

University of Otago Legal Issues Centre: Discussion Paper 3

- Topic:** Is Criminal Legal Aid Policy and Strategy undermining Access to Justice?
- Speaker:** Milton Sperring – Barrister, Dunedin
- Discussant:** Len Andersen - Barrister, Dunedin
- Chair:** Professor Kim Economides, Director of the University of Otago Legal Issues Centre

'Man's mind stretched to a new idea never goes back to its original dimensions.'

Oliver Wendell Holmes

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Introduction

There are two interpretations of “access to justice”. One is the ‘ambulance at the bottom of the cliff’ interpretation: the ability to help individuals resist the prosecutorial efforts of the State, after being accused of an offence. The second is a more holistic interpretation: that access to justice is access to just outcomes. Just outcomes are outcomes that allow consequences to come home to roost, dissuading criminal behaviour and minimising offending by the individual and within society as a whole. Do legal aid policies pervert one or both of these definitions of access to justice? Do Legal Services Agency (LSA) policies run counter to professional obligations of the Bar?

Background

1. The Supply of Legal Aid in New Zealand

Legal aid grants for criminal charges are currently assigned based on the seriousness of charges. These are matched against lawyers listed as providers. These lawyers are categorised 1 through 4 in the levels of skill necessary for the litigation of matter(s) in question. However, to attain the first level of provider status, practitioners are expected to have experience and to have participated in three recent defended matters. I know several practitioners, myself included, who have had to practice for four or five years without completing 3 recent defended matters. Practitioners who wish to move to category 1 status have the best opportunity of doing so by fighting and losing three defended matters in quick succession. From the perspective of the LSA it does not matter if the hearings are lost, what matters is that the practitioner has had the opportunity to engage in the litigation practices and the attendant opportunity to identify relevant or contentious matters and present them properly in court. Thus, a motivation for Counsel to litigate is created.

In opposition to this is best practice for litigators: As part of general practice Counsel would first seek to have charges withdrawn. If there is any defence available then a good lawyer will convince Police that the matter is not clear-cut and try for resolution without litigation.

Alternatively, if there is little hope of any real defence Counsel should be advising the client of the benefits of an early guilty plea. The concern raised is whether the Legal Aid inspired necessity for litigation experience may conflict with the duty to court and client

to minimise litigation where there is no legitimate chance of success. Since the goal of LSA is “access to justice”, do current policies encourage litigation or make it more likely that counsel will be less experienced in charge-negotiation or delivery of best-outcome plea advice from counsel to client?

At the same time the practitioners’ side of the legal aid system is undergoing significant changes. Currently legal aid qualified lawyers are divided into four categories. Each category requires mandatory courses to be undertaken and experience in criminal litigation in degrees of seriousness appropriate to the category of legal aid provision. To enter into the Legal Aid provider scheme practitioners are required to have at least three recent defended matters to enter Category 1, the first level of assigned cases. As experience grows and more serious matters are dealt with, practitioners can apply for higher levels. As part of each application for higher standing, other more senior local practitioners will be asked for their input through references and the “Local Consultative Group” (LCG) or their equivalent. Effectively, those most adversely affected by the new policy now have more influence over the number of new practitioners who will enter that market and further dilute the pool into which legal aid assignments are assigned.

2. The Demand for Legal Aid in New Zealand

Legal Services currently provide legal aid to criminal defendants. Levels of aid are based on the personal financial circumstances of the applicant (asset and means tested), any interests of justice factors and the level of sentence likely to be imposed in the event of a guilty outcome, factors there being the seriousness of the alleged offence itself and the number of previous convictions of the defendant. The more offences you have committed the more likely any new charge will result in a more serious punishment. The more serious the likely punishment on conviction the more likely an individual will be granted legal aid and be given a more experienced litigator. Hence: the more crime you commit the more likely to be granted legal aid.

There are other paradoxical drivers with the LSA system but some affect crime rates directly. Everyone may be familiar with the term “moral risk” which was recently used in the government bailouts of the American and British banks and speculative investment mechanisms. The “risk” identified was that bailing out such behaviour would create an environment where minor risk taking was borne by the investor but extreme risk taking (with the accompanying risk of bankruptcy), was externalised to governments and taxpayers rather than shareholders: who after all provide the drive to create profit.

This raises the question: Does the provision of legal aid act as a driver of crime?

Consider these points:

- 1 The more offences you have committed the more likely any new charge will result in a more serious punishment. The more serious the likely punishment on conviction the more likely an individual will be granted legal aid and be given a more experienced litigator. Hence: the more crime you commit the more resources the community provides to you.
- 2 Legal aid has become a complicated system of benefits to recipients. Legal aid is provided as a combination of an interest free loan, a grant outright and a subsidy of the lawyer's fees, those fees being contracted at a significantly lower rate than would be available if the practitioner was retained privately for the same work. Legal aid applicants are tested for income and assets. The less you earn and the less you have put aside in savings or equity the more likely you are to get legal aid. Recipients are expected to make repayments but can suspend those due to financial hardship. The system of assessment for hardship is reasonably generous and most recipients of a Work and Income Benefit would be in a financial position to seek and obtain such relief. Result: Those that have worked the hardest and acted the most responsibly financially are less likely to be granted legal aid. Those who are already receiving the most in public welfare are more entitled to free legal assistance for committing offences while already receiving a benefit

The Issue

Against this background I wish to examine two policies that impact on access to justice. I intend to raise one from the market-supply side of the equation and one from the market-demand side of the equation.

- 1 (Supply) Is the policy of requiring three defended matters creating a driver for new practitioners to litigate matters that would otherwise be withdrawn or pled guilty to?
- 2 (Demand) Does the criteria under which legal aid is provided encourage the commission of offences through the feedback of "moral risk", ie that the more offences previously committed or the more serious the allegation the more likely free legal representation will granted?

The Concerns

Against the first proposed driver there are counterweights: all members of the Bar are required to adhere to a strict code of conduct. This code requires that counsel should not needlessly litigate. Where the chances of winning are slim Barristers are required to counsel the client of the consequences of fighting and losing. Members of the Bar also have a duty not to waste Court time.

The argument here, though, is that there should not be LSA policies that require counterweights. LSA policies should promote access to justice. Any policy that creates a paradoxical driver should be re-examined. If possible it should be altered to remove the

driver or expanded to provide its own counterweight to the driver. To that end, as well as identifying the driver, I have also provided some proposals to counterbalance those drivers.

Given that new standards will shortly come into effect that require practitioners to have three years of post admission experience before they can become barristers the program suggested may be the only way that those who have not secured jobs with firms can get that experience. Finally, given that the public defender model may spread to all major centres, such a program, as suggested, would provide a similar system of juniors working under experienced supervision.

Under the second “demand” side driver, Legal Aid has become a complicated system of benefits to recipients. The more income you have, the more you are expected to contribute to your own defence. Those who are already receiving the most in public welfare are rewarded with free legal assistance for alleged offences. I have had employed clients who rationally calculated that pleading guilty is the best option even when they had very good defence options. Justice is economically out of their reach. Some clients even recognise and comment that had they stayed out of work they would have been better able to contest their charges. Normally this would not worry me greatly but I have had at least two cases where I formed the opinion that an innocent person would be accepting a criminal record for want of the means to contest a case.

Finally, my last concern is the strategic consequences of the current program, in particular how it may affect the development of counsel in the criminal courts. Recent changes to the allocation of legal aid cases have created a situation where counsel can no longer rely on existing relationships with past clients to gain assignments in category 1 and 2 cases. It is quite natural for practitioners to respond to this. Unfortunately some have responded by acting to dissuade new practitioners from entering that arena. The atmosphere of collegiality has chilled somewhat, mentoring has declined and in some cases practitioners are attempting to “pull the ladder up after themselves” i.e. acting to prevent the next generation of barristers from entering the profession. This is a particularly difficult subject because within the profession there is a real desire to self-govern the profession. To resist government oversight the profession needs to maintain the strictest standards and maintain the public’s confidence in the profession disciplining their own. But law is a profession that is learned as much on the job as at university. If the pursuit of perfection is set too rigidly there is not room for learning and mentoring within the practicing community. What is the affect of current policy ten years out?

I recently had a warrant to arrest issued for one of my Legal Aided clients. The warrant

was issued in error. I attended the Court and sorted the matter out. The warrant was withdrawn and the client remanded on bail. However, enquiry with LSA resulted in being told that no fees could be invoiced for the work, as it was not assigned. If I had instead allowed the warrant to be executed, attended Court and applied for further bail after Police and the Courts had spent hours of time on the arrest, I would have been paid without quibble. Given the intervention rule and that I am now aware that LSA will not pay me to attend to such problems, am I even allowed to intervene in the best interests of client, Court and police when I clearly have no instructions to do so?

Conclusion

In regards to the supply side of legal aid, my proposal is a Ministry of Justice mandated and funded mentoring program within the legal aid assignment system. Legal aid should be engaged in legal aid provider development. The easiest way to do this would be to invest in junior practitioners. The best way would be to oblige more experienced practitioners to accept juniors as second chair at legally aided fixtures. Both practitioners would report back on the work done and how they found the "teacher" or "student" to work with. Seniors who take on this task get assignment preference, as they are now mentors of young talent. This provides several benefits: trial experience without incentive to needlessly litigate; experience of participation in trials of various matters with various practitioners; mentoring feedback that can identify and encourage good mentors and improve or weed out practitioners who are not good at this; trial prep experience for those starting out including further scenario analysis, such as included in Profs; fosters culture of collegiality. It also allows firms or sole practitioners to see prospective employees of the future, can be funded at very cost-effective hourly rate.

As for moral risk in providing legal aid, stop providing it. Just like the Bail Act can reverse the onus of proof for bail after a set number of offences, so should legal aid. If an offender has been convicted of, for example, 5, 10 or even 15 offences then the only grounds for granting legal aid should be "interests of justice" or possibly mental health issues. I would hate for Joan Butcher to be without counsel, but 99% of her stuff is handled by duty solicitors and many of us would work pro bono for individuals such as her anyway. Where a person has used up their allotted assignments there should be no counsel at all. The only downside of such a system would be the major increase in trial time for un-assisted defendants, this may be offset by the drop in crime once criminals realise that they will not get free lawyers. There may be overlap causing a temporary increase in trial time before a decline.

Would the legal aid system be better at reducing crime if it was strictly an interest free

loan?

Discussant's Comments on the Speaker's Idea

1. When a client is assigned a legal aid lawyer they are entitled to expect that the lawyer is competent to perform that task and the purpose of nominating 3 defended hearings before a lawyer receives any approval is that the lawyer must have demonstrated competence on 3 separate occasions. It is wrong to regard this as a “driver” as the committees consider the nature of the defended hearings (and the defence) and also consider senior lawyers’ assessments of the practitioner’s capabilities.
2. The causes of crime are complex and often relate to social deprivation and alcohol and drug abuse. Hanging criminals for minor offences did not act as a deterrent in the 19th century and no evidence is produced to support the theory that crime will drop if criminals cannot continue to get legal aid when they reoffend.
3. There is a finite amount of money available for legal aid and it is fundamentally important in a society that recognizes the right to a fair trial that legal aid enables the persons who face the most severe consequences as a result of the charges brought against them to be properly represented. If legal aid was limited in the manner suggested then, for example, those facing the additional penalties under the “three strikes” legislation would probably be denied legal aid because of their previous offending.
4. There is no proper basis for legal aid being diverted from assisting persons before the courts on criminal charges to finance training for lawyers.

About the Speaker

Milton Sperring is a graduand of the University of Otago. He has practised as a Barrister Sole for 6 years in Dunedin. Prior to engaging in study Milton worked at Hillside Engineering for six years and served with the New Zealand Army Regular Force for five years including four years with the Ready Reaction Force and four overseas tours.

About the Discussant

Len Andersen is a Dunedin barrister of 35 years experience and lectures in Advocacy and Forensic law at the University of Otago. He is currently categorized to accept any legal aid assignment and until June 2011 formed part of the Otago Consultative Group that provided recommendations to the Legal Services Agency on applications for grading by practitioners.

Further reading

<http://www.justice.govt.nz/justice-sector/drivers-of-crime>

<http://www.justice.govt.nz/services/getting-legal-aid/criminal-legal-aid/granting-legal-aid>

<http://www.justice.govt.nz/publications/publications-archived/2002/eligibility-for-legal-aid-discussion-document-december-2002/publication?searchterm=legal+aid>

<http://www.nzlawyermagazine.co.nz/NZLawyerextra/Bulletin29/extra29F3/tabid/3436/Default.aspx>

There was, in the past, a significant amount of material regarding government Legal Aid granting policy. However, the provision of Legal Aid has recently become the purview of the Ministry of Justice. As part of the process much of the web based resources and explanations of past policy no longer exist or are no longer current. The Ministry of Justice does have extensive web based material both explaining the system of Legal Aid and the Ministry's separate approaches to recognising and reducing drivers of crime. The ministry does not appear to identify itself or its own policies as potential drivers of crime.