Legal aid: a domestic diagnosis

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An Australian response to the 'international' perspective on legal aid.

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The views expressed are not intended to represent the views of other Commissioners.

Francis Regan and Don Fleming reported on a recent legal aid conference in the Hague ((1994) *Alt.LJ*, August, p.183). The conference brought together senior commentators on and managers of legal aid from a number of countries.

Regan and Fleming ('the authors') offered 'international perspectives' on legal aid, and say that those perspectives reflect the fact that 'legal aid in Australia is in trouble' (p.183). In this article I question their analysis, specifically the extent to which overseas developments are a prescription for legal aid in Australia, and the importance the authors attach to new forms of legal service delivery. I aim to recast the authors' comparative observations in a way that highlights some of the particular characteristics and strengths of legal aid schemes in Australia, and that suggests particular areas for further analysis.

Although the authors do not spell out what they mean by 'legal aid', I use the term as I believe the authors mean to, as it used commonly in academic commentary, as it was used at the Hague Conference, and as Don Fleming described it in a previous article: 'a generic to describe free or assisted legal advice, non-contentious legal representation or legal representation before courts or tribunals'.[1] I would add only that the legal aid referred to is financially supported by the state. It might conveniently be referred to as 'conventional' legal aid.

Beware of comparisons

First, it is important to keep in mind the limited usefulness of comparative studies, particularly when presented in the abbreviated way required for the style of the *Alternative Law Journal*. The experiences of North America and Europe may be instructive in different ways; they cannot, without considerable qualification, lead to firm conclusions about the Australian situation. Part of the difficulty of applying to Australia the authors' observations from the comparative conference is the complexity of a national view of legal aid. Distinctive features of a jurisdiction cause legal aid to operate in a particular way; the authors have reported on the way that legal aid is working, or is not, in other places, but have over-generalised the explanation in applying it to Australia.

Legal systems have been grouped in different ways at different times to facilitate comparative studies, resulting in legal 'families' such as 'Romanist', 'Germanic', 'Anglo-Saxon', 'Socialist', 'Islamic' etc. Social, political, historical and cultural factors indicate that the legal aid experiences of Canada, England and Wales (England/Wales) are reasonably comparable to those of Australia, all being of the Anglo-Saxon/common law group of legal systems. From time to time I refer to developments in those jurisdictions.

The authors' references to France and to eastern Europe are of marginal relevance to the common law experience, due to basic historical and structural differences. If the lack of 'a history of commitment to legal services for the disadvantaged' (p.184) in those countries means a historical, and current, lack of conventional legal aid, the authors' statement may

be true. But the operation of the communist state in eastern Europe gave rise to fundamentally different perceptions of rights, property, poverty, need, and the role of lawyers and courts; in France the operation of civil law differs markedly from common law in ways that are directly relevant to the role and nature of legal aid.

Prospects for conventional legal aid in those countries may be limited for many such structural and cultural reasons; an 'overwhelming belief in small government' (p.184) is not the only or even dominant reason. Even if a trend to small government is a phenomenon in some western countries, eastern Europe shows a continuing popular and political adherence to a significant role for the state. For interest's sake, if not for persuasive comparative purposes, it will be worth monitoring developments in the justice systems in these countries.

The purpose of legal aid

Legal aid — the 'bold vision of Lionel Murphy' (p.183) — is said by the authors to be perceived as having failed in its mission 'to provide lawyers' services to the poor and disadvantaged' (p.183). This seems to be a complaint about the extent of legal aid; all the poor and disadvantaged cannot get legal assistance when they need it. This purely quantitative assessment, which is undoubtedly what some in 'the community and in welfare lobby groups' (p.183) subject legal aid to, is an unrealistic measure of a 'healthy legal aid scheme' (p.185), and was rejected by commentators in the US over 25 years ago. In the 'equal access' model of legal aid, universality is an ideal, and the extent to which legal aid falls short of universal coverage is not a measure of its failure.

Legal aid can only do as much as it is funded to do. If the complaint then is that governments give insufficient support to legal aid to enable it to reach all the poor and disadvantaged (discussed below), the failing is with government, not with the operation of legal aid. The complaint may be that legal aid could, with the resources it does have, reach more of the poor and disadvantaged. This may well be true; at the very least the priorities used for legal aid expenditure and the types of services provided need to be analysed by Legal Aid Commissions and independent commentators, and perhaps substantially revised.

The point is that it is not the mission of conventional legal aid (nor has it been) simply to provide legal services (without qualification) to all the poor. The most broadly accepted and most innocuous role for legal aid has been to enhance access to the courts by helping to ensure that parties are represented in court. The Access to Justice Advisory Committee characterised legal aid as a critical factor in the pursuit of equality before the law. Yet even this conservative goal has been a challenge — the dramatic increase in the cost of the 'uncapped' or 'demand-led' programs in England/Wales and Ontario, Canada demonstrates the futility of trying to provide lawyers' services to all.

The authors however suggest a further mission for legal aid: 'changing the causes of poverty and disadvantage' (p.183). It is a long time since anyone seriously suggested that that was what conventional legal aid could, or even ought to try to, achieve. Since the rhetoric of Johnson's War on Poverty set the agenda for the Legal Services Program in the US in the 1960s, many legal aid commentators and administrators have argued that state-sponsored legal aid can be neither revolutionary nor structurally reformist.

Legal aid is available to the poor at the pleasure of the government of the day. It is a tool that can be used by the poor and their advocates to address — most commonly through litigation — injustices, anomalies and oppression, or simply to give individuals a fairer hearing than if they were unrepresented. In short, it attempts to ameliorate some of the harshness of the inequitable distribution of wealth in our society. Justice Brennan in *R v Dietrich* (1992) 109 ALR 385 at 404.19 said that 'legal aid is a measure which reduces the possibility of injustice and enhances the fairness of the criminal trial.' Even in this endeavour, many commentators have suggested that too much is expected of conventional legal aid.

To achieve for the poor whatever social change can result from litigation and the decision of a court may require the involvement of legal aid, and to that extent legal aid is an indispensable part of a fight for social justice. Substantive rights available under welfare, housing or consumer credit law may be clarified and expanded, and courts may be moved to have increased regard to aspects of poverty such as language, intellect and violence. But that is a far cry from saying that legal aid aims to effect change to the very causes of poverty in a capitalist system.

Legal aid could of course be defined beyond its conventional sense to include more than the usual lawyers' litigation services, in which case it might be better able to carry the burden of a 'social change' mission. But although legal education and law reform are a common part of legal aid's statutory charter,[2] and political advocacy is part of the early rhetoric of legal aid, such activities scarcely compete with conventional lawyer/client services as a priority in legal aid provision in Australia.

Australia is in fact one of the few countries that is explicit in including a reform aim for legal aid. It is not part of legal aid's mission in England/Wales or much of Canada; the extent to which education, political lobbying and law reform activity could be a realistic goal for an expanded form of legal aid is doubtful in those systems that deliver services through the private profession. Those goals are better met by specialist organisations with an appropriate structure and method of operation, such as community legal centres in Australia, law centres in England/Wales and legal clinics in Canada. The distinctive nature of these organisations is discussed below.

In summary, it is not clear whether conventional legal aid schemes in Australia continue to do, or ever did, what Lionel Murphy or any other 'founder' intended them to. To a considerable extent, legal aid schemes have become large public administrative bodies where efficient delivery of a product is the first priority, in pursuit of an uncritically accepted goal of, it seems, equality of access to courts. It is appropriate therefore to revisit the research and debates of 15 or 20 years ago in Australia, and to review the social and political purpose for the expenditure of public money on conventional legal aid.

This is a necessary first step to the development of a coherent stategy for legal aid. Perhaps the proposed Australian Legal Aid Commission can begin its work here; at the moment such an undertaking is listed seventh of eight functions, following other functions that amount to tinkering with existing schemes for the sake of conformity.[3]

The demise of legal aid?

The authors refer to legal aid being 'in trouble' (p.183), and in 'decline' (pp.184, 185). But what is it about legal aid that is suffering?

Decline of the welfare state

The authors suggest that legal aid as an institution no longer has a respected place in the political order: 'The decline of political acceptance for a strong central public welfare state since the late

1970s in many societies seems to be responsible for this new approach to legal aid' (p.184).

What the authors are saying is that governments these days just don't have the will to commit themselves to legal aid: 'there has been little interest from governments to contribute larger amounts to the constantly growing legal aid budgets' (p.183).

Wherever else in the world this may be so, is it the case in Australia? It is too simple an assertion to make of a country where legal aid is administered by a number of different governments, and where those governments have not shared a political identity in the past few years, let alone since the 1970s. Legal aid in fact experiences different fortunes among the federal and various State and Territory jurisdictions; it is reasonably well supported by the current federal administration, and has been marginalised by some State governments.

The standing of legal aid in the community, and in the eyes of some Australian governments, may be affected by at least three other phenomena. The first is a simple decline in the capacity of the state to meet the expense of legal aid. In the rights-based society that Australia has firmly established, and for reasons of government initiatives with consequent effects (discussed below), a growth in demand for legal aid reflects a growth in contested litigation; the state, rather than being unconcerned, is simply unable to keep up.

Related to this is the popular exercise of 'legal aid bashing' in the community, based in large part on the financial inability of legal aid to meet all demands. Whether the priorities of legal aid are appropriate (discussed further below), public disillusionment with the limited availability of a public service, simply because of its limited availability, is inevitable.

The significant involvement of the private profession in delivering legal aid services has, regrettably, permitted critics of lawyers to include legal aid in their attacks on the profession. Legal aid is characterised as a money spinner for private lawyers, and the lawyers' defence of legal aid is denounced for alleged self-interest.

Inadequate funding

It is certainly the case in Australia as in other 'rich' countries that while funding has not declined nationally in dollar or real (inflationary) terms, it has declined in terms of its ability to meet demand. (Whether funding should continue to increase in response to demand cannot be determined until the necessary review of the strategic purpose of legal aid that I mentioned above has taken place.) The authors point to increased population eligibility as a principal cause of the decline in the demand-relativity of legal aid funding, presumably compounded by the 'decline of political acceptance' (p.184) for legal aid.

The first cause of increased population eligibility is said to be the recession. This is undoubtedly true. However, unlike England/Wales and most Canadian jurisdictions — particularly the largest, Ontario — Australian legal aid models are 'mixed': they employ a significant salaried staff to deliver the legal aid services as well as using the private profession. Thus while the recession may increase the eligible legal aid population, the effect on the salaried side of legal aid will be an increase in the salaried lawyers' caseloads rather than an increase in expenditure.

Nor can it be assumed that the increase in the eligible population leads to a proportionate increase in demand for legal aid. There is scope for research to be done in determining the extent of this phenomenon: an inability to repay a financial obligation due to retrenchment does not necessarily result in legally aidable proceedings; family break-ups due to financial pressures do not necessarily result in any legal proceedings.

The second cause of increased population eligibility is said to be recent dramatic increases in the number of migrants and refugees. This phenomenon, it is said, leads to increased use of refugee/migration administrative processes, and increases the national population and therefore the population eligible for legal aid. This is presented as a European phenomenon, and I think the authors are right not to suggest that the same equation is necessarily true for Australia.

Other causes

There is little doubt that in Australia, and in at least Canada and England/Wales as well, a very real cause of the decline in the demand relativity of legal aid funding is the escalation in recent years of those government initiatives that are unfunded. In Australia these initiatives are often those of State governments. New gaols, new courts, new offences, increased law enforcement funding, new causes of action, the speeding up of court lists, increases in lawyers' scale fees, and the imposition and increase of 'user pays' court fees, are all examples of government initiatives that create demands on legal aid, both by increasing the eligible population and by imposing direct costs on legally aided clients.

Policy developments and government initiatives need not be an unfunded burden on legal aid. There are often specific groups making use of legal aid, some of which have their eligibility 'created' by government initiative. Thus the implementation of the Child Support Scheme brought with it a range of new legal rights and requirements, creating new demands on legal aid. The Federal Government, however, included with the implementation of the Child Support Scheme targeted funding to meet the legal aid impact of the initiative. Similarly, it has provided funding for its programs for veterans' affairs, refugees, and the implementation of the *Disability Discrimination Act 1992.*

When the legal aid impact of a scheme — such as an administrative decision-making process for refugee status — is included as a factor in the funding and implementation of the scheme, legal aid is accepted as a legitimate and essential part of the operation of the state. Such measures, when they occur, illustrate a notable commitment on the part of government to legal aid.

The phenomenon of legal aid impact was recognised in the AJAC Report, although the relevant suggested action, Action 9.3, merely recommends the preparation of legal aid impact statements, without obliging a government to act on such a statement.

Summary

While it is true that government expenditure on legal aid has not enabled legal aid to keep up with demand, simply to increase expenditure assumes that the role of legal aid is understood. In terms of its current operation, the role and 'health' of legal aid schemes in Autralia must be judged by reference to particular features of the economy and the politics of Australia: the status of 'the welfare state', the effects in Australia of the global and domestic recession, the role of the private profession in legal aid service delivery, and the preparation of legislative legal aid impact statements.

Changes in legal services

The authors note three recent developments in the method of legal service provision generally, each of which is said to have an impact on the way legal aid services are delivered. Most importantly, the authors say that the 'simple division . . . between private lawyers providing services on the market and public legal aid is breaking down forever' (p.184).

Legal expense insurance

Legal expense insurance takes two principal forms: individual or group policies. Group schemes were described 30 years ago in the US as 'not new'. There has been considerable discussion of legal expense insurance in Australia (from the Commonwealth Legal Aid Commission in 1982 to the AJAC Report in 1994) and little evidence of its growth. In England/Wales it has been considered without enthusiasm, and promoted without notable success.

Legal expense insurance might address the needs of the notoriously large number of people often said to be not poor enough for legal aid — it may go where legal aid has never been in Australia — but in doing so it will not reshape the existing legal aid schemes significantly or at all. Even if such insurance does establish itself in Australia its users, as the AJAC Report acknowledges, will not be those who would be financially eligible for legal aid. Should this type of insurance prove to be relevant to legal aid schemes in the Netherlands and Sweden, it will be due principally to the more extensive coverage provided by those schemes.

Franchising

Franchising is a development in legal aid administration in England/Wales. A similar initiative has been taken in Manitoba, Canada where the private profession tenders for legal aid work on the basis of doing a number of cases for a fixed fee. The development is a novel one, and is being monitord by some legal aid commentators, managers and policy makers in Australia.

Regan and Fleming seem to be supportive of franchising, seeing the privatisation, if only in part, of public legal services as leading possibly to greater competition and improved quality of service (p.185). It is not clear what intrinsic value there is in introducing competition among legal service providers who, as the authors acknowledge (p.184), are accountable to the state for competitive efficiency before they are accountable to the client for competitive quality. Critics of franchising in England/Wales are not appeased by the cumbersome and dubious system of 'transaction criteria', a checklist of lawyers' tasks with which the English Legal Aid Board intends monitoring the quality of franchised legal services. [See article on franchising in this issue on p.270. Ed.]

Alternative dispute resolution

Alternative (or, some say, additional) dispute resolution (ADR) is a development in law generally, affecting disputants whether legally aided or not. The particular impact on legal aid in Australia has been twofold.

Legal aid expenditure is saved by having resort to mediation rather than litigation, although whether this has resulted in money saved being spent on other services, or merely in money saved, is unclear. At the same time mediation has been used as a further barrier to eligibility for legal aid, a grant of aid being dependent on the applicant first taking part in mediation or, in family law, 'conferencing'.

To the extent that they result in cheaper dispute resolution, ADR innovations are relevant to legal aid budgets. However it is difficult to see — and the authors do not make clear — what is implicit in ADR processes that contributes to the permanent breaking down of the division between public and private legal service delivery.

Profit generation

The account of profit-generating work by legal aid offices in Sweden is again perhaps stated too simply to get a sense of how such an idea may be useful in Australia. Legal Aid Commissions in Australia have generated income when acting successfully in civil matters by recovering costs. In doing so it might be said that legal aid has competed with the private profession — those matters might well have been taken on by a private lawyer prepared to defer receipt of fees until the conclusion of the matter, as is commonly done in workers compensation and common law personal injury cases ('speculative' or 'conditional' fee charging).

But to suggest that Legal Aid Commissions might act for non-legally aided clients, in direct competition with the private profession, is far too literal a translation of a phenomenon from another culture.

Contingency fees

Although not presenting it as part of the 'dramatic transformation' (p.184) of legal service provision, the authors do refer to Australia showing an interest in contingency fees which is not widely shared. The AJAC Report gives only qualified support to the use of contingency fees, and suggests limitations on a contingency fee system that amount to a system of speculative fees, discussed below.

England/Wales continues to debate the efficacy of such a system, and its future in the US is under scrutiny with the increasing incidence of adverse costs orders, antithetical to the feasibility of contingency fees. A related concept is the maintenance, by percentage payments from successful litigants, of a fund designed to *supplement* legal aid. Such a fund has operated in Hong Kong for ten years, and there have been persistent recent proposals for a fund in England/Wales.

Serious doubts exist about the financial viability of contingency legal aid funds in jurisdictions the size and nature of those in Australia, as do doubts about the equity of the operation of such funds and of contingency fee arrangements generally. Deliberations on contingency fees and funds have not been a high priority in Australia, nor have they been given any urgency by the limited success of the fund established in Western Australia. Nevertheless the AJAC Report does support the establishment of such schemes, with the apparently fatal proviso that they be 'self funding'.

Part way to contingency fees are 'speculative' or 'conditional' fees, referred to above in the discussion on profit-making enterprises for legal aid. The existence of such arrangements in the private legal service market are certainly being relied on by some Legal Aid Commissions as a basis for excluding from their services those matters that will be done on a speculative fee basis. To that extent, speculative fees seem to have a firm place in the future, shaping public legal services by redefining the nature of private legal services.

Summary

The authors have reported on a range of factors that they suggest will recharacterise public legal services and define the future of legal aid. Despite overseas experiences, few of these developments will have even an indirect impact on the existing legal aid schemes in Australia. A more detailed study of the domestic relevance of these innovations would be useful, perhaps picking up the inquiry begun in the AJAC Report.

Setting new priorities

On the question of priorities, I agree with the authors that as a result of the current approach to cutbacks in legal aid expenditure, 'legal aid becomes increasingly criminal legal aid' (p.184). This process carries with it an insidious gender inequality, and

perpetuates the simple illogicality of ascribing in absolute terms a greater seriousness (and need for legal assistance) to criminal matters than to non-criminal matters. Interestingly the authors illustrate the protection of legal aid in criminal matters with a reference to England/Wales and to New South Wales. As recently as September 1994 another comparable jurisdiction, Ontario, addressed a budget deficit, and demands by the private profession for quicker payments of accounts, by cutting eligibility for legal aid in non-criminal matters.

The role of community legal centres

As a result of some of the developments outlined above, the authors forecast a 'new look' for legal aid in 'rich' countries. Part of that future is said to be 'an expanded role for community-based legal aid as a cheaper alternative . . .' (p.185). It is clear from the text that, in the Australian context, the authors are referring to community legal centres. Don Fleming has previously suggested a similarly narrow role for community legal centres.[4]

To suggest that they are part of conventional legal aid misunderstands the role and actual practice of community legal centres in Australia. The error is compounded by suggesting that their special virtue is that community legal centres may provide 'a cheaper alternative' to other means of delivering legal services.

Community legal centres work in a complementary manner with conventional legal aid and the private profession, extending the definition of 'legal service'. In England, Canada and Australia, community legal services (known variously as law centres, law clinics and legal centres) use their community identity and ideological independence to engage in the legal education, law reform and political activism that fulfils a broad definition of legal services to and for the poor.

A distinguishing feature of community legal services in 'rich' countries is that they receive support in money or in kind from the state, and have been accepted as a legitimate part of the profile of legal service provision. While dependent on grant funding, they are not necessarily an extension of the state legal aid apparatus. In Australia they are, as is often said, the 'third arm' of legal services, complementing the first arm: the private profession, and the second arm: conventional legal aid.

Community legal services are almost non-existent in Europe, but exist without state funding and often as politically marginalised entities in Asia, Africa and South America. The development of legal aid in the US has resulted in neighbourhood law offices delivering conventional legal aid for the Legal Services Corporation, and there being little state-sponsored commitment to a broader view of legal services.

In England and Canada, community legal centre equivalents, particularly in Saskatchewan and more recently in Ontario, have a history of having to battle against expectations that they will simply process numbers of legal aid recipients as a cheaper means of providing conventional legal aid. Even when this expectation is not explicit or persistent, such as in Australia, the relentless demand for individual case response threatens the capacity of community legal services to commit themselves to an educational and reformist agenda.

It may be true that '[a]t present no society is placing as much faith in this form of aid as Australia is doing' (p.185), but 'this form' is different from conventional legal aid. Cheap or not, community legal services are a complementary exercise, fulfilling the extended definition of legal service that conventional legal aid cannot (or at least does not) address.

A summary

Conventional legal aid has a limited but vital role to play in ensuring access to courts, if not to justice, It is by no means clear that governments in Australia lack the political commitment to maintain both an effective conventional legal aid system and a complementary system of community-based legal services.

It is true that in Australia, as in many like jurisdictions, the way in which legal services generally are being provided is changing. It is equally true that conventional legal aid is under considerable popular, political and economic pressure, to differing degrees in different jurisdictions. Some of the developments in legal practice — such as mediation — may enable legal aid to operate more cheaply, some — such as legal expense insurance — may provide access to legal services to those who are now beyond the reach of legal aid. Some — such as legal education and reform activism through community legal services — may be particular to Australia in their nature or extent, and need therefore to be assessed in an Australian context.

Developments in other countries, particularly in England/Wales and in the various Canadian provinces, may be instructive for or reflective of Australian trends. Some features of legal aid in Australia — administration independent of government and the profession, capped budgets, significant salaried services, viable and independent community legal services, legal aid impact assessments for government initiatives — distinguish Australia for comparative purposes. Those and other features are worthy of analysis in their own right as a basis for assessing prospects for legal aid in Australia.

What is really called for, however, implicit in the confusion of goals against which the authors assess the success of legal aid, is a major reassessment of the definition, the purpose and the consequent strategies for legal aid schemes in Australia.

References

1. Fleming, D., 'Legal Aid in the Early 1990s. A Broad View of a Bleak Picture', (1992) 17 *Alt.LJ* 124 at 125.
2. For example, s.10(1)(f) of the *Legal Services Commission Act 1977* (SA); s.10(2) of the *Legal Aid Commission Act 1978* (Vic.).
3. Access to Justice Advisory Committee, 'Access to Justice — An Action Plan', 1994, Action 9.2.
4. Fleming, above, p.126.