LEGAL AID IN CRIMINAL PROCEEDINGS — THE PUBLIC SOLICITOR'S OFFICE

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[*This article is a study of the provisions for legal aid in the more serious criminal matters. As such it does not concern the Legal Aid Committee (whose ambit is mainly civil) but concentrates on the Office of the Public Solicitor. Mr. Willis, in considering the administration of the Legal Aid Act 1969 by the Public Solicitor, looks at the interpretation of the power delegated to the Public Solicitor's office, the organization of that office and the criteria applied when considering whether to grant a request for assistance. The article concludes with the author's suggestions for an interim rationalization of this present scheme.*]

'Every man is presumed innocent until proved broke.'

(The Wizard of Id)

The great bulk of what legal aid there is in criminal matters in Victoria is granted under the provisions of the Legal Aid Act 1969. Under this Act the provision of legal aid in criminal matters has been entrusted to two bodies: the Attorney-General and the Legal Aid Committee. The Legal Aid Committee is mainly concerned with legal aid in civil matters, but grants some assistance in criminal proceedings mostly at Magistrates' and Children's Courts. The actual administration of the area of aid entrusted to the Attorney-General has been delegated to the Public Solicitor.

The focus in this article is on the actual administration of the Act by the Public Solicitor's Office: the interpretation of the power delegated by the Attorney-General, the organization of the Public Solicitor's Office, the criteria applied in granting and rejecting applications for assistance and the adequacy of the aid provided. Methodologically such an examination seems to offer two advantages in particular. It allows a truer determination of the principles underlying the provision of aid and provides, at the same time, some means for an assessment of the adequacy of those principles.

The compass of this article has been tightly drawn. It is not an examination of the arrangement for providing legal aid in *all* criminal matters. More specifically, it does not attempt to deal with the huge, yet largely neglected area of aid in criminal matters in the Magistrates' Courts.

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Part 1 of the Legal Aid Act 1969 which makes provision for the granting of legal assistance in criminal matters is administered by the Public Solicitor's Office, although in fact no mention of the Public Solicitor occurs in the Act.

Section 3 of the Act lays down the classes of persons eligible to apply for assistance. There are three broad classes:
(a) Persons charged with murder, treason, manslaughter. These persons can be granted assistance from the time they are charged.
(b) Persons who have been committed for trial (or are otherwise due to stand trial) for an indictable offence.
Apart from those charged under (a) with murder, treason or manslaughter, no assistance can be given by the Public Solicitor until *after* the committal proceedings.
(c) Appeals. A person can be granted legal aid:
(a) to appeal to the Full Court of the Supreme Court with respect to any indictable offence.
(b) to appeal to the Privy Council with regard to an offence for which he has been sentenced to death.
(c) if he (or she) is the respondent in an appeal brought by the Crown.
In general then, the Public Solicitor can grant assistance in the more serious criminal matters — those dealt with in the County Court or above. There are, however, some strange omissions.

Assistance cannot be granted in committal proceedings for non-capital charges, nor in appeals from the Magistrates' Courts, presumably because the matter is either dealt with in the Magistrates' Courts or originated there. Moreover, the Legal Aid Act, as interpreted by the Public Solicitor, does not permit assistance to be granted for making bail applications save where a person has been charged with treason, murder or manslaughter.

COMMITTAL PROCEEDINGS

The Legal Aid Act 1969 should be amended to enable the Public Solicitor to grant assistance, at *committal proceedings* to persons charged with indictable offences.

The desirability of representation at committal proceedings has been well expounded in *Coleman v. Alabama.*[1]

> Plainly the guiding hand of Counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the Magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment

[1] (1970) 399 U.S. 1, 9 *per* Brennan J.

> tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favourable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defence to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.

The Widgery Report[2] recommended that aid be given for the preliminary hearing, pointing out also that some of the work which would be done by solicitor and counsel before and during the committal proceedings, would have to be done anyway, after committal.

> For the more serious offences which can be tried only on indictment, we consider it desirable that legal aid should be given as early as possible in the case. We therefore recommend that subject to the test of means, a legal aid certificate should normally be granted for the preliminary hearing in the case of offences triable only on indictment.[3]

I would extend this recommendation to all offences actually tried on indictment. At the present time it is possible for the Legal Aid Committee to grant assistance at committal proceedings; in fact, it does not often do so, and it would be administratively very cumbersome to have the Legal Aid Committee handle the committal proceedings and the Public Solicitor, the actual trial. The proposed amendment to the Justices Act 1958 providing for simplified committal proceedings might render this suggestion unnecessary; that, however, remains to be seen. In the meantime, the Public Solicitor should handle indictable offences from their inception.

BAIL APPLICATIONS

The need that persons have for assistance in making bail applications has been well put by the Public Solicitor himself.[4]

> It appears clear to me that persons on remand badly need legal assistance to help them prepare a bail application. When they are in custody they cannot assemble the evidence needed to carry weight on the question of bail, and cannot carry on the paper warfare that is needed. As the Legal Aid Act stands at present, I cannot do much to help. An application cannot be submitted in most cases until after committal, and after committal all of my officers' efforts are directed to processing the application and getting the trial date from the Crown Solicitor, who is responsible for the Court listing arrangements. In any event, having regard to the present legislation, I am doubtful that I have authority to conduct a bail application except in murder-manslaughter cases.

[2] United Kingdom, *Report of the Departmental Committee on Legal Aid in Criminal Proceedings* (Cmnd 2934), known as the Widgery Report, para. 183. Its recommendations were the basis of Criminal Justice Act 1967 (U.K.) Pt IV.

[3] The Widgery Report, para. 183.

[4] Address of Public Solicitor, Mr. G. A. Madden at symposium organized by Australian and New Zealand Society of Criminology on 16 May 1972.

The average time between reception in the remand yard at Pentridge, and actual trial was found to be seventy days in 1968.[5] Milte found that there were four main disadvantages resulting from lack of bail —

(a) The prisoner found it difficult to get an interview with his solicitor;

(b) It was more difficult to prepare defence and get witnesses;[6]

(c) The men, who have received bail, will still have a job when they are tried, and if convicted can make a better case for probation or bond.

(d) A period of 70 days in prison can lower a person's morale, and so the prisoner can present a much less favourable impression to the jury.

The result was, according to Milte, that prisoners being tried on indictable offences had a much greater likelihood of receiving a heavier sentence. What little research there is in Australia, would, moreover, suggest that the represented prisoner stood a much better chance of getting bail.

The following is an analysis of all bail applications at the Melbourne Magistrates' Court (City Court) for February 1972.[7]

REMAND		
Number granted bail	101	(18 represented)
Number refused bail	29	(None represented)
Number bail not applied for	9	(None represented)
COMMITTALS		
Number granted bail	42	(15 represented)
Number refused bail	7	(None represented)
Number bail not applied for	1	(None represented)
APPEALS		
Number granted bail	23	(9 represented)
Number refused bail	0	(None represented)
Number bail not applied for	10	(None represented)
TOTALS		
Number granted bail	168	(42 represented)
Number refused bail	36	(None represented)
Number bail not applied for	10	(None represented)

Prima facie, it appears that the legally represented bail applicant stands a much better chance of getting bail. This is confirmed by an English Research Project[8] where it was found that if the police opposed bail, the prisoner had almost twice as much chance of being granted bail if represented.

[5] Milte, 'Pre-trial Detention' (1968)1, *Australian and New Zealand Journal of Criminology* 225.

[6] See *R. v. Light* [1954] V.R. 152 *per* Sholl J.

[7] My thanks are due to L. Hallett of Monash for these figures.

[8] Zander, 'A Study of Bail/Custody Decisions in London Magistrates' Courts', [1971] *Criminal Law Review* 191, 194: 'The legally represented defendant obtained bail in 31% of 49 cases compared with 16% of 77 cases where he was unrepresented.'

It might be added that Milte's findings in particular suggest that the prisoner on bail will be more likely to satisfy the Public Solicitor's criteria for aid, at least in a negative sense. The accused on bail will, if convicted, have something to plea in mitigation; his likelihood of acquittal in trial will be greater. While it is of course partly true that the criteria for being granted bail and for being granted assistance by the Public Solicitor will tend to select the same class of prisoners, the correlation noted above likewise points to the cumulative disadvantages that flow from lack of representation at the bail application.

With regard to applicants for legal aid, the Public Solicitor thought, as an approximate figure, that of those in custody (in 1971, 504) probably about 60% received assistance, while of those on bail (in 1971, 319) about 80% received assistance.

Of course, those on bail would tend to be less regular offenders. However, if one remembers that as a matter of policy, assistance is granted in all capital offences, and that bail is likewise refused in the great majority of capital offences, the proportion of those in custody on non-capital offences who are granted assistance is even lower. In practice, the applicant in custody is at a clear disadvantage.

However, I think the Public Solicitor is misconceived when he states that 'as the Legal Aid Act stands at present I cannot do much to help'. Section 3 of the Act gives the Attorney-General power to cause arrangements to be made for 'defence or representation' of certain classes of applicants. As a matter of statutory interpretation, it would seem that 'defence' could include the handling of bail applications, either as part of a defence[9] or, more broadly, including if need be those who are pleading guilty, the word 'representation' could include assistance in preparing and presenting bail applications. Moreover, the Public Solicitor, in fact, does handle bail applications for those charged with murder, manslaughter and treason. This entitlement must be derived from Section 3 (1) (d), and must involve interpreting 'arrangements to be made for their defence or representation' as including bail applications.[10]

Section 3 (1) which permits the Attorney-General to make arrangements for the 'defence or representation' of applicants, could be interpreted to cover a grant of partial assistance—that is a grant of assistance in preparing and presenting a bail application to those refused assistance at their

[9] See *Supra* nn. 5 and 6 for the importance of bail in preparing a defence.

[10] Section 4 of the Act speaks of its being 'desirable in the interests of justice that the applicant should have legal representation *on any proceedings referred to in his application*'. The present Form A Application Form does not anywhere specifically mention bail application. However, the question 'Are you in custody?' which appears on the form could be taken to refer to bail proceedings. Presumably that is the interpretation taken by the Public Solicitor in respect of bail applications in capital offences. If a more specific reference to bail application is needed, it is simply a question of adding this to the Form A, whose format has not been prescribed by regulation.

trial or guilty plea; and section 4 with its reference to having 'legal representation *on any proceedings* referred to in his application' is certainly open to the interpretation of partial assistance for making bail applications. Given the presumption in favour of bail, the length of time between committal and trial, the advantage for a person to organize witnesses etc. when on bail and the advantages of a steady job etc. when requesting leniency even on a guilty plea, it would not seem unreasonable to automatically allow such bail applications to be handled for all applicants eligible under Section 3 of the Act. At the moment it seems clear that pressure of work in the Public Solicitor's office has been a very significant factor in the restricted interpretation of handling bail applications, despite the great need which the Public Solicitor has himself pointed out. It might be added that a decrease in the number of persons in remand would be to the economic advantage of the taxpayer.

OFFICE OF THE PUBLIC SOLICITOR

The administration of Part 1 of the Legal Aid Act 1969 has been delegated by the Attorney-General to the Public Solicitor's Office, whose composition and procedures must now be examined.

Staff that were involved in the criminal side comprised:[11]

1 Public Solicitor,

10 Interviewing Staff,

5 Clerical staff.

The 10 Interviewing Staff comprised 4 with LL.B. qualifications; 2 with overseas law qualifications not recognized in Victoria and 4 administrative staff trained in the Law Department.

The number of interviewing staff has been increased from 4 in 1969 to the present 10. There has tended to be a fairly rapid turnover of interviewing staff, a tendency aggravated by the change in function of the Public Solicitor's Office, and the low morale that had previously existed in the office.[12] While there is now greater stability in the Public Solicitor's Office, there are still some comparatively young and inexperienced interviewing officers handling serious criminal matters.[12]

[11] There is a total of 31 staff in the Public Solicitor's Office, but not all are involved with criminal matters. The remainder are engaged in handling the backlog of civil matters which, since the Legal Aid Act 1969 had been transferred to the Legal Aid Committee. This was the staffing situation in May 1972. There has been a slight increase since to 11 or 12 Interviewing Staff in criminal matters. (Interview with Public Solicitor 11 May 1973.)

[12] Victoria, *Parliamentary Debates* Legislative Council 9 December 1969. (Cmnd 2581.) The Hon. R. J. Hamer, *re* 'the inadequate assistance which has been provided in the past by the Public Solicitor's Office. One of the troubles is the difficulty in obtaining staff. This comprises many young solicitors, many of whom do not stay very long. There has not been enough staff anyway.'

APPLICATIONS FOR AID TO PUBLIC SOLICITOR

Arrangements have been made to inform persons who are eligible that they can apply for assistance.

In the case of a person committed for trial on an indictable offence, the Clerk of Courts is required by an instruction from the Law Department[13] to hand him a Form B which sets out information concerning legal aid. This method seems to be quite effective.

For a person charged with treason, murder or manslaughter, legal aid is available from the time he is charged. A member of the Police force is required to hand over the Form B information sheet. This has not proved satisfactory. 'Considerable delay has occurred between the time the person has been charged and the time the application is processed. In some cases this delay has operated to the prejudice of an accused.'[14] It would seem that the Police are not always doing their duty with alacrity; indeed, it is asking the Police in a sense to act both for and against the accused.

As a general rule, it could be said that the earlier legal aid is received, the more difficult is the task of the prosecution. The person charged will often be in a state of some shock and early referral to the Public Solictior's Office is frequently essential to his defence, enabling psychiatrist's examinations to be made close to the time of the offence when the person is more likely to be upset, and allowing witnesses etc. to be traced while the trail is still warm. Hence a further arrangement has been made. When a person charged with murder, manslaughter or treason is brought before a Magistrate for the first time, the Magistrate has been requested by the Chief Stipendiary Magistrate to ask him whether he intends to apply for legal assistance. If the person charged wishes to apply, the Public Solicitor will be informed by the Clerk of Courts, and he will send an interviewing officer to the prisoner to help him make his application, if the person charged is in Melbourne. If he is in a country area the Public Solicitor will arrange for a country Solicitor to conduct the interview. This arrangement would seem to have covered any omissions by the Police in this matter.[15]

With respect to appeals, the warders at Pentridge or in the County Court cells are to give the prisoner the Form B form. It is difficult to assess how faithfully this duty is carried out; if one can extrapolate from English practice, it is probable that warders will co-operate only if requested by the prisoner.[16]

[13] *Clerk of Courts Manual* 55.9.3.

[14] Letter of the Public Solicitor to W. J. Cuthill C.S.M. 7 July 1971.

[15] However, in June 1973 the Public Solicitor said that he was still dissatisfied with the length of time that elapsed in many cases between the time a person was charged and the time the Public Solicitor's Office received notice of the person's desire for legal aid.

[16] Zander, 'Legal Advice and Criminal Appeals: A survey of Prisons, Prisoners and Lawyers.' [1972] *Criminal Law Review* 132, 149 ff.

There is, however, no requirement on any person either Clerk of Courts, Magistrate or Police to help a person read Form B, and fill out his application. The Public Solicitor's preparedness to send out an officer to help persons charged with treason, murder or manslaughter to fill in an application form, while motivated no doubt by a desire to contact his clients as soon as possible, is also an indication that persons need assistance in understanding and filling out these forms.

Moreover, the Form B which the person receives, is not an application form: it merely informs him, inter alia, where he may obtain application forms—that is, from any gaol, any Clerk of Courts, the Law Department or the Public Solicitor. The onus is then on the person, who is often in custody and emotionally disturbed, to set about getting an application form. In stark contrast, the English Court of Appeal has reiterated that there is a duty on the court to offer legal aid to the prisoner, (especially where a heavy sentence is likely).

> There are no grounds for thinking that this applicant asked for legal aid and was refused, but we take the view and express the view that in the circumstances already indicated (*sc.* likelihood of a heavy sentence) the court should take it upon itself to offer legal aid to the accused person.[17]

In England, then, for the Court (and the Court is the body which makes the decision *re* legal aid), it is not a negative duty of not unreasonably refusing assistance, but a positive requirement of offering aid. The *onus* is on the Court to offer, not on the prisoner to request legal aid. Moreover, the intermediate steps in the Victorian arrangement have been omitted.[18]

Efficiency, principle and overseas authority would suggest that prisoners eligible for assistance be given an application form, and that provision be made for assistance in completing it. It could be the duty of the Clerk of Courts to give the person committed for trial an application form, explain

[17] *R. v. Serghiou* [1966] 1 W.L.R. 1611, 1612; *cf. R. v. Hooper* [1967] 1 W.L.R. 766.

[18] The actual format of Form B is worth commenting on. The first half of the form details the classes of person eligible to apply for assistance. Since the only persons who are given the form are *prima facie* eligible for assistance (subject to a means test) this is largely pointless. Under the heading 'Time for Lodging Applications', the applicant is informed that the application must be lodged within the time fixed by the Legal Aid Act 1969. The Form B then states in heavy black type:

> 'Where the applicant is appealing to the Full Court of the Supreme Court or to the Privy Council, his application for legal assistance must be lodged within the time fixed for lodging the appeal'.

For the normal applicant this is not very illuminating. At the bottom of Form B there is written in large heavy type: 'It is essential that applications be lodged within the times mentioned above'.

In fact, this is not true, since late applications are processed.

I believe that Form B is unnecessary. But, considered as an Information Sheet, it not only combines unnecessary and cryptic information with incorrect statements, but it shows a remarkable lack of awareness of the needs of those for whom it was produced.

the working of legal aid, and help him fill in the application form if he so desired.

TIME LIMITS

Although Section 3 (3)[19] of the Legal Aid Act 1969 lays down time limits for the lodging of applications, without granting the Attorney-General any discretion, in fact, these are not complied with. Applications received out of time are processed as though received within time and the recommendation *re* aid made by the Public Solicitor's Office is passed on to the Attorney-General who acts upon the application in the normal way. The Public Solicitor thought that about 20% of all applications received would be out of time.[20]

This is clearly an equitable result as, for example, previously on a strict application of the Act, culpable delays by the Police in informing a person charged with murder or manslaughter could have deprived him of assistance. It would however, be desirable to amend the Act to bring it into line with the present practice.

The number of persons eligible to apply for aid to the Public Solicitor, who do not do so, is unknown. There is the occasional referral to the Public Solicitor by the Court possibly because the accused person wants another Judge and says he is unrepresented, or because the Judge does not like presiding at a trial where the accused person is unrepresented. Whether some or many fail to apply for reasons other than financial—for example: defeatism, ignorance of their rights, antipathy with any connection with the law, is likewise unknown.

PROCESSING OF APPLICATION

Once the application is received by the Law Department, it is forwarded to the Public Solicitor, and one of the 10 interviewing officers is detailed to handle the application. The procedure to be followed is laid down in considerable detail in a screed 'Procedure Adopted in Criminal Defences'. The interviewing officer reads the depositions, determines from the Crown Solicitor's Office the precise charge which is being preferred, and interviews the prisoner. Accepting the criteria laid down by the Public Solicitor's Office, it is clear that the main task facing the interviewing officer is to discover whether the depositions on the interview reveal the existence of some rational argument that can be used at his trial or of some material to be used as a plea in mitigation. It is difficult to determine how efficient the interviewing officers are. There is virtually no information about the fate of those refused aid, save for the odd glaring case which receives publicity.[21]

[19] Applications must be made within 14 days of committal for trial (or notice of trial or intention to prefer a presentment); within 14 days of being charged with treason, murder or manslaughter, within 14 days of receiving notice of the Crown's appeal, and within the time limit for lodging an appeal.

[20] Interview 11 May 1973.

[21] For example, the case of Boardman quoted in *The Age* 14 June 1972. Mitchell and Stirling, 'Let Justice be Done Pt 1' *The Age,* 14 May 1972.

Moreover, the system tends to be self-justifying; the applicant refused assistance, without legal representation, will almost inevitably be convicted, thus it can be argued, demonstrating that he had no defence. The criteria tend to place the focus on a tangible success—the number of acquittals or convictions on a lesser offence than the one charged, rather than on less tangible, but more significant issues of 'justice' in an adversary system and rehabilitation. To the extent that the staff in the Public Solicitor's Office see a proof of their efficiency in their 'success rate' of acquittals etc., there must be a tendency (albeit quite subconscious) to tend to reject those who insist on pleading 'not guilty', when there is a strong case against them. Indeed, it is a stated policy of the Public Solicitor's Office to put pressure on the applicant to plead guilty when, after an examination of the depositions and an interview with the prisoner, the interviewing officer believes that the applicant has absolutely no hope of success in a trial.[22] Such a policy might be argued for as a justifiable avoidance of unnecessary waste of public money; it seems uncomfortably close to a Police practice of advising the accused to plead guilty and so get a lesser sentence—a practice the subject of judicial censure. In any event, a heavy responsibility is placed on the interviewing officer—he must be able to see weaknesses in the Crown's case from the depositions, for example, such matters as possible inadmissible material—and discover from the charge laid and the accused's story any defences substantive or technical. For a comparatively young and inexperienced officer (and there are some), this is a difficult task. A solicitor who has worked in the Public Solicitor's Office confessed that a more experienced criminal lawyer would almost certainly, in many cases, have discovered more weaknesses in the Police case than he.

The interviewing officer makes the original assessment as to the granting or rejection of the application. In practice, if the interviewing officer recommends that assistance be granted, and the applicant satisfies the financial criterion, the Public Solicitor rubber-stamps the decision of the interviewing officer. If, however, the interviewing officer recommends that the application be rejected, the officer-in-charge of the Criminal Law Branch of the Public Solicitor's Office, (that is, the Senior Interviewing Officer) inspects the file, and if he accepts the interviewing officer's rejection, the Public Solicitor likewise will examine the file before adopting or rejecting the interviewing officer's recommendation. Of course, the file containing *inter alia* a report of the interviewing officer's interview with the applicant, will of its nature allow the Officer-in-Charge and the Public Solicitor only a limited review of the case. It might be thought that this procedure could lead interviewing officers to grant assistance more readily, and thus avoid

[22] *Hefferman v. Ward* [1959] Qd. R. 12. Putting it crudely—if you plead 'guilty' we will give you aid, but not if you insist on pleading 'not guilty'.

a double scrutiny of their recommendation. The validity of their assessment will, of course, to some extent, be tested in Court, and the number of applicants not granted assistance gainsays such a view.

The recommendation of the Public Solicitor as to the granting or rejecting of assistance is then passed on to the Attorney-General, who is the person under the Legal Aid Act 1969 who must make the actual decision. In practice, when an application has been rejected by the Public Solicitor on grounds other than financial, the Attorney-General has never reversed the ruling. Indeed, because of his function under the Crimes Act 1958, the Attorney-General is in practice just not able to reverse a decision by the Public Solicitor's Office. 'As you will appreciate, having regard to the powers and duties of the Attorney-General under the Crimes Act 1958, it would not be proper for him to seek information as to the defence of an accused person for the purpose of determining whether legal aid should be granted.'[23]

As a matter of administrative law, it seems highly anomalous to say the least, that the Attorney-General in delegating the statutory task imposed on him by Section 4 of the Legal Aid Act 1969, has established criteria, the application of which to any particular case he is unable to supervise. As matters stand at present, the Attorney-General must accept the recommendation of the Public Solicitor. The Act states that the Attorney-General is to exercise his discretion. It is difficult to see how the Attorney-General is exercising or could exercise his discretion. It would be more in accord with administrative law and actual practice, if responsibility for the provision of legal aid in criminal matters (that is, Part 1 of the Legal Aid Act) was statutorily imposed on the Public Solicitor rather than the Attorney-General.

It is the practice for the interviewing officer who first handles an application to take the matter right through to the trial. Administratively, this is clearly convenient, preventing time-wasting duplication of interviews etc.; it can also work against the applicant's interests.

An interviewing officer who has already got a full case load, could tend to apply the criteria a little more stringently in handling new applications.[24]

It is always undesirable in such vital cases of justice as this, that the interviewing officer should have it in his power to control his own work load. The remedy is either to ensure an adequacy of staff (which would not seem to be the case at present),[25] or to have the people responsible

[23] Letter from R. Glenister, Secretary to the Law Department, to P. J. Hanks, Senior Lecturer in Law, Monash University. 12 July 1971.

[24] As one former employee said, 'If you've already got a full case load, there is a temptation to be more selective in granting assistance in the more borderline cases'.

[25] In an interview on 11 May 1973, the Public Solicitor was generally satisfied with the size of his staff. He did state, however, that they were occasionally snowed under, especially on (country) circuit work, and he thought that a few more staff would be

for the decision about the granting of assistance separate from those who actually provide the assistance.

CRITERIA OF ELIGIBILITY

There are two basic criteria for eligibility the one financial, the other 'legal'.

FINANCIAL CRITERION.

The Act states (Section 4) that the applicant must be without adequate means to provide legal assistance for himself. The financial eligibility of all applicants is processed by the Officer-in-Charge; this has the administrative advantage of developing expertise and uniformity. Moreover, any applications that are rejected on the financial criterion are re-examined by the Public Solicitor, thus providing some administrative check.

The financial criterion is, of necessity, very flexible. The Officer-in-Charge[26] regarded as a starting point the criterion of the Stipendiary Magistrates Under the Poor Persons' Legal Assistance Act: NEVER BANKRUPT ANYONE. Thus mathematically, he saw it as a question of measuring the available income and assets[27] of the applicant against the probable costs that would be charged by private practitioners. In assessing the capacity of the applicant to pay, the length and complexity of the case, the seriousness of the offence and the cost of the trial were clearly vital factors. What assets were to be taken into account varied with each case. Generally speaking, the marital home of an applicant who was supporting dependants would not be regarded as a disposable asset; on the other hand, the attitude to be taken concerning the home of the single man with no dependants could be quite different. It would, of course, not be unreasonable to regard an applicant's speedboat (used for recreational purposes only) as an asset that could realize income for paying for his defences.

In general, very few applications are rejected for financial reasons by the Public Solicitor's Office. The Attorney-General has, moreover, never rejected a recommendation for assistance although on a few occasions he has granted aid to applicants rejected by the Public Solicitor's Office because they were considered to have adequate means.

desirable. In view of the Public Solicitor's statement (interview 11 May 1973) that the criteria for aid have not changed over the past two years, the huge increase in the proportion of applications approved in the last year compared with previous years (see table *supra* p. 39) would seem to show the beneficial results of a larger and more stable staff.

[26] Interview 9 June 1972.

[27] In a similar regulation 11(3) of Courts-Martial Appeals Regulations the word 'means' was interpreted to include both income and assets. *Re Miller's Appeal* (1967-8) 12 F.L.R. 77.

LEGAL CRITERION OF ELIGIBILITY

Section 4 of the Legal Aid Act states:

> In any case where the Attorney-General is of the opinion that it is desirable in the interests of justice that an applicant should have legal representation on any proceedings referred to in his application, and that the applicant is without adequate means to provide legal assistance for himself, the Attorney-General may grant the application.

The key words in this section are 'desirable in the interests of justice'. These words have been interpreted administratively by the Crown Law Department and the Public Solicitor's Office to mean more than the interests of the accused. The Secretary to the Law Department in outlining the criteria adopted by the Attorney-General in considering applications for assistance under Part 1 of the Legal Aid Act 1969 has written:

> The expression 'interests of justice' has been understood to have the three broad elements of the interests of the accused, the interests of the community, and the interests of the proper administration of the law.
>
> Whilst it is in the interests of the accused that he should have legal representation at his trial, the expression 'interests of justice' appears to indicate that the other elements should be taken into account in the assessment of legal aid applications.[28]

How this interpretation of these words has been applied in granting or refusing legal assistance has been set out in some length by the Public Solicitor in a memorandum to the Secretary of the Law Department.[29]

> *re: LEGAL AID ACT 1969 — LEGAL ASSISTANCE IN CRIMINAL MATTERS*
>
> I refer to your memorandum dated 2nd June, requesting a statement for the Minister of the factors which may be taken into account when recommendtions are made that assistance not be granted to applicants.
>
> Before I list the factors it may be convenient to make some observations which operate when considering applications for legal assistance by persons accused of indictable offences.
>
> It has been laid down by the High Court in *Tuckiar v. The Queen*[30] that it is Defence Counsel's duty in criminal cases — both to his client and to the Court, to press such rational considerations as the evidence fairly gives rise to in favour of a complete acquittal or a conviction of a lesser offence than that with which the accused is charged. Although that case was concerned with the defence of one known by Counsel to be guilty, it provides, I think,

[28] Letter from R. Glenister, Secretary of the Law Department, to P. J. Hanks, Senior Lecturer in Law, Monash University 12 July 1971. *cf.* G. A. Madden: Address to A.N.Z. Society of Criminology:

> The expression 'interests of justice' does not mean that every applicant should be granted assistance as of right. Interests of justice has been taken to mean not only the interests of the accused, but also the interests of the community, and the proper administration of the law.

[29] Letter 25 June 1970 of G. A. Madden to Secretary of the Law Department. The same criteria have been re-stated more recently in more popular form by G. A. Madden in address to A.N.Z. Society of Criminology, *supra* n. 4.

[30] (1934) 52 C.L.R. 335.

a useful test in the consideration of applications for legal assistance. In the context of the present office procedure it means broadly that legal aid is recommended if there appears from the depositions or the accused's statements to my interviewing officers:

(a) Any evidence which will support such rational arguments by Counsel on the accused's behalf at his trial. (Very often legal aid is recommended because the accused has been charged with a serious offence when a lesser charge would be more appropriate.) or
(b) That the Crown will be unable to establish, by admissible evidence, its case against the accused.

It is of course, not my function to set myself up as the accused's judge and determine whether he is or is not guilty. But in the absence of the provision of Counsel by the State to every applicant some evaluation has to be made of the applicant's story, particularly where an alibi defence is claimed by an applicant with prior convictions. Accordingly my officers have instructions to enquire into an accused's alibi or to search for witnesses the accused says can explain his conduct. However, I would stress that even if the enquiries or investigations prove fruitless if it appears that the accused has a credible explanation of the accusations contained in the Crown's case, legal aid is recommended.

On this point it might not be inappropriate to remind the Crown officers that they have an obligation to inform an accused of the name and address of any witness whom the Crown Prosecutor thinks might help the defence.

Subject to the exceptions listed below, an accused's application is not recommended

(a) where no evidence or acceptable explanation exists to form a basis for a rational argument by Counsel, which could lead either to a complete acquittal or conviction of a lesser offence than that with which the accused is charged,

(b) where the testing of the Crown case would not, as a matter of high probability, be likely to affect the outcome of the trial.

EXCEPTIONS:

1. It has been the invariable practice to recommend applications where the accused has no prior convictions — or prior convictions of a minor nature. It is thought that such an accused ought to be represented by Counsel.

2. If the accused suffers from any particular disabilities or disturbances which would be likely to prejudice the proper conduct of the trial, legal aid is recommended.

3. Legal aid is recommended for aborigines because of the policy implied in Section 37 of the Aboriginal Affairs Act 1967.

4. In a joint trial if any one applicant is recommended for legal aid, legal aid is also recommended to any other applicants notwithstanding that they may not have been entitled on the usual tests.

5. Where it appears from the particular case to be in the interests of justice that the accused ought to be represented, for example, capital cases.

It often happens that an applicant desires to plead guilty at the trial. Although the accused may have no arguable defence, legal aid may be recommended so that Counsel may be briefed to make a plea on behalf of an accused. In these cases my officers collect the facts dealing with the

accused's personality and past history so that Counsel may present to the court some explanation or mitigating circumstance which can be considered on the question of punishment. It follows that legal aid is not usually recommended to frequent offenders desiring to plead guilty who have not been deterred from their criminal conduct by the risk of punishment.

Generalizing, one can say that to be refused aid,

(a) it must be a non-capital offence;

(b) the applicant must have prior convictions not of a minor nature;

(c) the applicant must not be an aborigine or have any disablities such as language problems.

Furthermore, if pleading 'not guilty', for a refusal of aid:

(d) there must be no rational arguments that can be used at his trial which could lead to his acquittal or his conviction on a lesser offence;

(e) it must not appear that the Crown will not be able to establish its case;

(f) if it is a joint trial, no others being tried must be being represented.

If the applicant is pleading 'guilty', in addition to (a) (b) and (c) for a refusal of aid:

(g) there must be no circumstances which can be pleaded in explanation or mitigation of his offence.

It would seem, then, that very few applicants would be rejected. In fact, this is not the case. The following is a list of legal aid applications received, investigated and approved or not, by the Criminal Law Branch of the Office of the Public Solicitor from 1960-72.[31]

APPLICATIONS FOR AID TO ATTORNEY-GENERAL
CRIMINAL BRANCH

Year	Total Applications	Total Approved	Trials All Courts	Not Approved
1959	349	153	169	—
1960	364	215	180	173
1961	442	202	215	198
1962	483	261	225	243
1963	423	202	243	221
1964	480	259	227	210
1965	537	272	216	272
1966	595	268	276	301
1967	590	315	310	231
1968	656	383	430	240
1969	680	411	454	193
1970	848	469	496	317
1971	827	535	532	292
1972	1144	813	822	298

[31] Of the applications not approved some few would have been applications by people not eligible under the Act (*e.g.* appeals to the High Court, appeals to the County Court). There would seem to be room for a better system of records in this matter.

The ground for refusal of aid is virtually never financial. Those who are refused assistance are generally speaking, socially disadvantaged in all sorts of ways. They could, according to the Public Solicitor, be roughly classified as 'habituals'. Once their application is refused, they are on their own. The Public Solicitor has expressed concern that the fate of those refused assistance, as a class, is to his knowledge quite unknown. Their rejection by the Public Solicitor's Office tends to define them as 'without hope', both in the eyes of society and themselves.

The largeness of the group and the very probable severity of their jail sentence makes it most important to analyse carefully the criteria applied in rejecting their application.

It is quite possible to read Section 4 of the Act as effectively permitting the Attorney-General to grant assistance to every applicant, at the trial stage, at any rate. Granted the interpretation put on 'interests of justice' as involving the interests of the accused, the interests of the community and the interests of the proper administration of the law, it is arguable that these three interests in fact all favour the granting of aid to all applicants. It is clearly in the interest of the applicant that he be given legal representation.[32] Likewise, it would seem that the proper administration of the law is best served by the granting of aid to all applicants. Justice should, to quote a truism, not only be done but be seen to be done. Unrepresented persons in our adversary system with its technical rules and procedures are clearly at a great disadvantage.[33]

Many judges faced with an unrepresented defendant feel compelled to protect him against his ignorance of such technicalities as the rules of evidence, and in entering the lists, as it were, could be seen (as they themselves feel) to be abandoning their impartial stance. The interests of the community clearly enough embraces the interests of the proper administration of law. It also involves the correct use of the taxpayers' money. The point was made by the Public Solicitor; 'everyone does have the right to legal representation in the ordinary Criminal Courts; but when it is a question of whether such representation should be made available at the community's expense the right is not quite so straightforward for those without adequate means to afford it. The community is entitled to expect that its money is spent intelligently'.[34] Many members of the legal

[32] *Gideon v. Wainwright* (1963) 372 U.S. 335, 344 *per* Black J.: 'reason and reflection require us to recognize that in our adversary system of criminal justice, any person hauled into Court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him'.

[33] *Powell v. Alabama* (1932) 287 U.S. 45, *per* Sutherland J. esp. 68-9.

[34] Address of Mr. G. Madden to A.N.Z. Society of Criminology, 16 May 1972. Commenting on the very high success rate in appeals by aborigines, if represented, Dr. E. Eggleston states: 'Better legal representation at an earlier stage might in individual cases actually save the community money (including costs of prison administration and the legal costs of appeals as compared with the costs of original hearings), as well as being fairer to the individual defendant. The Tasmanian Court of Criminal Appeal recognized the problems faced by an unrepresented defendant in

profession consider that the person represented has in general a better chance of acquittal or of receiving a lesser sentence than the unrepresented person. What few studies have been made on this matter would seem to confirm that opinion.[35]

An increase in legal representation could lessen the cost to the community of keeping prisoners in jail and maintaining their wives and families.[36] Moreover, an experienced official in the Public Solicitor's Office spoke of trials being aborted through, for example, outbursts by unrepresented prisoners with consequent waste of public money.[37]

Persons unrepresented and convicted, are not infrequently even more alienated from the whole legal system. It is quite probable, on the other hand, that an unrestricted grant of legal assistance to accused persons would result in an increase of 'not guilty' pleas, and consequent increase in work for already overcrowded Courts.[38]

It is however, generally conceded that any inducements towards making more 'guilty' pleas should be regarded with very considerable misgiving,[39] as should any temptation to see increased overcrowding of already overcrowded Courts as a justification for restricting legal representation.[40]

Granted, then, the broad meaning given to 'interests of justice' a general analysis would seem on balance to indicate that it is desirable that all applicants, on principle, be granted legal representation.

Further assistance as to the interpretation of the phrase 'desirable in the interests of justice' can be found in the Criminal Justice Act 1967 (U.K.) Pt IV section 75.

The Departmental Committee on Legal Aid in Criminal Proceedings (*viz* The Widgery Report) has given guidance in its report (Cmnd.2934) as to the criteria which the courts should use in judging whether, apart from the applicant's means, it is desirable in the interests of justice that he should be given free legal aid and the Government has agreed in

these words: "The lack of representation led, as often happens, to difficulties in the conduct of the trial itself, it also brought about successive delays in the prosecution of the appeal." '
Aborigines and the Administration of Justice: A Critical Analysis of the Application of the Criminal Law to Aborigines, unpublished Ph.D. thesis, Monash University 1970. Ch. 5 Section 2.

[35] See Jameson, 'Alcoholism and Driving: The Breathalyser Bogey', 1968 *Medical Journal of Australia,* 435. See also the same tentative conclusion in Zander, 'Unrepresented Defendants in the Criminal Courts' [1969] *Criminal Law Review* 632.

[36] See Abel-Smith and Stevens, *In Search of Justice* (1968) 201. See also D. Biles, Lecturer of Criminology, *The Age* 10 March 1972, estimated that the weekly expenditure on a prisoner in Victoria was $27.76, a figure in his opinion dangerously low.

[37] See Adams and Cranston 'Legal Aid in Criminal Matters in Australia' in Chappel and Wilson *The Australian Criminal Justice System* (1972) 443.

[38] Zander, *op. cit.* found a 'distinct association' between representation and a 'not guilty' plea.

[39] See the comments of Stanley J. *re* a guilty plea on the advice of a Policeman, whether or not connected with the actual case in *Heffernan v. Ward* [1959] Qd. R.

principle with these recommendations.[40]

The Widgery Report is quite explicit:

> In our view, trials on indictment clearly fall into the category of cases where we would expect an accused person whose means are insufficient to pay for his own defence to be granted legal aid as a matter of course. These cases satisfy the criteria discussed in paragraphs 168-180 below, which in our opinion should govern the grant of legal aid. They are mostly trials for serious crime, the prosecution is invariably legally represented and the consequences for the accused can be grave. A layman, however competent, can rarely be relied on to possess the skill and knowledge necessary to put forward his defence effectively in cases tried on indictment without the guidance of a lawyer.[41]

More particularly it regards certain criteria as irrelevant in deciding whether legal representation should be granted. Thus the probable plea of a person committed for trial should not be a consideration,[42] nor should the existence of a reasonable defence to the charge,[43] or the possession by the applicant of a criminal record,[44] factors expressly relied upon here by the Public Solicitor's Office.

The criteria suggested by the Widgery Report as appropriate in granting legal representation—risk of imprisonment, loss of employment, serious damage to reputation, interviewing of witnesses, need for expert cross-examination—all or most of these clearly apply to those at present rejected by the Public Solicitor's Office.

It is worthy of note that the most recent legislative provision for Legal Aid[45] covering Legal Aid in the Australian Capital Territory has largely followed the Widgery recommendations. It has omitted the phrase 'desirable in the interests of justice' from the general section (Section 27) providing for the granting of aid in criminal matters, and in Section 29 incorporated substantially the Widgery criteria for granting aid in Courts of Petty Sessions. The clear implication is that for indictable offences, aid will be granted almost as a matter of course.

12, 16. See also Right Hon. Lord Denning M.R. *Gazette*, the Official Journal of the Law Society Vol. 69 No. 2, 12 January 1972 who, objecting to the unnecessary use of 'not guilty' pleas saw the only remedy as an increase in staff.

[40] See 738 H. of C. Official Report 73, 74: 12 December 1966. Also Halsbury, *Statutes of England* (2nd Ed.) Vol. 47 Sec. 409, Note on s.75.

[41] The Widgery Report Para 143, Sec. 39.

[42] *Ibid.* Para 146, Sec. 40.

[43] *Ibid.* Para. 165, Sec. 44. 'A more serious objection however, which would arise irrespective of the authority responsible for dealing with applications, is that for some offences it is often impossible to decide whether the defence exists without in effect trying the case'.

[44] *Ibid.* Para. 167, Sec. 45. 'There is a fairly widespread feeling that public money should not be devoted to the repeated defence of persistent criminals whose livelihood is derived from the commission of crime, and who make use of legal aid merely to frustrate and delay the course of justice. This is an understandable view, but, of course, it cannot be reconciled with the established principle of our system of justice that a person — even a professional criminal — is innocent of a particular offence until he is proved guilty.'

[45] Ordinance No. 5 of 1972.

Judicial pronouncements on the legal aid in England have been frequent and clear. In *R. v. Serghiou*[46] a woman pleaded guilty to charges of larceny as a servant, forgery of a cheque and various allied offences. At sentencing she asked that 62 other offences be taken into consideration. She was unrepresented and had previous convictions. She received concurrent sentences of 5 years. On appeal against sentence, her sentence was reduced to 3 years, and Edmund Davies L.J., in the course of giving the judgment of the Court said:

> This Court desires to express the view that if a lower court has it in mind, having regard to the gravity of the offence charged or the number of offences which are charged or for other reasons, to take the view that a heavy sentence is called for, it is most desirable that the accused persons should in those circumstances be offered legal aid. There are no grounds for thinking that this applicant asked for legal aid and was refused, but we take the view, and express the view that in the circumstances already indicated, the court should take it upon itself to offer legal aid to the accused person so that, albeit there may be guilty pleas before the court, any matters which might even remotely tell in favour of the accused person may be properly advanced through a skilled advocate to the court and so adequately brought to their attention and then considered by them. That was not done in this case and this woman came away with a first prison sentence of five years. In the result the court will reduce the sentence to one of three years' imprisonment.

Effectively, here we have a defendant with prior convictions pleading guilty—the class of applicant very likely to be refused aid by the Public Solicitor's Office, unless there is something that can be pleaded by way of mitigation. The Court of Appeal impliedly stated that there are always matters to be pleaded in mitigation, thus rendering one of the criteria of the Public Solicitor's Office redundant. Moreover, the criterion of prior convictions used by the Public Solicitor to reject applicants is here again impliedly regarded by the Court of Appeal as a reason for granting legal aid. Clearly the existence of prior convictions is a factor likely to result in a heavier sentence; hence, if the likelihood of a heavy sentence is a very strong reason for granting legal aid, the existence of prior convictions must be a factor supporting the grant of legal aid.

Parker C.J. made more or less the same point with some vigour.[47]

> It does look as if the Chairman had in mind that, if there was a plea of guilty, there was no reason to grant this man legal aid at all in any form. I had hoped that there was nobody now who did not know my views on this matter, and certainly the court has expressed them only recently in fairly strong terms. (*Reg. v. McLinden, The Times,* 10 March, 1964). When a man albeit he is going to plead guilty is involved in a serious offence, carrying a penalty which in this case turns out to be one of seven years, the cases must be rare indeed in which justice does not demand that he be granted full legal aid, solicitor and counsel.

[46] [1966] 1 W.L.R. 1611.
[47] *R. v. Howes* [1964] 2 Q.B., 459, 463.

On this criterion virtually every applicant refused assistance by the Public Solicitor's Office would have to be granted assistance.[48] It should be added that failure to grant legal representation has in a number of cases constituted grounds for appeal, and led to a substantial reduction in sentence.[49] The interpretation given to Section 4 of the Act seems unduly restrictive semantically and quite contrary to legislative and judicial opinion overseas—notably, for Australia, in England.

THE CONDUCT OF THE CASE

In his handling of the approved applicant's case, the interviewing officer chooses counsel. If it is a capital offence, the policy is to choose, if possible, a Queen's Counsel, thus gaining experience, expertise and two barristers. In other cases, the aim is to choose counsel with some expertise in the given criminal area. Given the youth and inexperience of some of the interviewing staff, it can happen that not the best choice of counsel is made.

FEES OF COUNSEL.

Much more important is the dissatisfaction felt by the bar generally at the low scale of fees paid counsel in Public Solicitor briefs. As a result of a petition by twenty members of the Bar practising in the criminal jurisdiction, the Bar Council put out a memorandum on 19 October, 1971 expressing this dissatisfaction and suggesting a more realistic and acceptable scale of fees. While prepared to accept 80% of current non-Public Solicitor brief fees, the Bar Council considered with some justice that the increase in fees paid to defending counsel should have at least some parity with salary increases received by Crown Prosecutors. The suggestions made in this memorandum were only partly implemented by the Law Department, and on 24 April the Bar Council grudgingly accepted the scale of fees laid down.[50]

[48] *Mahoney and Stevens* (*Per* Diplock L.J., unreported 23 June 1967 C.A.) and *James Joseph O'Brien* (*Per* Winn L.J., unreported *The Times* 21 March 1967, C.A.) *R. v. Serghiou* [1966] 1 W.L.R. 1611. *Dicta re* the necessity of legal aid in cases in which a heavy sentence is likely to be imposed were expressly approved in *R. v. Green* [1968] 1 W.L.R. 673, and *R. v. Laird* [1968] 1 W.L.R. 673.

In *R. v. Sowden* [1964] 1 W.L.R. 1454, 4 convictions were quashed because lack of legal representation made it impossible for his case to be put properly. This, despite the fact that the Court of Appeal now knew that after conviction and before sentence the appellant had handed in a confession written before the trial which he now wished to use as a plea in mitigation.

[49] *R. v. Hooper* [1967] 1 All E. R. 766: (C.A.) sentence reduced from 3 years to 15 months; *R. v. Serghiou* [1966] 1 W.L.R. 1611: (C.A.) sentence reduced from 5 years to 3 years; Case of *Mahoney and Stevens,* unreported, 23 June 1967, the Court of Appeal reduced the sentence from 5 years to 4 years; Case of *James Joseph O'Brien* (unreported, cited in *R. v. Green* [1968] 1 W.L.R. 1611), the Court of Appeal reduced the sentence from 30 months to 18 months; and in *R. v. Green* [1968] 1 W.L.R. 1611, the Court had to reduce drastically 2 out of the 4 of the sentences of 30 months.

[50] Letter 24 April 1972 from W. O. Harris, Chairman of Bar Council to Mr. R. Glenister, Secretary of Law Department. 'The Bar Council maintains that fees to counsel on briefs from the Public Solicitor should not be less than fees which would result from the application of the principles set out in the memorandum of the 19 October 1971, but in the circumstances it agrees to these fees for the present'.

Scale of fees as at 24 April 1972:

	Public Solicitor Briefs	Non-Public Solicitor Briefs
Committal Proceedings or Inquests	$60.00	$120.00
County Court	$81.00 — $102.00	$135.00
Supreme Court	$102.00 — $126.00	$195.00
Queen's Counsel	$200.00	$380.00

'In cases where a range is stated, the fee chosen within the range is to depend on the weight and complexity of the case, and is to be a matter for negotiation between the Public Solicitor or his Officer, and Counsel's Clerk.'

Clearly enough, the Public Solicitor's Office is being compelled to get counsel 'on the cheap'. While in general, it is true that silks regard it as something of a duty to accept Public Solicitor's capital briefs, on non-capital matters, the Public Solicitor's Office can often get counsel who are cutting their teeth. One barrister has been quoted as saying: 'Most of the top boys are engaged doing other work when the Public Solicitor approaches them, so of course they can't do it. The result is that younger and inexperienced barristers are assigned to defendants.'[51]

EFFICIENCY

I have spent some time on the matter of counsel's fees because in a criminal trial, the quality of counsel is so clearly vital to the best handling of the case. It has been stated more than once that murder and manslaughter trials are well handled by the Public Solicitor's Office, but that in non-capital matters there is considerable room for improvement. This differentiation would seem borne out at one level by the choice of counsel, a choice dictated to some extent by the fees paid.

Section 3 (1) of the Legal Aid Act 1969 gives the Attorney-General power 'to cause arrangements to be made for their (that is, applicants') defence or representation and the payment of the expenses of all material witnesses.'

This, in practice, means that the Public Solicitor does all that a private practitioner would do. As a general rule, once an application is approved no expense is spared. Thus, interpreters are employed where necessary and witnesses have been brought interstate, the evidence of scientific experts is used wherever possible, especially that of pathologists and psychiatrists.

Recently, for example, in an insanity plea an air-encephalogram was used for the first time in a Victorian court—and successfully. It is unfortunate that the fees of counsel—probably the expense most critical to efficiency—are not controlled by the Public Solicitor, and inevitably the effectiveness of other expenses (that is, expert witnesses) will be diminished.

[51] *N. Mitchell and P. Stirling* 'Let Justice be Done Pt 1' *The Age*, 14 May 1972.

Granted a quite satisfactory handling of capital cases, there have been some criticisms made of the conduct of non-capital cases by the Public Solicitor's Office especially at County Court level. In particular, there seems to be a lack of adequate preparation by Public Solicitor's staff in guilty pleas, and an excessive casualness in arranging for conferences between counsel and the accused. Both these matters have been vigorously criticized recently by the Bar Council.[52] The special prestige of, and consequent concentration on capital cases is one factor, but the findings are clearly attributable also to lack of staff.

One member of the Public Solicitor's Office stated that they were flat-out, while another said that sometimes, if there were say 3 or 4 possible lines of defence in a case, there was time really only to follow up one or two of them. And the Public Solicitor himself has implied that his officers could not have concerned themselves with processing bail applications, whether statutorily entitled to do so or not because they had no time.[53]

SUCCESS RATE IN PUBLIC SOLICITOR CASES

Success rate in trials handled is and must be only a partial criterion of efficiency. Any focusing on success in trials could tend to lead to a restriction in cases handled and a neglect of the wider view of the task of the Public Solicitor's Office to provide 'equal justice' in our adversary system for those who are eligible. It is, of course, very true that success in trials lifts morale of the Office, and in fact has done so; the ensuing confidence and enthusiasm can lead to greater efficiency in the overall handling of cases.

Figures for trials handled by the Public Solicitor's Office in 1971 and 1972 were as follows:

	1971	1972
Not guilty	58	100
Guilty as Charged	110	67
Guilty on a lesser count	81	44
Mixed Verdict	—	73
Disagreement (that is, retrial)	21	6
Aborted (that is, jury discharged without verdict)	20	20
Unfit to plead	1	0
Nolle Prosequi	7	11
Total	298	321

[52] Letter to W. O. Harris, Chairman of Bar Council to Mr. R. Glenister, Secretary of Law Department 24 April 1972. 'It is, however, stressed that the proper presentation of the defence in a criminal trial necessitates a conference with the accused and the Bar feels strongly that further facilities for counsel to have conferences with accused persons are needed beyond those now available.

The Bar feels strongly that more consideration needs to be given to the way in which counsel are instructed on Public Solicitor pleas, so that the interests of the

Thus, excluding trials where the jury could not reach a verdict or which were aborted in 1971 there were 257 trials where a result was reached. Of these, the Public Solicitor's Office gained complete success in 65 (not guilty, *nolle prosequi*), and partial success in 82 (guilty on a lesser count, unfit to plead): a total of 147—well over 50%. A similar picture emerges for 1972. It must be remembered that the Public Solicitor's criteria (but it is only one), for handling trials is the existence of some 'defence'; moreover, there is a tendency for the Police to 'throw the book' at the accused person, charging him with a string of offences, on the grounds that some, at any rate, will stick, even if not the most serious. It is impossible to compare this rate of success with the overall rate of acquittals etc., in higher courts owing, *inter alia,* to a lack of available statistics. But, nevertheless, these figures would suggest that the Public Solicitor's Office in conducting trials in all courts (there were only 26 capital trials last year), with a very adequate degree of efficiency. It is rather on the handling of 'guilty pleas' (there were 184 last year) that the main criticism in terms of efficiency must, as I have stated, be focused.

Despite the not uncommon objection to the Government handling both prosecution and defence in criminal matters, there has been virtually no[54] criticism of the kind so common in the U.S.A. with Public Defenders *re* plea bargaining with the prosecution. This is, to some extent, the result of using non-government counsel in Public Solicitor cases.

APPEALS

The criteria for granting aid in appeals under Section 3 (1) (e), (f) and Section 4 have been set out at some length by the Public Solicitor: 'In determining the recommendation to be made for an application for legal aid under Section 575 of the Crimes Act 1958, the following matters are considered.[55]

accused can be properly presented by counsel and the Court is in a better position to assess a fair penalty in the circumstances'.

[53] Speaking on bail, at his speech to A.N.Z. Society of Criminology, he said: 'As the Legal Aid Act stands at present, I cannot do much to help. An application cannot be submitted in most cases until after committal and after committal all of my officers' efforts are directed to processing the application and getting the trial date from the Crown Solicitor, who is responsible for the Court listing arrangements. In any event having regard to the present legislation, I am doubtful that I have authority to conduct a bail application, except in murder, manslaughter cases'.

[54] Mitchell and Stirling, *op. cit. The Age* 14 June 1972. A Barrister is quoted as saying: 'You can call this a prejudice, but on general grounds I don't like the fact that the Government is both prosecuting and defending the individual'.

[55] It should be noted that s. 575 of the Crimes Act has been effectively replaced by s. 3(1) (e) of the Legal Aid Act 1969, which repeated s. 575 of the Crimes Act. Although the title of the Public Solicitor's talk was: *re:* Legal Aid Act 1969 — Legal Assistance in Criminal Matters; his letter was written on 25 June 1970 before the Legal Aid Act had been proclaimed. Hence he has referred to the old provision (s. 575 of the Crimes Act) covering appeals. The criteria are, I am assured, those now in use.

1. The Judge's charge . . .
2. The evidentiary aspects of the case . . .

If one or both of these considerations favour an appeal, and it appears reasonably probable that the jury would not have returned the verdict had there been no misdirection, legal aid is recommended. I must consider the fundamental merits of the applicant's case because the Court of Criminal Appeal may dismiss an appeal which they have decided in favour of the appellant if they consider that no substantial miscarriage of justice has occurred.

Where the application concerns an appeal against sentence, legal aid is not recommended unless the sentence is manifestly excessive or contrary to the limits imposed by statute . . .'

These criteria as enunciated are open as a matter of law to some criticism. Appeals on the ground of misdirection by the judge are tested by a different standard from appeals on the ground that the verdict was unreasonable in the light of the evidence.

> It goes without saying that a distinction must be maintained between the manner in which a court examines the evidence for the purpose of ascertaining whether a question of provocation should have been submitted to the jury and the manner in which the court examines the evidence in considering whether there is material sufficient to support the jury's conclusion that the applicant was guilty of homicide amounting, if considered independently of any possible extenuations such as provocation, to murder.[56]

In deciding an appeal on the grounds that the verdict of the jury was unreasonable in the light of the evidence, the test is: 'if contained in the evidence there is enough reasonably to lead to that conclusion, even if another view might be formed of this or that part of the evidentiary material.'[57] If, on the other hand, there has been a misdirection by the judge or evidence wrongly withheld or admitted, the test is almost a reversal of the above—that is, it is not sufficient for upholding a conviction if contained in the evidence there is enough reasonably to lead to that conclusion if another view might be formed of this or that part of the evidentiary material. Thus, 'the fact that the jury might have convicted is not sufficient to justify us in applying the proviso' (Crimes Act Victoria 1958, s. 568).[58]

The Public Solicitor seems not to have clearly distinguished between these two broad grounds of appeal and the different degrees of certainty required by the appellate court. In giving aid for an appeal, only if it appears 'reasonably probable' that the misdirection would have influenced the jury's verdict, he is establishing a quite different and far more stringent

[56] *Parker v. R.* [1963] Arg.L.R. 3, 4 *per* Dixon C.J.
[57] *Ibid.* 4-5.
[58] *Ratcliffe* (1919) 14 Cr.App.R. 95, 99. See also, *Harold Jones, alias George Wright* (1922) 16 Cr.App.R. 124, 129. Cf. *R. v. Sowden* (1964) 1 W.L.R. 1454, 1461 *per* Parker C.J.

criterion than that used by the court in allowing an appeal. While the overall criterion for granting aid in an appeal is whether there is a reasonable chance of success, the Public Solicitor has established a test for what is a 'reasonable chance of success' well above what the Courts have laid down as the grounds for actual success in an appeal. Likewise in granting aid for an appeal against sentence, the phrases 'manifestly excessive' and 'in someway out of proportion' seem to set a very high standard for granting aid. Given, moreover, the general complaint that in many cases preparation for guilty pleas is deficient, it will tend to follow that the application of an over-rigid standard for granting aid will effectively prevent any righting of the earlier deficiency in plea preparation.

It has been stated that as a matter of policy the Public Solicitor is slow to grant assistance for appeals. The quite detailed provisions outlined in the screed for the interviewing officers, with their 37 steps to be followed contain no procedures for consultation with trial counsel, for example, concerning the possibilities of appeal. Nor can it be assumed that such consultation will take place automatically. The English experience is relevant here; there is an express mandatory provision that legal aid at trial shall include advice as to the existence of reasonable grounds of appeal and assistance in preparing an application if such reasonable grounds exist.[59] Nevertheless recent research[60] has shown that of a sample of 134 prisoners who did appeal, 10% at least of these and possibly as many as 26% received no advice. Furthermore, in a quarter of the cases where advice to appeal was given, no help was received in the drafting of the appeal documents. With no procedure at all here and a policy opposed to giving aid for appeals, the likelihood of an excessively casual attitude is quite high. Statistically, while the number of trials conducted by the Public Solicitor's Office over the last few years has increased significantly, there has been no similar trend over the last few years in the number of appeals assisted.

Year	Trials	Appeals
1967	310	7
1968	430	10
1969	454	14
1970	496	12
1971	532	11
1972	822	16

Members of the legal professions have expressed their opinion that the Public Solicitor should be more liberal in granting aid for appeals. Recently the Public Solicitor would not handle Ratten's appeal[61] to the Privy

[59] Criminal Justice Act 1967, s. 74(7).
[60] Zander, 'Legal advice and Criminal Appeals: A Survey of Prisoners, Prisons and Lawyers' [1972] *Criminal Law Review* 132.
[61] In the Supreme Court of Victoria. *R. v. Ratten* [1971] V.R. 87, and then to the Privy Council.

Council against his conviction for murder until the Legal Aid Committee at considerable expense got a Queen's Counsel's opinion that there existed grounds for such an appeal. Although the appeal was unsuccessful, recent developments involving an exhumation of the victim's body, and further referral to the Supreme Court would further confirm the reasonableness of such an appeal. While a plethora of appeals is clearly undesirable (cf. the English experience), a relaxation in the policy in this area seems warranted.

SUMMARY OF PROPOSALS POSSIBLE UNDER PRESENT ACT

1. The present arrangement for informing persons eligible for assistance by the Public Solicitor's Office is unsatisfactory. The actual application form (Form A) should be handed to prisoners charged or committed or convicted as the case may be. Likewise assistance on filling out the form should be provided for prisoners charged under 3(1)(d), or committed under 3(1)(a), 3(1)(c); assistance is best provided probably by the Clerk of Courts or some court official; for those eligible to appeal under Section 3(1)(e), (f), the duty of giving assistance could be imposed on the prisoner's solicitor.

2. It might be noted that Form C, which has to be completed generally by the Clerk of Courts refers to the Form B prescribed by the Regulations under the Legal Aid Act 1969. There have been, however, no Regulations issued.

3. The criteria established by way of interpretation of Section 4 of the Legal Aid Act 1969 are far too restrictive, and need a thorough revision.

4. There is a need for more staff in the Public Solicitor's Office. Some degree of experience in criminal law seems essential if the interviewing officer is to assess with any real accuracy the chances of success of the applicant, and run the case.[62]

5. Counsel in Public Solicitor cases must be paid at a rate, if not equal to that of non-Public Solicitor briefs, at least far closer to such rates than is the prevailing situation.

6. In non-capital cases, especially with guilty pleas, more opportunity for conference between counsel and accused is necessary. There is too, need of more adequate preparation in such pleas by the Public Solicitor's staff.

7. A more liberal approach to the granting of assistance in appeals seems desirable. There should be incorporated into the 'Procedure Adopted in Criminal Defences', specific requirements of consultation with defence counsel *re* the desirability of appeal, either against conviction or against sentence.

[62] Trebach, 'New England Defender Systems' (1946) 47 *Journal of American Judicature Society*, 170, 175. Speaking of inexperienced personnel in Public Defendants Office: 'It might be argued of course that the defender system is providing training for young attorneys. This is a beneficial result but a defender system should have as its major purpose the defence of the indigent and not legal education'.

8. Assistance in making bail applications should be given by the Public Solicitor at the very least, to all who are granted assistance, and, preferably, to all eligible under Section 3 for assistance by the Public Solicitor (unless, of course, they are being privately represented).

9. It seems desirable that a report of the activities of the Public Solicitor's Office should be presented, say annually, to the Judiciary, the Bar Council, the Law Institute, the Law Department and Parliament. Such a report would enable the work of the Public Solicitor's Office to be appreciated and reviewed, and useful recommendations could be made.

There are also certain clearly desirable modifications which could be achieved by minor amendments of the Legal Aid Act.

1. The statutory responsibility for at least the administration of Pt.1. of the Legal Aid Act 1969 'Provision by the State of Legal Assistance in Criminal Matters' should be transferred from the Attorney-General to the Public Solicitor. Such a transfer would help align the Act with the present practice and remove the anomalies of having the Attorney-General purporting to exercise his discretion in matters where on present criteria he is barred from doing so. Questions of the desirability of direct parliamentary control of the administration of criminal aid, and of the provision of adequate finance would need discussion.

2. The mandatory time limit on applications for assistance to the Attorney-General section (3) (3) should be extended to say six weeks, and there should be a discretion on the Attorney-General to allow applications made out of time. This suggestion is not original. The same recommendations were made by the Legal Aid Committee in 1968.[63] The present practice of ignoring the statutory time limits, while it achieves an equitable result, is clearly undesirable.

3. The Public Solicitor should be enabled to grant assistance at committal proceedings to all charged with indictable offences.

4. It would be desirable that the Public Solicitor handle appeals from the Magistrates' Courts which are rehearings of the case anyway, and which would chime in with much of the work the Public Solicitor is already handling.

[63] Report of the Legal Aid Committee, for the year ending 30 June 1967 (1968) *Law Institute Journal* 28.