



Pro Bono Practices and Opportunities in Slovenia¹

INTRODUCTION

The provision of pro bono legal services in the Republic of Slovenia (“**Slovenia**”) is less common than in the United States. However, Slovenia does provide robust free legal aid services. This chapter provides a general overview of pro bono practices and opportunities in Slovenia, and briefly discusses the legal aid system in Slovenia.

OVERVIEW OF THE LEGAL SYSTEM

The Justice System

Slovenia is a parliamentary democratic republic that became independent after the disintegration of Yugoslavia in 1991.² The Slovenian judiciary is one of three branches of government, and is independent from the National Assembly (the legislative branch) and the President (the executive branch).³ The Constitution of Slovenia, adopted by the National Assembly in 1991, is the highest law of the land. The Slovenian judicial system is a “unified” judicial system, consisting of courts with general and specialized jurisdiction.⁴ There are 60 courts with general jurisdiction, including 44 district courts, 11 regional courts, four higher courts and the Supreme Court.⁵ There are five specialized courts, including four labor courts, which rule on labor-related and social insurance disputes, and one Administrative Court, which provides legal protection in administrative affairs.⁶ The Administrative Court has the status of a higher court.⁷

Judges are elected by the National Assembly on the proposal of the Judicial Council, a special nominating body independent from the judicial branch.⁸ Among other conditions, the candidates must be at least 30 years old and have worked as a lawyer for at least three years.⁹ Once appointed to the bench, their offices are permanent.¹⁰ The Constitution gives judges immunity for any opinions expressed during decision-making in court.¹¹

¹ This chapter was drafted with the support of Dr. Neža Kogovšek Šalamon.

² SLOVENIA GOVERNMENT COMMUNICATION OFFICE, State, <http://www.slovenia.si/en/slovenia/state> (last visited on September 4, 2015).

³ See SLOVENIA GOVERNMENT COMMUNICATION OFFICE, The Judicial System, <http://www.slovenia.si/en/slovenia/state/the-judicial-system/> (last visited on September 4, 2015).

⁴ Id.

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Maja Čarni & Špela Košak, A Guide to the Republic of Slovenia Legal System and Legal Research, NYU LAW GLOBAL (2013) available at <http://www.nyulawglobal.org/globalex/slovenia.htm> (last visited on September 4, 2015).

⁹ Id.

¹⁰ Id.

¹¹ Id.



The Practice of Law

The legal system in Slovenia is part of the continental legal systems strongly influenced by German law.¹² The impact of the German institutions of socialized property, socialistic self-management, protection of workers and lower social classes can still be found in the legal system today through the social security system and special arrangements of the labor and social courts.¹³ In 2015, Slovenia had a population of just over two million, of which approximately 1,600 individuals were practicing attorneys.¹⁴ In order to become a lawyer in Slovenia, an individual must obtain a law degree from one of the three law faculties in Slovenia or abroad (recognized in line with the laws that regulate recognition of diplomas).¹⁵ However, in order to practice some specific legal professions (such as judge, attorney-at-law, state prosecutor, notary) or to represent clients in front of most courts, an individual must work for two years following a special program at the court, three years in some legal professions or four years in the public or private service as a lawyer, in addition to passing Slovenia's bar examination.¹⁶ To become an attorney-at-law, it takes another year of work as an "attorney-at-law candidate" in a legal office after passing the bar exam. Foreign attorneys that wish to practice in Slovenia must be citizens of a European Union member state, actively speak Slovene and pass an exam.¹⁷ Most attorneys in Slovenia work in private practice or for the State Attorney's Office, which represents the interests of Slovenia before courts of justice, administrative authorities and before foreign and international courts.¹⁸ Further, in order to become a judge, state prosecutor or notary, an individual must be appointed by the powers provided by law.¹⁹

The legal profession in Slovenia is governed by Article 137 of the Constitution, the Bar Act, and the Code of Conduct for Lawyers, the Lawyers' Tariff and by internal acts of the Slovenian Bar Association.²⁰ All practicing attorneys in Slovenia are required to join the Slovene Bar Association, which consists of 11 regional assemblies where membership is based on territorial and functional principles, largely coinciding with the territories of the district courts.²¹

LEGAL RESOURCES FOR INDIGENT PERSONS AND ENTITIES

The Constitution of Slovenia specifically provides that everyone has the "right to personal liberty," and that no individual may be "deprived of his liberty except in such cases and pursuant to such procedures as are provided by law."²² (Translation.) This includes the right for the individual to have "immediate

¹² Čarni & Košak, supra n.9.

¹³ Id.

¹⁴ ODVETNIŠKA ZBORNICA SLOVENIJE (SLOVENIAN BAR ASSOCIATION), Lawyer Register, <http://www.odv-zb.si/en/directory/lawyer-register> (last visited on September 4, 2015) (follow "Export All" hyperlink) [hereinafter Lawyer Register].

¹⁵ Čarni & Košak, supra n.9; Article 25 of the Attorneys Act. Official gazette of the Republic of Slovenia, 18/93, as amended.

¹⁶ Id.

¹⁷ Id.

¹⁸ REPUBLIC OF SLOVENIA STATE ATTORNEY'S OFFICE, About the State Attorney's Office, http://www.dp-rs.si/en/about_the_state_attorneys_office/ (last visited on September 4, 2015).

¹⁹ Čarni & Košak, supra n.9.

²⁰ Lawyer Register, supra n.8; STATUT ODVETNIŠKE ZBORNICE SLOVENIJE (Slovenia/Bar Act) 24-1455/2001 (Apr. 5, 2001), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/en_slovenia_bar_act1_1188889740.pdf (last visited on September 4, 2015).

²¹ Id.

²² USTAV REPUBLIKE SRPSKE (CONSTITUTION SERBIAN REPUBLIC) ("SLOVENIA CONST.") 33/91, 42/97, 66/00, 24/03, 69/04, 68/06 as amended (Dec. 26, 1991), art. 19.



legal representation of his own free choice.”²³ (Translation.) Thus, it is a constitutional guarantee that individuals in Slovenia have access to counsel in criminal cases.²⁴ Beyond criminal cases, the Slovenian courts have stressed that it would be “incompatible with the constitutional guarantee of efficient access to justice” if access to justice was “dependent on [an individual’s] economic situation.”²⁵ Thus, the Civil Procedure Act and the Free Legal Aid Act contain provisions assuring access to justice for the impoverished in civil cases.²⁶

The Right to Legal Assistance in Civil Cases

Litigants in civil cases in Slovenia do not have to be represented by attorneys.²⁷ Indeed, Article 12 of the Civil Procedure Act 1999 (amended in 2004) provides that a “party who is not represented by an attorney and who by reasons of ignorance fails to exercise their procedural rights *shall be advised by the court of the acts of procedure which they are entitled to execute.*”²⁸ (emphasis added.) Thus, it is possible for a party to represent himself, and, at times, the court will advise the party of its procedural rights. While a party may represent himself in litigation, the costs associated with litigation may still be cumbersome to many litigants, and many litigants may not be able to adequately enforce their rights without the assistance of an attorney. Thus, there are mechanisms to prevent this hardship under the Civil Procedure Act and the Free Legal Aid Act.

The Civil Procedure Act

Under the Civil Procedure Act, litigants are expected to advance the payment for costs incurred by procedural acts, such as filing fees and fees associated with discovery.²⁹ However, the court “shall exempt from payment of the costs of proceedings a party who is not able, with respect to their pecuniary circumstances, to cover these costs without detriment to the maintenance of themselves and their family” by a “considerable” amount.³⁰ If the court determines that a party is exempt from payment of the costs of proceedings, then the court will pay for the “costs of witnesses, expert examinations, interpreters, inspections and announcements.”³¹ A party exempt from payment may also move to be represented by an attorney “when such representation is necessary for protection of their rights.”³² (Translation.) If the court appoints an attorney, the party is exempt from refunding all effective costs to pay the attorney, but the attorney may request to be relieved from duty for “justified reasons.”³³ (Translation.) Where the costs associated with litigation would be difficult for a party to pay, but are not necessarily a “detriment to the maintenance” of the party and his or her family, the court may permit the party to pay the fees in installments or postpone the fees until the decision has passed.³⁴ (Translation.)

²³ Id.

²⁴ See id.

²⁵ EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, Slovenia, <http://fra.europa.eu/fraWebsite/attachments/access-to-justice-2011-country-SI.pdf> (last visited on September 4, 2015) (citing Ustavnem sodišču Republike (Slovenia Constitutional Court) 376/02, Jul. 8, 2004 (Slovenia)) (hereinafter EUROPEAN UNION AGENCY).

²⁶ Id.

²⁷ See ZAKON O PRAVDNEM POSTOPKU (Civil Procedure Act) 73/07, 13.8, 19/15, art. 12.

²⁸ Id.

²⁹ European Union Agency, *supra* n.30 (citing ZAKON O PRAVDNEM POSTOPKU 73/07, 13.8, art. 477/4).

³⁰ Id. at art. 168.

³¹ Id. at art. 171.

³² ZAKON O PRAVDNEM POSTOPKU, *supra* n. 20 at art. 170 (Slovenia).

³³ Id.

³⁴ Id. at art. 168.



The Free Legal Aid Act

Under the Free Legal Aid Act, eligible individuals are entitled to the total or partial provision of funds necessary to cover the costs of legal assistance and are entitled to an exemption from paying the costs of judicial proceedings.³⁵ Legal aid is available to be used in all courts of general and specialized jurisdiction in Slovenia, before the Constitutional Court of Slovenia, before all authorities, institutions or persons in Slovenia authorized for out-of-court settlements and, in certain cases, for proceedings conducted before international courts or arbitration panels.³⁶ Further, free legal aid may be granted for “legal advice, legal representation and other legal services” and for “all forms of judicial protection.”³⁷ (Translation).

To be eligible to receive legal aid, an individual must be a citizen of Slovenia or must meet certain other citizenship or resident requirements, such as holding a permit for permanent residence in Slovenia or being an alien subject to reciprocity based upon international treaties.³⁸ Further, nongovernmental and non-profit organizations may be eligible for legal aid if the dispute involves the “performance of activities in the public interest or activities for the purpose of which they were founded.”³⁹ (Translation.) Legal aid will be granted to persons who, “given their financial position and the financial position of their families, are not able to meet the costs of the judicial proceeding or the costs of legal aid without jeopardizing their social situation and the social situation of their families.”⁴⁰ (Translation.) The term “jeopardizing their social situation” is modified to only include individuals whose monthly income does not exceed “twice the base amount of the minimum income laid down in legislation governing social aid services.”⁴¹ (Translation.) The financial position of the applicant is determined by taking into account the applicant’s income and receipts, the income and receipts of the applicant’s family and the property owned by the applicant and the applicant’s family.⁴²

If an applicant is approved to receive legal advice, legal advice will be provided by attorneys who are entered into a “Directory of Attorneys,” by law firms “founded on the basis of the act governing attorneyship,” and by notaries, and may also be offered by “persons who perform not-for-profit services of free legal aid with the approval of the minister responsible for justice.”⁴³ (Translation.)

³⁵ ZAKON O BREZPLAČNI PRAVNI POMOČI (Free Legal Aid Act) 96/04, 30/08, 19/15 art. 1.

³⁶ *Id.* Legal aid is available for international proceedings and arbitrations where the international jurisdiction does not provide legal aid or where the individual does not qualify for the international legal aid.

³⁷ *Id.* Legal aid is not permitted in the following matters: (1) criminal offenses involving insulting behavior, libel, defamation or slander, unless the injured party proves the probability that he or she has suffered legally recognized damage due to these offenses; (2) disputes involving a reduction in maintenance when the person obliged to pay maintenance has failed to settle the due liabilities arising from maintenance, unless he or she has failed to settle these liabilities for reasons beyond his or her control; or (3) in damage disputes involving compensation for non-property and property damage caused by defamation or libel, unless the injured party provides credible evidence that this has affected his or her material, financial or social position. *Id.* at art. 8.

³⁸ *Id.* at art. 10.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at art. 13.

⁴² *Id.*

⁴³ *Id.* at art. 29. In order to obtain approval by the minister to administer legal aid, the person performing the services must: (1) be registered in the Republic of Slovenia; (2) perform the activities of providing legal advice pursuant to the regulations on the basis of which they were founded; (3) have concluded an employment contract with a university graduate lawyer who has passed the national bar examination, or the person who is in possession of such qualifications; (4) have appropriate premises and the equipment required for providing legal advice; (5) ensure adequate supervision of the provision of legal aid pursuant to this Act; and (6) carry a liability insurance contract for the possible eventuality of damage caused by their advice for at least the minimum insurance amount.



Applications for legal aid have been on the rise.⁴⁴ However, many indigent individuals, part of the most vulnerable social strata, are not properly informed of free legal aid possibilities.⁴⁵ In fact, some studies indicate that certain public institution employees fail to carry out their work to inform individuals about free legal advice, and are not properly sanctioned when failing to do so.⁴⁶

The Right to Legal Assistance in Criminal Proceedings

Slovenia guarantees legal aid, including legal representation, in criminal cases.⁴⁷ In certain situations, representation by an attorney is mandatory and if an individual does not have his or her own counsel, the court will appoint counsel on its own motion.⁴⁸ These situations arise where the defendant is: (1) mute, deaf or incapacitated; (2) charged with a crime punishable by imprisonment of 30 years or more; or (3) brought before an investigating judge for questioning after being detained by police.⁴⁹ The court-appointed counsel is chosen from the court's list of eligible lawyers and the representation persists until there is a final judgment.⁵⁰ If the individual is convicted, the court will order the individual to repay the costs of the counsel to the court; however, the court can exempt an individual from repaying these costs if the repayment would impoverish the individual.⁵¹

Where a defendant is not obliged to have counsel, the defendant can nevertheless apply for free legal assistance.⁵² In the application, the defendant must indicate that he or she has insufficient income or assets to pay for legal counsel.⁵³ If the court grants the application, then the court will select a lawyer from an eligible lawyer's list, and the appointed lawyer will defend the individual throughout the criminal proceedings.⁵⁴ The appointed lawyer's fees will be paid from the state budget, and the defendant does not have the obligation to repay the fees, even if convicted.⁵⁵ Further, a court can assign counsel to an individual served with a charge sheet, even if the individual does not otherwise meet the requirements for free legal assistance, if doing so is in the interest of fairness.⁵⁶

⁴⁴ REPUBLIC OF SLOVENIA, First Annual Report On The Implementation Of The National Action Plan On Social Inclusion NAP/inclusion 2004-2006, 20 (2005), available at http://www.mddsz.gov.si/fileadmin/mddsz.gov.si/pageuploads/dokumenti_pdf/nap_inclusion04_06_report1.pdf (last visited on September 4, 2015).

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ See SLOVENIA CONST. *supra* n.15.

⁴⁸ EUROPEAN E-JUSTICE, Slovenia: Getting Legal Advice, available at https://e-justice.europa.eu/content_rights_of_defendants_in_criminal_proceedings_-169-SI-en.do?clang=en&idSubpage=1 (last visited on September 4, 2015).

⁴⁹ Id. Further, where an individual is served with a charge sheet accusing him or her of a criminal offense punishable by a jail sentence of eight years or more, the court will also appoint counsel if the individual does not have his or her own counsel. Id.

⁵⁰ Id.

⁵¹ Id.

⁵² Id.

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id.



Alternative Dispute Resolution

Instead of the courts, individuals can refer their disputes to non-judicial bodies through mediation or arbitration. Cases of discrimination, for example, can be brought to the Advocate of Principle of Equality (the Advocate) through the Slovenian equality body or the Ombudsman.⁵⁷ Both of these institutions, however, have only persuasive authority and lack formal investigative power.⁵⁸ The Advocate mainly reviews cases of alleged discrimination in accordance with the Principle of Equal Treatment Act.⁵⁹ The Ombudsman's mandate is defined more broadly as encompassing the protection of all human rights and basic freedoms in all matters involving state and local authorities.⁶⁰

PRO BONO ASSISTANCE

Pro bono Opportunities

Pro bono is an increasingly important part of the practice of law in Slovenia, and many attorneys accept pro bono cases. Attorneys are under no obligations to take or report any pro bono legal work.⁶¹ Pro bono services in Slovenia had been increasing for several years, due both to the creation of the Free Legal Aid Act and the creation of the Slovenian Clearinghouse (which previously worked with NGOs to match attorneys with referred individuals in need of pro bono services). The recent closing of the Clearinghouse has negatively impacted the availability of pro bono services in Slovenia.⁶² Pro bono services are most likely to be administered by "candidate" attorneys, and many attorneys will agree to take on pro bono services several times per year.⁶³ Once a year on December 19, the Slovenian Bar Association holds a pro bono day when many attorneys provide pro bono legal services to anyone in need of legal advice.

Historic Development and Current State of Pro bono

The provision of pro bono services by NGOs and foreign entities can be quite difficult due to the requirement that legal services be provided by attorneys who have undergone training and passed Slovenia's law exam.⁶⁴ While foreign attorneys seeking involvement in Slovenia can advise NGOs about pro bono services and can assist Slovenian attorneys in the administering of legal services by providing additional legal advice, many challenges remain. In particular, many lawyers in Slovenia rarely take on some of the most challenging cases pro bono (such as providing services to individuals in rural areas). As such, it can be very difficult for a foreign attorney to provide pro bono services in those situations if the foreign attorney cannot find a Slovenian practicing attorney to help advise the pro bono client. Further, many NGOs do not employ attorneys, and, as such, NGO involvement in the administering of pro bono services is "very marginal."⁶⁵ While the Clearinghouse had significant potential in assisting NGOs, it found it challenging to communicate to NGOs what pro bono services are and to understand the needs of

⁵⁷ European Union Agency, *supra* n.30.

⁵⁸ *Id.*

⁵⁹ European Union Agency, *supra* n.30 (citing SLOVENIA/IMPLEMENTATION OF THE PRINCIPLE OF EQUAL TREATMENT ACT 93/07 (27.9.2007), ART. 11/1).

⁶⁰ European Union Agency, *supra* n.30 (citing SLOVENIA/CONSTITUTION 33/91, 42/97, 66/00, 24/03, 69/04, 68/06, AS AMENDED (26.12.1991) ART. 159.1).

⁶¹ Čarni & Košak, *supra* n.9.

⁶² *Id.*

⁶³ Šalomon, Milohnič & Vučko, *supra* n.3.

⁶⁴ EUROPEAN UNION AGENCY, *supra* n.18.

⁶⁵ *Id.*



the NGOs, one of many factors leading to its closing.⁶⁶ Lastly, many attorneys engaged in pro bono services in Slovenia express frustration with administering pro bono services due to difficulties in communicating with clients, particularly because many pro bono clients lack access to telephones and internet and are poorly educated.⁶⁷

Attorneys in Slovenia are required to charge a minimum tariff under the Lawyers' Tariff Act of 2003, but may provide free legal services to socially disadvantaged and impoverished individuals.⁶⁸ Still, attorneys are required to charge VAT on services that they provide for free, although attorneys who provide free services to defendants in criminal cases may not have to charge VAT on their services.⁶⁹

More information about pro bono opportunities in Slovenia is available at www.pilnet.org (last visited on September 4, 2015).

CONCLUSION

Slovenia's Constitution, the Civil Procedure Act and the Free Legal Aid Act provide significant services for individuals in need of legal aid. However, these services are insufficient to help all individuals requiring legal services and, in fact, there are indications that many of the most vulnerable individuals in Slovenia are not aware of these free services. Thus, there remains a need for pro bono services. The recent closure of the Clearinghouse has hindered the provision of additional pro bono services, and there is an even greater need for international attorneys to assist local attorneys and other NGOs in an advisory role.

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⁶⁶ Need for Pro Bono, supra n.52.

⁶⁷ Šalamon, Milohnič & Katarina Vučko, supra n.50.

⁶⁸ SLOVENIAN BAR ASSOCIATION, Interpreting Lawyers' Fees, <http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO5198> (last visited on September 4, 2015).

⁶⁹ Id.



Pro Bono Practices and Opportunities in South Africa

INTRODUCTION

The South African government and legal community have made significant strides towards improving access to justice for all in the Republic of South Africa (“**South Africa**”). The government operates, and continues to expand, a legal aid system that uses public funds to assist those in need of legal services. Likewise, law firms and law societies throughout the country have adopted mandatory pro bono requirements for attorneys. Nevertheless, it is widely recognized that the legal aid system falls short of meeting the needs of the poorest South Africans, particularly in view of the social and economic challenges the country has experienced since the end of the apartheid era. There has been significant growth in the number of legal NGOs offering services, though efforts by private law firms, the country's law societies and these NGOs only go part of the way to improving access to pro bono services.

OVERVIEW OF THE LEGAL SYSTEM

The Justice System

Constitution and Governing Laws

South African law is a ‘hybrid’ legal system, with its origins derived from both continental Europe and England. As a general rule, South Africa follows English law in both criminal and civil procedure as well as in company law and the law of evidence. On the other hand, Roman-Dutch common law is followed in contract law, law of tort, law of persons, law of things, family law, etc.¹ In the post-apartheid era room has also been made for the recognition of traditional African customary law.² International law is incorporated into domestic law and becomes binding via adoption in the country's parliament. International law must be considered when interpreting the Bill of Rights and thus foreign law may frequently be referred to in this context.

Overarching the above legal framework is the Constitution of South Africa, which was approved on December 4, 1996 and which took effect on February 4, 1997. The Constitution is the supreme law of the land in South Africa and no other law or government action can supersede the provisions of the Constitution. Chapter 2 of the Constitution sets out the Bill of Rights, which enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality and freedom.³ No law can limit any right entrenched in the Bill of Rights except for laws of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors.

The Courts

The South African judiciary is an independent branch of the government and consists of the Constitutional Court (the final court of appeal for all matters), the Supreme Court of Appeal (the second highest court for all matters except for certain labor and competition matters), the provincial divisions of the High Court, and the district and magistrate courts. There are also specialty courts established to oversee various matters, such as land claims, labor disputes, and tax matters.

Judicial officers in South Africa are not publically elected but rather appointed via various commissions pursuant to processes set forth in the Constitution. Judicial appointment is not for life, though security of tenure is established through prescribed terms of service. Judges of the Constitutional Court, including The Chief Justice and Deputy Chief Justice, are appointed by the President of South Africa on the advice of the Judicial Service Commission. The appointment of High Court Judges is conducted by the Judicial

¹ See <http://www.justice.gov.za/sca/historysca.htm> (last visited on September 4, 2015).

² Section 39(3) Constitution of the Republic of South Africa, 1996.

³ See <http://www.gov.za/documents/constitution/chapter-2-bill-rights> (last visited on September 4, 2015).



Service Commission, and the appointment of (lower court) magistrates falls under the separate Magistrates' Commission.

The Practice of Law

The legal profession in South Africa is comprised of two types of lawyers: attorneys and advocates. In general, attorneys provide advice on matters ranging from commercial transactions to the drafting of wills while advocates represent clients in major court proceedings and arbitrations, and also provide written or oral opinions on matters involving South African law. The Qualification of Legal Practitioners Amendment Act of 1997 dictates that an LLB degree is required to practice law in South Africa. The degree should be obtained from a South African law school. If a law degree is obtained outside South Africa, independent verification is required to establish that the degree is equivalent to an LLB in South Africa. If equivalency is verified, candidates must satisfy certain other requirements to become either an attorney or advocate. These include being at least 21 years old, a South African citizen or permanent resident.

Historically, advocates could only work on matters that were referred to them by attorneys and only advocates (as opposed to attorneys) were permitted to argue matters in court. However, the recent Legal Practice Act 28 of 2014 has led to the blurring of the distinction between advocates and attorneys. The Legal Practice Act provides that an advocate may render legal services upon receipt of a request *directly* from a member of the public, provided that the advocate is in possession of a fidelity fund certificate and a trust account. Also fairly recently, attorneys who have obtained the requisite certification have been allowed to appear and argue cases at the High Court level.⁴ The Legal Practice Act has as its stated purpose the creation of a single regulatory body for advocates and attorneys to ensure that legal services are accessible to the public and entry into the profession is unrestricted. It remains to be seen what impact these statutory changes will have on the profession and access to justice. To date very few attorneys have entered into the sphere of practice historically served by advocates.⁵

The Legal Practice Act envisages that all legal practitioners will be subject to the jurisdiction of the South African Legal Practice Council (the “**Council**”), which will, *inter alia*, regulate the conduct and affairs of all practitioners (attorneys and advocates), develop norms and standards and develop programs to empower the previously disadvantaged.⁶

Currently, attorneys in South Africa are regulated by regional law societies – the Black Lawyers Association, the Law Society of the Northern Provinces, the Cape Law Society, the Kwa Zulu Law Society, the Law Society of the Free State and the National Association of Democratic Lawyers, all of which fall under the umbrella body of the Law Society of South Africa (the “**LSSA**”).⁷ According to the LSSA, as of May 2015, there were 23,217 attorneys practicing in South Africa.⁸ While some of those attorneys practice at large-to medium-sized firms (firms with ten or more legal professionals), as of December 2014, approximately 17.4% of South African law firms consisted of between two and nine attorneys and approximately 81.7% consisted of sole practitioners.

Currently, advocates are represented by the General Council of the Bar (the “**GCB**”), a national body comprised of ten societies of practicing advocates. Societies are located at the seat of every provincial and local division of the High Court of South Africa.⁹ At a more micro level individual advocates organize around ‘Chambers’ or ‘Groups’, some of which have made express commitments to improve access to

⁴ See Right of Appearance in Courts Act 62 of 1995.

⁵ While the Legal Practice Act has been signed into law it is not (as of the date of this report) in effect.

⁶ See Preamble to the Legal Aid South Africa Act 39 of 2014.

⁷ See <http://www.lssa.org.za> (last visited on September 4, 2015).

⁸ See <http://www.lssa.org.za/?q=con.147> (last visited on September 4, 2015), About the attorneys' profession.

⁹ See <http://www.sabar.co.za> (last visited on September 4, 2015).



justice through pro bono services and other initiatives.¹⁰ There are currently over 2,000 advocates practicing in South Africa.¹¹

Attorneys and advocates both have a long history of pursuing equal access to justice in South Africa, dating back to the apartheid era. The legal profession has heeded calls to increase its pro bono efforts as part of a new spirit of volunteerism in the country by introducing a mandatory pro bono initiative for attorneys and advocates. Legal professionals are required to provide at least 24 hours of pro bono services per year.¹² A number of South Africa's leading law firms have gone further and made significant efforts to develop and increase their pro bono activities, including the creation of the ProBono.org website¹³, seeking to match lawyers with individuals in need of legal services. It is expected that pro bono work will continue to grow in importance for the South African legal profession over the next several years as legal professionals are encouraged to establish their social responsibility credentials consistent with principles embedded in the Constitution and with the coming into force (and anticipated full effectiveness) of the Legal Practice Act.¹⁴

LEGAL RESOURCES FOR INDIGENT PERSONS AND ENTITIES

The Right to Legal Assistance

Whether a matter is criminal or civil in nature impacts the right to legal assistance in South Africa. Other than for children, there is no constitutional or common law right to legal counsel in civil proceedings. For a child to qualify for assistance in a civil matter he/she must be under 18 years of age and, furthermore, substantial injustice must otherwise result if no counsel were to be appointed. Notwithstanding the lack of an express right, the constitutional entitlement to a "fair public hearing" may give rise to a claim for legal assistance in civil matters and such assistance is in fact made available for civil matters under the Legal Aid South Africa Act 39 of 2014 (the "**Act**"). In the criminal law context, detained and accused persons have a constitutional right to legal counsel and to provision of a legal practitioner at state expense if substantial injustice would otherwise result.¹⁵ The Criminal Procedure Act reiterates this right.¹⁶

State-Subsidized Legal Aid

South Africa has a system of legal aid that uses public funds to assist those unable to afford legal services. Effective March 1, 2015 state-funded legal aid came to be governed by the Act, which replaced the Legal Aid Act 22 of 1969. The Act established Legal Aid South Africa ("**LASA**") as the national public entity responsible for rendering and providing access to legal aid, advice and representation. LASA's purpose is "to ensure access to justice and the realization of the right of a person to have legal representation as envisaged in the Constitution and to render or make legal aid and legal advice available."¹⁷ The functions of LASA are carried out by a board, (the "**Legal Aid Board**") in consultation with the Minister of Justice and Correctional Services.¹⁸ The Legal Aid Board's work covers both civil and

¹⁰ See Thulamela Chamber's constitution: <http://www.thulamela.com/wp-content/uploads/2014/04/Thulamela-Constitution-14-November-2013.pdf> (last visited on September 4, 2015).

¹¹ See <http://www.advocatesa.co.za/> (last visited on September 4, 2015).

¹² See http://www.lssa.org.za/index.php?q=con,89,Pro_bono_services_by_attorneys (last visited on September 4, 2015).

¹³ See <http://www.probono.org.za/> (last visited on September 4, 2015).

¹⁴ See <http://www.justice.gov.za/legislation/acts/2014-028.pdf> (last visited on September 4, 2015).

¹⁵ Section 35 Constitution of the Republic of South Africa.

¹⁶ Section 73 of the Criminal Procedure Act 51 of 1977 (as amended).

¹⁷ See Preamble to the Legal Aid South Africa Act 39 of 2014.

¹⁸ Legal Aid South Africa Act 39 of 2014.



criminal cases, although criminal matters comprise a larger percentage of its services and budget. In its civil work, the Legal Aid Board is particularly focused on providing legal advice and protecting and defending the rights of vulnerable groups such as women, children and the homeless.

The forthcoming Regulations to be promulgated under the Act will lay out the eligibility criteria for state-funded legal assistance. The extant 2014 Legal Aid Guide published by LASA details the existing criteria as follows:

- **Criminal Law Matters** - Children and recipients of State grants and old age pensions from the South African Social Security Agency are automatically eligible. Others must meet a means test (the applicant must earn less than ZAR5,500.00 (approximately US\$ 450.00) per month after tax and not own personal property in excess of ZAR100,000 (approximately US\$ 8,250.00). Where the applicant is a homeowner, the value of the home together with any personal property must not exceed ZAR500,000 (approximately US\$ 41,000.00) in the aggregate; other than cases where an applicant's Constitutional right to representation is implicated, if the individual applicant is part of a household then the household income is tested and must not exceed ZAR6,000.00 (approximately US\$ 500.00) per month after tax). There is no citizenship requirement.
- **Civil Law Matters** - Recipients of State grants and old age pensions from the South African Social Security Agency are automatically eligible. All other applicants must meet the means test noted above.¹⁹ For a child applicant the child's household must meet the means test, and where the proceedings are between spouses there is no aggregation of household assets for the purposes of the test. Non-citizens are not eligible for legal assistance in civil matters unless the matter (i) involves a child or (ii) the individual is an asylum seeker.
- **Alternative Dispute Resolution** - Mediation and arbitration assistance is offered as part of LASA's non-litigious civil proceeding services. The eligibility criteria noted above are applicable.

Distinct from the legal aid system are various ombuds (and other similarly functioning organs) which may take on and investigate complaints on behalf of complainants in certain sectors or on specific topics. Typically, these ombuds are mandated by statute or by an industry association to hold industry or government officers accountable and a complainant's legal representation is less relevant. Depending on the empowering statute or founding document, ombuds may also have more limited power to secure specific relief for a complainant and are typically limited to issuing non-binding findings or recommendations.²⁰

According to its 2014 Annual Report,²¹ the Legal Aid Board provided:

- Legal services through a national footprint of 64 justice centers and 64 satellite offices;
- Delivery of legal services in 447,301 new legal matters - an increase of 7% from the 2009-2010 reporting period. Of these matters over 85% were criminal cases, with the balance civil in nature; and
- Legal assistance in 16,858 matters involving children

¹⁹ See <http://www.legal-aid.co.za/?p=929> (last visited on September 4, 2015) for the Legal Aid Board's Impact Litigation Program, which recognizes that the Legal Aid Board may have opportunities to assist or fund litigation with the potential to positively affect the lives of a large number of indigent persons. The Legal Aid Board looks at whether an opportunity exists to establish legal precedent either by class action or strategic intervention and rendering of non-litigious services. Rather than evaluate each client individually, special litigation matters are submitted to the Legal Aid Board through written proposals and approved on a case-by-case basis.

²⁰ In the context of maladministration in the performance of public functions see the Public Protector Act 23 of 1994, see also the Consumer Protection Act 68 of 2008 and <http://ombudsman.ombudsmen.co.za/find-an-ombudsman/> (last visited on September 4, 2015).

²¹ See <http://www.legal-aid.co.za/wp-content/uploads/2012/12/2014-Legal-Aid-REPORT.pdf> (last visited on September 4, 2015).



The Legal Aid Board uses justice centers, cooperation agreements with university law clinics, contracted private attorneys, and special impact litigation to fulfill its mandate of providing legal aid.

- **Justice Centers.** The justice centers operate in a similar fashion to private practice firms and are the primary source for applicants seeking legal aid in South Africa. Each justice center is headed by a principal attorney, with assistance from professional assistants, candidate attorneys and paralegals. Justice centers offer legal assistance for certain defined criminal and civil matters and the services offered include advice, referrals and litigation.²² Through its justice centers, the Legal Aid Board provided general legal advice to 424,679 clients in South Africa between 2013 and 2014, accounting for 95% of all its work flow, the balance was handled through the appointment of private legal counsel in Judicare matters (as detailed below), and through cooperation agreements.²³
- **Cooperation Agreements.** The Legal Aid Board enters into cooperation agreements with certain university law clinics and NGOs to provide additional legal assistance to the local communities. As of 2014, cooperation agreements were in place with law clinics at the following universities:
 - **Eastern Cape Province:** Rhodes University, University of Fort Hare, Walter Sisulu University, Nelson Mandela Metropolitan University
 - **Free State Province:** University of the Free State
 - **Gauteng Province:** University of Pretoria, University of South Africa, University of Johannesburg, University of the Witwatersrand
 - **KwaZulu-Natal Province:** University of KwaZulu-Natal, University of Zululand,
 - **Limpopo Province:** University of Limpopo, University of Venda
 - **North West Province:** North West University
 - **Western Cape Province:** University of Cape Town, University of the Western Cape, Stellenbosch University
- **Private Counsel.** The Legal Aid Board may appoint and pay private legal counsel (known as the "Judicare" system). Such appointments are voluntary and rates are agreed by contract. There is no provision in South African law for mandatory assignment of matters to private attorneys.
- **Special Litigation.** Special litigation involves cases which, if successful, would have a major impact on South African law. These types of cases primarily involve class actions suits as a means to challenge constitutional violations and require special teams of legal representatives to assist in litigating them. The legal representatives may be chosen from the justice centers or they may be private practice attorneys. The Legal Aid Board considers special litigation on a case-by-case basis, and the cost is covered through a dedicated fund.

The Legal Aid Board also continues to explore other access-to-justice models to complement the outlets outlined above pursuing and evaluating various pilot projects.

²² Matters eligible for legal aid are outlined in Chapter 4 of the Legal Aid Guide 2014. Criminal and civil matters eligible for representation are offense and jurisdiction specific. For example, legal aid may be granted in matters where District Courts have increased penal jurisdiction, such as theft, dealing in drugs and drunk driving. Legal aid is available for many common law offenses such as arson, assault, bribery, fraud, rape, murder, kidnapping, and robbery but is not generally available for criminal defamation, public indecency and contempt of court. Covered statutory offenses include those relating to children, mental disability, corruption and vehicle theft. Legal aid is also available for miscellaneous matters such as bail reviews, extradition and involuntary HIV testing (in the case of sexual offenders). In addition, legal aid is available for certain High Court appeals if the client qualifies under the means test. On the civil side, legal aid is available for family law issues including divorce, maintenance matters, child custody and domestic violence, as well as in a range of other civil matters such as housing law, asylum and certain labor disputes. There are many limitations placed on the scope of civil legal aid, such as no representation for certain personal torts (infringement of privacy and adultery); for cases in small claims court; and in the administration of estates.

²³ 2014 Legal Aid Report.



Unmet Needs Analysis

While the efforts described above go some way to improving access to justice, significant hurdles remain. A prominent legal services NGO, the Legal Resources Center, points to a lack of state infrastructure, scarcity of legal skills in poor areas, illiteracy and low levels of education about legal rights and entitlements as some of the barriers to access to justice.²⁴ Notably, a high percentage of legal aid (approximately 85%) goes toward criminal law proceedings.²⁵ Given the socio-economic challenges evident in the country, there is a strong need also for civil proceeding representation (including administrative law matters touching on access to grants and social assistance programs). The Legal Aid Board acknowledges this imbalance and attributes it to funding shortages.²⁶ The private sector is slowly beginning to supplement the services provided by the Legal Aid Board, though funding and capacity remains strained in both spheres.

PRO BONO ASSISTANCE

Pro Bono Opportunities

Although pro bono work had been carried out by legal practitioners on an informal basis for many years, no formal initiative in respect of pro bono practice developed in South Africa until 2003, when one of the regional law societies regulating attorneys, the Cape Law Society, instituted a mandatory pro bono rule for its members. The Society's initiative was prompted by the recognition that the government's legal aid system was not adequate to address the South African public's legal needs— particularly those of the poorest members of South African society. Since then, each of the regional law societies has required their members to perform pro bono services; today the Law Society of South Africa mandates attorneys to provide 24 hours per year of free legal advice to members of the public who qualify for this service in terms of a means test. In most cases, refusing to perform pro bono services without good cause amounts to unprofessional conduct. Some law societies publish a list of services that, when performed by attorneys at no charge for those who cannot afford to pay, are recognized as pro bono services capable of being delivered in compliance with the provisions of the societies' pro bono rules.²⁷ Regional law societies typically have rules governing the reporting and recording of pro bono services, including matters addressed and hours of service rendered. The intention is to ensure the accountability of society members, and the Societies reserve the right to publish members' pro bono track records on their websites.²⁸

In addition to the efforts of the law societies, individual legal practitioners and firms in South Africa are continuing to provide pro bono services on a voluntary and informal basis. Some of the country's large commercial law firms have adopted innovative policies towards pro bono; however the strategic approach and emphasis among firms varies. For example, ENSafrica (Edward Nathan Sonnenbergs) has established two dedicated offices located within underserved and poor communities (Mitchells Plain, in Cape Town and Alexandra Township in Johannesburg) where legal advice as well as rights education programs are provided. These offices are served by some permanent staff together with attorneys from the firm's other offices. The law firm Webber Wentzel (in alliance with Linklaters) has a permanent pro bono partner to coordinate that firm's pro bono practice. According to the firm's 2012 pro bono report, Webber Wentzel attorneys provided 10,596 hours of pro bono services—valued at over ZAR10 million—

²⁴ See <http://www.lrc.org.za/focus-areas/access-to-justice> (last visited on September 4, 2015).

²⁵ 2014 Legal Aid Report, page 21.

²⁶ 2014 Legal Aid Report, Foreword of the Board Chairperson, page 13.

²⁷ Rule 21.4 of the Cape Rules.

²⁸ See for example Rule 24.11 of the Free State Law Society available at: http://www.justice.gov.za/legislation/notices/2008/20080530-gg31083_a_pg68-80.pdf (last visited on September 4, 2015).



on a wide range of cases and issues including HIV/AIDS discrimination, land reform and housing and violence against women.²⁹ Bowman Gilfillan, another prominent South African law firm, reported that in 2014 their lawyers contributed 8,609 hours of pro bono work, with a value of over ZAR15.5 million. Bowman Gilfillan also places attorneys on six-month assignments with the State's Public Defenders' office and provides weekly staffing for the Domestic Violence Help Desk at the Randburg Magistrates Court. Other law firms, like Norton Rose, have focused their pro bono efforts on specific challenges facing the country, such as the xenophobic violence in 2015.³⁰

At the University of Cape Town, and an increasing number of other law schools across the country, it is a compulsory graduation requirement for law students to complete a total of 60 hours of community service. The service need not be legally oriented but must provide a direct service or benefit to an underprivileged or vulnerable group or to a social or economic upliftment organization. The primary purpose of this compulsory requirement is to instill a sense of public service in each new lawyer joining the profession.

In addition to these opportunities, legal professionals may also provide pro bono services through legal NGOs. South Africa has a vibrant legal NGO community which is an important aspect of the access to justice landscape in the country.³¹ Lawyers seeking opportunities for pro bono service may also contact the state's legal aid provider - LASA.

Historic Development and Current State of Pro Bono

While the developing culture (and pride) in the delivery of pro bono legal services is encouraging, a number of factors hamper the roll-out of wide-spread pro bono legal services in South Africa.

Case-processing and organizational capacity for handling pro bono intake is constrained. According to the LASA's annual report, South African regional law societies received a total of 7,863 pro bono applications in 2014. However, only 3,701 (less than half) of these were approved and referred to attorneys. It is not clear whether this discrepancy is due to a lack of capacity on the part of the attorneys, a high number of inadequate applications or some other factor. Even when attorneys are willing to provide pro bono services they are not always able to reach people living in the rural parts of the country who need access to these services.

The supply of qualified legal practitioners also poses a barrier to greater levels of pro bono work. Several academics suggest that a lack of capable lawyers (South Africa has approximately one lawyer for every 2,273 people (well below the internationally recommended ratio of one lawyer to 600 people) is hampering access to justice,³² and even economic growth.³³

²⁹ See <http://www.webberwentzel.com/wwb/content/en/ww/ww-pro-bono-report-new> (last visited on September 4, 2015).

³⁰ See <http://www.nortonrosefulbright.com/za/corporate-responsibility/xenophobia-has-no-place-in-africa/> (last visited on September 4, 2015).

³¹ ProBono.Org (<http://www.probono.org.za/> (last visited on September 4, 2015)), for example, focuses specifically on connecting individuals seeking pro bono representation with attorneys. The Legal Resources Center (www.lrc.org.za/ (last visited on September 4, 2015)), Lawyers for Human Rights (www.lhr.org.za/ (last visited on September 4, 2015)), Center for Applied Legal Studies (<http://www.wits.ac.za/law/cals> (last visited on September 4, 2015)), Center for Child Law (<http://www.centreforchildlaw.co.za/> (last visited on September 4, 2015)), Socio Economic Rights Institute of South Africa (<http://www.seri-sa.org/> (last visited on September 4, 2015)), the Southern Africa Litigation Center (<http://www.southernafricalitigationcentre.org/> (last visited on September 4, 2015)), and Section 27 (<http://section27.org.za/> (last visited on September 4, 2015)) are all examples of NGOs offering pro bono representation or litigating social justice issues.

³² See McQuoid-Mason, D., 2013. Access to Justice in South Africa: Are there Enough Lawyers? Oñati Socio-legal Series, 3 (3), 561-579. Available from: <http://ssrn.com/abstract=2272640> (last visited on September 4, 2015).

³³ See The Optimum Number of Lawyers: A Reply to Epp Stephen P. Magee, Law & Social Inquiry Volume 17, Issue 4, pages 667-693, October 1992 available at <http://onlinelibrary.wiley.com/doi/10.1111/lj.1747-4469.1992.tb00635.x/abstract> (last visited on September 4, 2015).



Substantive aspects of the legal system may also be deterring the bringing of pro bono matters, at least in the litigious context. As a general rule, the costs of legal proceedings follow the outcome. A pro bono (or state-funded) applicant is not shielded from an adverse costs order if his/her claim is unsuccessful. While this phenomenon may reduce the demand on an already over-burdened court system, its implications for access to justice are of concern. In addition, the class-action mechanism is fairly new and undeveloped in South Africa; the ability to litigate on this basis was introduced in 1996 for constitutional rights, and extended in 2013 to a broader array of matters.³⁴

Pro Bono Resources

ProBono.org, the Legal Aid Board³⁵ (<http://www.legal-aid.co.za/> (last visited on September 4, 2015)) and the law societies throughout the country offer the best resources for lawyers interested in providing pro bono representation. These organizations play a central role in providing and coordinating the provision of legal services to those who need it the most.

CONCLUSION

Access to justice for the poorest in society is crucial to South Africa's ongoing development. South Africa has made significant strides towards developing a pro bono and state legal aid policy that encourages its legal professionals to engage in a new spirit of volunteerism. Mandatory pro bono initiatives have been introduced, a number of South African law firms have developed more structured pro bono practices independently and legal professionals can now engage in pro bono beyond their law firm in efforts like ProBono.org. The trend illustrates a renewed commitment to pro bono among formalized South African legal organizations. Nevertheless, access to justice, particularly for the poorest communities, continues to be a significant problem in South Africa. In light of numerous pressures on State funding, it is likely that the legal profession will increasingly be looked to, to develop and broaden voluntary pro bono practices in an effort to address the problem. In a country where the gap between the wealthy and the poor is vast, the need for pro bono legal services for South Africa's most underserved populations continues.

September 2015

Pro Bono Practices and Opportunities in South Africa

This memorandum was prepared by **Latham & Watkins LLP** for the **Pro Bono Institute**. This memorandum and the information it contains is not legal advice and does not create an attorney-client relationship. While great care was taken to provide current and accurate information, the Pro Bono Institute and Latham & Watkins LLP are not responsible for inaccuracies in the text.

³⁴ See Trustees for the time being of the Children (050/2012) [2012] ZASCA 182.

³⁵ See(<http://www.legal-aid.co.za/> (last visited on September 4, 2015)