
International perspectives

on



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Legal aid moves away from the public paradigm.

There is little doubt that legal aid in Australia is in trouble. Numerous inquiries and advisory committees have called for reforms of legal aid, and for more money to be pumped into both legal aid commissions and community legal centres.¹ It would seem that the bold vision of Attorney General Lionel Murphy when he established the Australian Legal Aid Office in 1973 has slowly turned into a nightmare for governments. It has also turned into a nightmare for citizens. There is a deep sense in the community and in welfare lobby groups that legal aid has failed in its mission to provide lawyers' services to the poor and disadvantaged. There is also a sense that legal aid has had little impact on the special needs of disadvantaged groups. In a word, it has not had much impact on changing the causes of poverty and disadvantage.

A recent international conference on legal aid in The Netherlands demonstrated that these fears about legal aid are common in many of the rich, industrialised societies. Legal aid seems to be in trouble in many societies according to the legal aid policy makers and academics gathered from England, Scotland, The Netherlands, Scandinavia, the USA, Canada, and Australia.²

In this article we outline some of the common problems that legal aid schemes are experiencing in the rich countries, some of the reasons for these problems, and some of the ways that different countries are changing their schemes and the delivery of lawyers' services.

What is the problem?

Most commentators agree that legal aid is in trouble across the world. But what exactly are the features of the problem? They are said to include the following.

Expenditure is up but . . .

The apparently good news is the fact that legal aid spending grew during the 1980s in England and Wales, Sweden, Canada and in most societies at a faster rate than inflation. But this figure is misleading. In particular, funding failed to grow at a rate that was comparable to the increasing demand for legal aid that occurred during the late 1980s. This rapid growth was due to the impact of the world recession. But there has been little interest from governments to contribute larger amounts to the constantly growing legal aid budgets.

Population eligibility up (1)

There has been a rapid growth in the proportion of the population eligible for legal aid due to the impact of the recession. But the response by governments in Sweden, England, Australia and other societies has been to ensure that the proportion of the population eligible actually declines. This has been achieved by lowering the levels of means tests and/or increasing the use of assets tests. The result has been that the pool of people nominally eligible for aid has been manipulated to suit funds. It is of course an artificial mechanism as it does not mean that the newly excluded groups do not need legal aid. They are simply defined out of the eligibility criteria.

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Population eligibility up (2)

Some of the European societies have also had to contend with a massive new demand for legal aid from new population groups at the same time as the recession struck. The collapse of Eastern Europe has meant that in The Netherlands and Sweden and many of the rich western European societies have faced waves of refugees and immigrants who have legitimately used the legal aid schemes to apply for citizenship/refugee status. In addition, they have used legal aid to apply for lawyers' services in the normal criminal, civil and family law matters as would any other citizen.

Legal matter eligibility down

The range of legal problems that aid is available for has been restricted in many societies as part of the attempt to control the budget for legal aid. In England and Wales the practice that has been followed has been to protect eligibility for legal aid in criminal matters and to restrict eligibility in civil and family matters. Other societies have done what the NSW Legal Aid Commission did and cut back on the range of civil matters for which aid is available. The net result is that legal aid becomes increasingly criminal legal aid, not through any conscious decision but rather because the demand for criminal aid is rated higher than other forms of aid. The consequences of this are also ignored, such as the disparity in gender allocation of legal aid dollars which flows from this *de facto* prioritisation.

Client charges up

Another common feature in many societies is the increasing emphasis on charges and contributions that clients have to pay in order for them to receive the grant of legal aid. In Canada, Sweden and The Netherlands there have been major increases in the contributions levied on clients. In addition some systems have also introduced charges for lodging applications for legal aid.

Court work up, advice down

Finally, the changes demonstrate changing priorities in legal aid services. We may be witnessing a loss of faith in the role of legal advice in many societies. In England and Sweden for example, this is evidenced by a decline in the priority given by governments to legal advice and a corresponding increase in the priority given to court representation. This is achieved by a combination of factors, including policies such as increasing charges on legal advice to deter clients, and a shift to prioritising criminal representation. Again, it is unclear if this is a conscious policy decision, or if it simply represents choices made over how to allocate declining resources.

Why the change?

In terms of its capacity to assist low income citizens, legal aid is in a process of decline in rich societies. The combination of decreasing eligibility and increasing emphasis on user-pays supports this conclusion. 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. The British Thatcher regime can be seen as the clearest example, but Labor or Social Democratic governments in many societies have followed similar policies of restraint on public expenditure and retreat from public provision of services. Labor governments have followed the same policies more slowly and with a greater emphasis on trying to protect the weak from the dislocations of the labour market. The term 'Thatcherism with a human face' can be used to refer to these governments.

But while the welfare state and legal aid may be in decline they have not disappeared and are not likely to do so in the

immediate future. Indeed what we may be witnessing in legal aid may be a microcosm of a wider process of change in the provision of services in society.

Public, private and . . .

The future does not look good for legal aid in the rich countries. It seems inevitable that unless something happens, many societies will be left with very small legal aid schemes that primarily represent young males in criminal matters in an attempt to make sure that not too many go to gaol unnecessarily. It certainly appears that the ideal of accessible services for the disadvantaged (let alone the non-poor) is a receding and unattainable goal in our life time.

And the future looks even worse in the societies where legal aid is very mean, as in France, or non-existent, as in the Eastern European societies. In these societies, where there has not been a history of commitment to legal services for the disadvantaged, the fight was never even fought and will therefore not be lost. The possibility of decent legal aid emerging is therefore remote. It is hard to imagine any society setting out on an ambitious program of expansion of publicly funded legal aid in the coming years, so overwhelming is the belief in small government.

But there is another major change in the provision of legal aid that we have not yet mentioned. While there is a decline in publicly funded legal aid, there is at the same time a dramatic transformation occurring in the range and combination of mechanisms for providing lawyers' services. The simple division that existed in countries such as Australia between private lawyers providing services on the market and public legal aid is breaking down forever.

In The Netherlands and Sweden, governments are looking to legal expense insurance to pick up some of the work that legal aid used to undertake, though it remains to be seen whether such a plan will be successful. Legal expense insurance changes the lawyer/client relationship on the market by introducing a third party, the insurance company, who can make major decisions about the conduct of a legal action. Legal expense insurance is slowly developing in Australia as well.

In England the government is embarking on a process of making contracts with private law firms to deliver a certain number of cases for a fixed fee. This 'franchising' process breaks down the privileged client/lawyer relationship as never before, but also significantly changes the idea of governments simply paying lawyers for legal aid work as if they were private lawyers being paid at a lower rate than the market.

In Sweden the government has encouraged the Public Law Offices (the equivalent of legal aid commission offices in Australia) to compete with the private legal profession. Since they were set up in 1972, they were required to generate part of their income from doing legal aid for non-legal aid clients, and thus generate a profit. In the 1990s they have largely achieved this by the direct result of introducing some market logic by way of offering a profit sharing arrangement for staff. It is increasingly hard to tell the difference between public and private legal services in Sweden as a result of such arrangements.

Finally, many societies, including Australia, are looking to the use of mediation and other processes in order to reduce the costs of legal aid services and disputing generally. This is particularly true in such areas as family law. Mediation represents a process of removing disputes from the courts altogether in the hope of achieving quicker and cheaper results.

These examples are not meant to be seen as prescriptions as to what legal aid should do to survive. But they do represent fairly common trends around the world of an increasingly

blurred distinction between public and private legal service provision. They are also the world that legal aid will be part of if it survives. And, if it does survive, it is unlikely to be in the form of schemes that simply employ salaried lawyers or pay private lawyers to provide legal services. Legal aid is likely to include franchising, forms of legal insurance, public legal aid generating profit from the private sector, and extensive use of mediation type processes.

And it may not be all bad. In fact in many ways it may be a vast improvement on what exists now with the slow decline of publicly funded legal aid. The challenge will be for commentators and researchers to study the interactions between the different forms of legal service provision to try to identify whether groups are missing out.

The future

The future for legal aid in the rich countries is pretty clear. Publicly funded and provided legal aid will continue to exist, but as part of a more diverse pattern of provision of legal services within a more flexible legal system than we have known. In addition to a small publicly provided legal aid, some governments may look to an expanded role for community-based legal aid as a cheaper alternative to both public lawyers and the private profession. But community-based legal aid was not central to the discussions in The Hague to its relatively small role. Few countries have the number of community legal centres that Australia has, and many have none. In the countries where they do exist, such as England, they appear to be in decline or static along with legal aid generally. At present no society is placing as much faith in this form of aid as Australia is doing.³

The future will almost certainly also involve an increasing use by many societies of low cost legal clinics, legal expense insurance and mediation processes in court and community settings. Interestingly, very few societies are showing the same interest in contingency fees that Australia is currently.

Is it then a good or bad future? As with many of these complex issues it depends on how you look at it. The idea of extensive publicly funded legal aid is history, that is certain. We will never see again the legal aid schemes covering 70% of the population as they did originally in England and Wales and The Netherlands. And in some ways that is good. In principle there is no reason why legal aid should be expected to provide all the help needed, nor why there was little thought given to ways of processing disputes other than using lawyers and going to court.

It may also be a better future for the citizens in some important respects. First, the trends indicate a de-emphasising of court-based dispute resolution and that is a good thing (within limits). Second, there should be some degree of choice for citizens as to where and how they purchase their legal services. Third, the mix of public, community-based, insurance and private market provision of legal services may be very useful. One of the benefits of a range of providers from public to private legal services is that they may act to keep each other honest, introduce a bit more competition, and perhaps even improve the quality of the services that consumers receive.

But on the other hand there is no guarantee that low income earners will be as well served as they would be by a thriving, comprehensive, and well-funded legal aid scheme. The ideal would probably be to have a healthy diversity in legal services provision, an expanded range of dispute processing mechanisms, and a healthy legal aid scheme. The first two parts of this model seem to be almost inevitable in Europe and Australia. It is only the third part, the future of legal aid that is still up in the air. But the big fear is that if our societies do emphasise the first two parts will they slowly let the third part wither and die?

References

1. The recent report *Access to Justice: An Action Plan*, Canberra, AGPS, 1994 (chaired by Ronald Sackville) was but the most recent of many reports canvassing reforms in the general area of access to justice, including legal aid.
2. The authors were part of a group of four Australians who attended the 'Legal Aid in the Post Welfare State Society' Conference sponsored by the Dutch Ministry of Justice, held in The Hague, The Netherlands, in April 1994.
3. This observation is made on the basis of discussions at The Hague Conference, and at the 'Symposium on the Future of Community-Based Legal Aid' sponsored by the London-based Legal Action Group at which there were speakers from North America, England and Australia. The authors also visited law centres in London and met with staff from the UK Law Centres Federation. The total number of law centres in the UK has declined over the last few years but may now have stabilised.

Continued from p. 182

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7. Brian Burdekin quoted in the *Age*, 28.9.93, p.1.
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