four cameras, hidden behind screens, were used: one at the back of the court, giving a wide shot of the courtroom; one trained on the dock; one on the witness stand; and one on the judge.

Meanwhile the Master of Rolls in England, Sir Thomas Bingham, has become the latest senior judge to call for cameras to be allowed into the courtroom on an experimental basis. He told The Times: “I see this as an extension of press reporting. Provided the cameras were not obtrusive, I would have no objection.” The Lord Chief Justice, Lord Taylor of Gosforth, has already indicated that he would not oppose such an experiment.

The English Bar Council first recommended a pilot project in 1989 and later sponsored a Private Member’s Bill which would have amended the law to make televising of trials possible. (Counsel, May/June 1994.)

It might be a good idea to allow the televising of court proceedings in the Constitutional Court on an experimental basis.

Restructuring the Bar

In the article “Restructuring the Bar” which appeared in the previous issue of Consultus, Gerald Josman SC of the Cape Bar advanced several proposals to meet the challenges facing the Bar in 1995 and in the President’s message addressed to our readers in the same issue, Mr Mandela also referred to those challenges.

The English Bar, amongst others as a result of the granting of rights of audience to certain attorneys, also faced similar challenges. And judging by a contribution (under the heading “A Review of Standards”) by Andrew Smith QC in a recent issue of Counsel, the English Bar responded admirably by appointing a “Standards Review Body” under the chairmanship of Lord Alexander of Weedon QC. The body functions independently of the Bar Council and its membership includes lay representatives as well as barristers: such as Lord Murray, a former Secretary of the Trade Union Congress; John Magill, a distinguished accountant; and Sir John Wickerson, a former President of the Law Society.

The body’s terms of reference are:

“...To conduct a thorough review of the Bar’s arrangements for the maintenance and enforcement of high standards and to consider, report and make recommendations as to:
«(a) what measures should be taken, having regard to the recommendations of the Royal Commission on Criminal Justice and legitimate public expectations generally, to maintain, improve and enforce high standards and quality of service to clients, the general public and the courts;
(b) whether, by extension of the present disciplinary system or otherwise, and if so how and what, new procedures should be established for dealing with poor or inadequate service whether amounting to professional misconduct or not, including the availability of redress in appropriate cases; and
(c) the likely recourse and costs of such measures.”

The time may well have arrived for the General Council of the South African Bar to follow the example of its English counterpart by undertaking an in-depth introspection into all aspects of the profession. There can be no doubt that the advocates' profession is virtually indispensable for South Africa, but it is equally true that it will have to become more amenable to adaptation if it wishes to be able to fulfil the requirements of the new South Africa.

Improving the performance of Advocates

The Advocacy Institute of Hong Kong has followed the lead of other jurisdictions in a move to improve the performance of advocates. Jurisdictions which have also chosen to offer advocacy...
training through an institute established for this purpose include:

- **Australia (The Australian Advocacy Institute).** In 1991 the Law Council of Australia established the Australian Advocacy Institute in Canberra. Its goal is to improve the standards of advocacy throughout Australia. The Institute has developed training materials and organises regular advocacy workshops for delivery throughout Australia.

- **Canada (The Advocates’ Society Institute – now called the Ontario Centre for Advocacy Training).** In 1987 the Advocates’ Society in Ontario formed the Advocates’ Society Institute. Its goal is to enhance lawyer competence, to improve service to clients and to facilitate the efficient and effective administration of justice.

- **The United States of America (The National Institute for Trial Advocacy).** In the USA, the National Institute for Trial Advocacy (NITA) was created as a non-profit organisation in 1971 as a result of an American Bar Association task force on advocacy. The Institute offers a series of workshops which concentrate on learning advocacy skills by performance, critique and demonstration.

All these institutes offer specialised training programmes in which expert practitioners act as group leaders. They all provide systematic and highly successful advocacy training.

**The Advocacy Institute – Hong Kong.** This Institute fills a void in Hong Kong as neither the Bar Association nor the Law Society provides systematic advocacy training of this type.

The Institute’s main objective is to promote the efficient and effective resolution of disputes so that the interests of clients are better served. It is hoped that the introduction of such training has raised and will continue to raise the level of performance and competence of practitioners and have an important salutary effect on the administration of justice. *(The Commonwealth Lawyer, November 1994.)*

**South Africa.** At the 1990 Annual General Meeting of the General Council of the Bar the then Chairman of the Council said “that he wished to explore the possibility of the establishment of an institute for trial advocacy. He said that he would like to see the Bar set up some kind of institute which trained people to learn trial skills and which institute would also be open to attendance by attorneys. He undertook to refine the concept and submit a proposal for consideration during the next Executive Committee meeting to be held in January 1991.” *(1990) 3 Consultus 82*

As far as Viator is aware, the proposal referred to was not pursued. However, the underlying idea seems to be sound and ought to be given further thought. (See also the “Chairman’s report on the IBA Conference” elsewhere in this issue – which was received after the above note was written. – Editor)

**Reforms in Australia**

According to an article by Robert Meadows, Past-President of the Law Council of Australia *(the Commonwealth Lawyer, November 1994)*, a revolution is taking place in that country’s legal profession.

After inquiries by several committees, all governments – through the Council of Australian Governments – have established yet another committee which is to bring forward proposals for removing constraints on the development of a national market in legal services, and for other reforms to enhance the profession’s efficiency.

In the meantime several important changes and reforms have already been introduced in Australia. For instance:

- **The Legal Profession Reform Act 1993,** which came into force on 1 July 1994, brought about fundamental changes. This legislation inter alia provides that barristers (advocates) and solicitors (attorneys) may advertise in any way they think fit – subject to rules about false and misleading advertising, and so on. For the Bar in particular, this is a major departure from tradition. In response to the new Act, the Bar has abolished its very restrictive advertising rules, and barristers will be regulated in this area by the Act.

- In another major departure the Bar has actually agreed that some classes of clients, subject to various restrictions, may have direct access to barristers instead of approaching them through a solicitor.

The author concludes by saying that the attitude of government may be seen from the following statement by their Commonwealth Attorney-General:

“There is now little disagreement that the legal profession must join the internationalisation of the economy. Australia cannot expect to be taken seriously in the fast-growing market for legal services internationally when its domestic market continues to be characterised by barriers to free trade.”

In an article in the previous edition of Consultus, under the heading “Restructuring the Bar”, several proposals were put forward to bring about reforms in the profession. It is assumed that these proposals are receiving the attention of the General Council of the Bar.

**The right to silence**

In terms of the Interim Constitution an accused person has a right to remain silent during plea proceedings or trial and not to testify during trial. An English judge, The Honourable David Q Miller, however, contends that the right to silence is an old-established procedure which now needs to be re-examined. One of these is the ‘right to silence’. All defendants are now represented, PACE has improved procedures on arrest and in the police station, and the prosecution routinely discloses unused material.

The public, it should not be forgotten, has rights too and one of these is the right to a system of criminal justice which acquits the innocent and convict the guilty. This is only possible if sensible procedures are followed in the trial and one of these must surely be that the jury hears both sides before making a decision. If an accused person has a defence, what possible objection can there be to disclosing it at the first reasonable opportunity? An alibi has to be disclosed at an early stage in any event. If there is no defence, then instead of using tactical ploys to try to obtain an unjustified acquittal, there should be a conviction.”

**Appointment of Silks**

The Lord Chancellor (England) recently indicated that he would not resist any move to ... transfer responsibility for silk appointments to a specially constituted
committee. "I would not raise objections in such cases if that is the profession's wish," he said. He added, however, that if appointments were no longer under the auspices of the Crown, after advice from the Lord Chancellor, the name "Queen's Counsel" might need to be replaced with "senior counsel", or something similar (Counsel, May/June 1994).

A working party of the English Bar Council is examining the whole issue concerning the appointment of Silks. In South Africa too, the question may well be asked whether it is really necessary or desirable to involve the Government in the appointment of senior counsel.

Criticism of Judges

A civil suit was launched by Judge Edward Rappaport of the State Supreme Court in Brooklyn in regard to an article written by two journalists in the Village Voice in which the plaintiff was called one of New York's ten worst judges. Supreme Court Justice Carol Arber, however, dismissed the claim and stated that "discussion and criticism of public officials and judges must be encouraged". She also found that the article contained constitutionally protected opinions". (The Lawyers Weekly, 13 January 1995.)

It is to be hoped that our courts will not follow the American courts in regard to matters such as those referred to. Legitimate criticism of judges is justified but blatant insults fall in an entirely different category. If such insults are for the Supreme Court should necessarily have its own division of the Supreme Court. Such divisions should rather be created on the basis of the need of the general public and without necessarily adhering to the borders of the provinces.

Rationalisation of the Courts

Australia, with just over 17 million people, has the odd situation of having nine governments, nine Attorneys-General, nine legal jurisdictions and, in a sense, nine legal systems. And it is obvious that this proliferation in the legal field is causing huge problems in that country. (The Commonwealth Lawyer, November 1994.)

It is to be hoped that when the rationalisation of the existing jurisdictional areas and structures of the courts is considered (a commission of inquiry has been appointed) the (undesirable) situation which has developed in Australia will be borne in mind. There seems to be no justification that each province should necessarily have its own division of the Supreme Court. Such divisions should rather be created on the basis of the need of the general public and without necessarily adhering to the borders of the provinces.

Failure to follow clients' instructions: law firm ordered to pay $9.2 million damages

A prominent law firm in Toronto was recently ordered to pay $9.2 million damages to its clients for failing to follow their instructions. The solicitor concerned failed to exercise lease renewal rights because she thought the instructions were spent. The Court held that the solicitor had a duty to tell her clients that she considered the matter closed. Furthermore, a solicitor has a positive obligation to be aware of the client's goal when he or she undertakes to act in a particular transaction.

Damages were assessed at $1.9 million for loss of income by the clients until 31 December 1994 and $9.3 million for the future loss of income. (The Lawyers Weekly, 3 February 1995.)

Life on the Russian Bench

During a recent visit to Canada, Russian Chief Justice Vjacheslav Lebedev, indicated that Russia's 14,000 judges are winning some of their battles for independence, but that the fight for public respect is far from won. In an interview he stressed the following points:

- Lawyers are scarce in Russia and the lure of private practice is strong. Russia has fewer judges per capita than almost any other European country.
- Stingy pay, low status, huge caseloads and difficult working conditions contributed to a massive turnover in the Russian judicial corps, particularly between 1982 and 1987 when more than one-third of Soviet judges quit the Bench, leaving behind a young, largely female and inexperienced, judicial corps.
- The courts are swamped with work, and much of it is of a boring, routine nature. If one were to go to the halls of the Supreme Court you would find cases in bags, just waiting to be reviewed.
- The Supreme Court judges almost all sit in very small rooms and leaf through thousands of documents every day to detect legal errors.
- The majority of the lower court house don't really merit that name. Of some 2,800 district courts in Russia, 40 to 50 per cent were found to be unsuitable. In some cases it means literally that there are holes in the ceilings, that the toilets don't work and that there are no rooms for jury deliberation so that the judge and lay assessors will retire to the judge's own chambers.
- President Boris Yeltzin tried to improve the situation in 1992 when he decreed that the buildings belonging to the outlawed Communist party be transferred to the courts. However, fewer than half the buildings were transferred to the strenuous objections of local politicians. Consequently, the judges in Riazan squatted in the building of the former district party organization in order to acquire it. They simply moved in at night in the dark and for the next two days there was a stand-off. The governor of Riazan had ordered the police to move them out, but the police refused. Finally the judges won.
- Judges are quite vulnerable to physical danger. In recent years two judges were blown up in Moscow, and a third was shot while leaving his court. If people involved in organized crime don't like what is going on they burn the courtroom down. (The Lawyers Weekly, 13 January 1995)