



CATHOLIC COMMISSION FOR
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JUSTICE - A COMMODITY OR SOMETHING MORE FUNDAMENTAL?

"The human person is also entitled to a juridical protection of his rights, a protection that should be efficacious, impartial and in conformity with true norms of justice."

Paragraph 56, *Pacem in Terris*, April 11, 1963

"The right to a fair trial is engrained in our legal system"

Toohy J, *Dietrich v The Queen* (1992) 177 C.L.R. 292 at 353 also see in the same decision but reported (1992) 109 ALR 385 Mason CJ and McHugh J 387 and Deane J 408, and Gaudron J 436

"... an entitlement to legal aid is a measure which reduces the possibility of injustice and enhances the fairness of the criminal trial."

Brennan J, *Dietrich v The Queen* (1992) 177 C.L.R. 292 at 321

This paper will highlight the increasing difficulties for many Australians in obtaining access to a fair trial process and legal assistance in the climate of government cuts to legal aid budget and where economic constraints and priorities now take precedence over ensuring equality before the law and a chance for justice.

The social teachings of the Catholic Church promote issues of justice and view the role of institutions and governments as critical in promoting the common good of all citizens. It is important that if people are to receive the protection of the law that all peoples have access to proper legal advice, representation and remedies, otherwise, the laws of society will become unfair and unjust and will be unable to be applied universally in a manner which ensures human dignity and respect.

This paper will focus broadly on access to legal aid in human rights matters, criminal law matters and Family Law. This is not to deny that there are also

serious limitations on funding in other areas of law. As the experience of the author is mainly in the Victorian jurisdiction the article will mainly concentrate on the Victorian experience.

National Legal Aid stated in a report in July 1996, that the demand for legal aid in Australia had increased significantly, that the level of funding had not increased with that demand and that to restore funding to levels which would provide legal aid in 1994 to those who were eligible in the period 1987-1988, required a real increase in funding of not less than \$50 million¹. The Australian Commonwealth government's response one month later was not to increase the funds but instead to cut the legal aid budget by \$120 million over three years.²

The report also noted, that Australia, by comparison with other countries, had a low per capita spending rate on legal aid. In England/Wales \$65 per capita, Netherlands \$22 per capita, Canada \$18 per capita³ and Australia \$13 per capita. Francis Regan in an article entitled "Rolls Royce or Rundown 1970s Kingswood?"⁴ draws on further data which also supports the conclusion that Australia is mean in its contribution to legal aid services. He notes that in the years 1993 -1994 the number of legal aid services provided per 1,000 population in Australia was 30.2 whilst in England Wales it was 67.3. Regan notes that the Australian approach to legal aid has been to target legal aid to the poorest members of society and to restrict the range of legal problems to which legal aid is available to a much greater extent than in other comparable Western societies.

It is the restrictions on the range of legal problems to which legal aid funding is granted which we will now focus on. In Victoria, Victoria Legal Aid(VLA) has used its guidelines for legal aid to shrink not only the types of cases for which legal aid is available but also to dictate the circumstances in which aid will be granted, the manner of operation of counsel and has set ceilings in the family and criminal law jurisdictions and time lines, which if reached, mean that legal aid will cease, irrespective of the stage proceedings have reached. The Annual Report of VLA for 1996-1997 states that due to the financial pressure VLA was facing ceilings were "brought into effect immediately. they resulted in the

¹ *Meeting Tomorrow's Needs on Yesterday's Budget: The Undercapacity of Legal Aid in Australia*, A publication of National Legal Aid July 1996 refers to the Law Council of Australia's report released in March 1994. It was entitled "Legal Aid Funding in the 1990s". It quantified the levels of funding necessary to restore eligibility levels for legal aid to those levels set when in 1987-1988, the joint Commonwealth/ State funding agreements were reached.

² The official cuts in funding often referred to by the Attorney General's Department is \$100 million. The figure quoted here however also includes the monies lost to the legal aid commissions under the Justice Statement issued in December, 1995

³ Note Canada also has a fund for public interest test cases

⁴ *Alternative Law Journal*, Vol. 22, No.5, October 1997 225-228

termination of some family law grants which had already exceeded the fee cap even though the cases were not completed.”⁵

In some cases Family law clients have been literally left at the door of the court without legal representation. This poses significant problems for women who by reason of their finances often cannot afford the representation that their spouses can because whilst their husbands have been in full time work, they have been occupied in duties as a home-maker. The matter becomes even more complex for people from a non- English speaking backgrounds and in cases where incest, domestic violence and abuse are alleged. Members of the judiciary have already stated on the public record that they have witnessed women harassed in the witness box about the details of their abuse by the alleged perpetrator and are concerned that a lack of representation means that evidence is not being brought before the court thereby enabling inappropriate orders. Family court judges have indicated that because a party is not represented issues of domestic violence may not be brought to the court’s attention and orders made could therefore inadvertently place women and children in danger.

The court has also criticised the VLA for the retrospective nature of its Family law monetary caps in relation to the provision of separate representatives for children. Chief Justice Nicholson states, “While acknowledging the difficult financial situation in which VLA apparently found itself, I have difficulty in understanding the justification for the retrospective nature of the restrictions placed by it on legal aid recipients or the extremely arbitrary nature of the caps applied. It is obvious that each case is different”⁶ Australia as a nation has made various undertakings to the world through its ratification of the *International Convention on the Rights of the Child* that it will improve the capacity of children’s best interests to be attained. The Family Court in ensuring that these international obligations are met should be assisted in ensuring that all the relevant factors to the child’s best interests are before the court. The absence of representation is likely to make the court’s task in ensuring the child’s best interest is attained more difficult.

The attitude of some legal aid commissions as they cope with the funding cuts and adopt fiscal management plans has not only been to limit guidelines for aid and fees, it has been to argue that the cuts will effectively force the legal system

⁵ VLA Annual Report 1996-1997 p 8

⁶ *S v S*, and *The Child Representative and Victoria Legal Aid and the Chief Commissioner of Police*, 13 January 1997, Date of Judgement Family Court of Australia at Melbourne Matter ML 9999 of 1995, Reasons for Judgement 5 May 1997

to reform itself⁷. Such arguments yet again see a targetting of the people who can least afford it. In *Pacem in Terris*, Pope John XXIII stated that “Considerations of justice and equity, however, can at times demand that those involved in civil government give more attention to the less fortunate members of the community, since they are less able to defend their rights and to assert their legitimate claims.”⁸ It is inappropriate to seek to reform the whole legal system by taking away services and entitlements of those who are already disadvantaged, especially as there is no empirical evidence to substantiate the claim that cutting legal aid to disadvantaged people will reform the entire legal system. (Perhaps a quote from Raulston Saul can be found for this.)

Such arguments, put the cart before the horse. Taking legal assistance away from the poorest members in our society to enforce change in the legal system is not only a poor means of enforcing change but allows for the victimisation of those who are the most disadvantaged in our community. Such an approach is hardly the means of obtaining law reform which is progressive, well thought out and not merely a knee jerk reaction. Surely, good law reform is a matter for broadly based dialogue on the reasons for and against legal change which included a discussion of the basic rationales for the existence of fundamental underpinnings of our justice system, principles of fairness, access, innocence until proven guilty and so on. Organisations such as the Australian Law Reform Commission, The Human Rights and the Equal Opportunity Commission, Parliament, the Courts are some of the key stake-holders amongst many others where input into areas where law reform should originate in a democracy.

If anything “back door” law reform, by cutting legal aid, is likely to lead to measures which “deal” with the poor, unrepresented people by ignoring their need to put their case or circumstances in criminal matters or in family law matters ensuring that women (who because of their role as home-maker often cannot afford private representation) do not pursue their entitlements or those of their children. In a recent case a client of a legal centre was charged with indecent language and resist arrest by the police. He alleged he had been harassed and badly treated by the police. An application for legal aid was made on the grounds of “public interest” for him to be able to defend the charge. Legal aid was refused. The man was lucky enough to gain representation on a pro bono basis. He was found not guilty.

Not all members of the public are fortunate enough to access lawyers prepared to act for free. It is also highly inappropriate that justice depend on the generosity of

⁷ Mr Robert Cornall, Managing Director of VLA at a Conference “ The State of Legal Aid” 12, December 1997 in Melbourne and the Commonwealth Attorney General, Mr Daryl Williams 13, March 1998 “The Age”.

⁸ *Pacem in Terris*, paragraph 56, April 11, 1963

a few lawyers. Many people in society have either limited funds or no funds at all. Because of this they will receive limited representation or none at all in our justice system unless they meet the high threshold of the legal aid guidelines. Legal aid provides duty lawyers at most courts, but, these lawyers are not able to run a contest. In many instances, this has led citizens to plead guilty irrespective of the existence of a defence in order to secure some form of representation. The outcome for such people, especially young people, is that the conviction they then receive may prejudice their later chances of securing employment. The long term impacts of a needless conviction for some will reverberate long after the day in court. If you are wealthy the outcomes of a court case may be very different.

The increasing emphasis on “saving money”, “efficiency” and “competitiveness” are not necessarily the panacea nor correct criteria for ensuring a *just* justice system. Although elements of the three may assist in a more streamlined system they will not of themselves result in an improvement for the common good of all citizens. Terry Carney a Professor of Law at the University of Sydney states that “Exposing the legal system to the winds of competition and enhanced ‘case management’ by courts were the new melodies. Managerial and economic perspectives were barely mentioned in 1975. The “Access to Justice Report” (1994) by contrast devoted much space to competition... however, whatever its merits, it must be remembered that competition does not guarantee significant access gains (Meadows 1994, pp.86-9).”⁹

The current climate of cuts has lead members of the magistracy, prosecutor’s office and judges alike to express concerns about the time wastage and reductions in the court’s capacity to case manage due to the increase in time it takes to ensure a non-represented person is adequately safeguarded and to sift through the often irrelevant material presented.¹⁰ It is likely that short-sighted funding constraints may in the long term lead to financial blow-outs in other areas of the justice system.

In Victoria lawyers have expressed concerns about funding constraints being linked to time limits placed on cases where a defence or a plea of “not guilty” occurs¹¹ (ie contested cases) and requirements that lawyers work only for a

⁹ “Poverty and the Law”, Chapter 11, Contributor - Professor Terry Carney, Australian Poverty: Then and Now, Edited Ruth Fincher and John Nieuwenhuysen 231, Melbourne University Press, 1998

¹⁰ 1996 Annual Report of the Supreme Court of Victoria, p 8

¹¹ See “The Age” 30/6/97. In the article Mr Neil Young, Chair of the Victorian Criminal Bar Association states that 50% or more of criminal appellants in the Court of Appeal may now be unrepresented because VLA had withdrawn funding for many appeals. It was also reported in the same article that a number of persons who had their appeals heard in the second last week of March had no legal representation and that it was likely 24 people in August 1997 would be forced to represent themselves.

prescribed fee unconnected to the length of a case. International standards have either been ignored or their intent has been watered down.

“ 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in suit a law, which everyone shall be entitled to fair and competent tribunal established by law.....”

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed properly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, and in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient funds to pay for it;...” (Article 14 of the International Covenant on Civil and Political Rights)

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Many practitioners who once did significant legal aid work say they are now deterred from working under the conditions prescribed by Victoria Legal Aid. The Victorian Bar after receiving guidelines from VLA interpreted the guidelines as placing VLA in the position of client as VLA was the “purchaser” of legal services. The response of the Victorian Bar was to state that their primary obligation was to the court and the client and not to legal aid. Clearly, this is consistent with the ethical and professional responsibilities of the legal profession.

One questions whether the so-called reforms and cuts to funding seriously address the rights of the people who have the legal problem in this whole legal aid debate and what the outcomes in terms of justice will be for them.

Unfortunately, their real life dilemmas go largely ignored or are dismissed as merely “anecdotal” or as “hard luck stories.”¹³

Many of the remedies for human right’s infringements enacted by the Australian Parliament have been enacted pursuant to Australia’s commitment at International law to ensure domestic compliance with international human rights

¹² In *Pacem in Terris*, April 11, 1963 it is noted that the United Nations human rights instruments which take their direction from the Universal Declaration of Human Rights, “represents an important step on the path toward the juridico-political organisation of the world community...” para 143

¹³ The Age newspaper, 10 December 1996

conventions Australia.¹⁴ In Victoria, legal aid for civil matters such as human rights actions is almost non-existent. Guidelines in Equal Opportunity/Discrimination cases allow legal aid in civil matters if the matter is “in the public interest”¹⁵. In the human right’s jurisdiction, practitioners complain of the reading down by some commissions of the “public interest test” contained in some guidelines. The Commonwealth government in recent funding agreements and in other documents has stated that it has provided to State Commissions a list of priority areas for Commission funding¹⁶. Practitioners report that since the priority list has been identified there is little evidence of such priorities being adhered to by virtue of the types of grants that are still being refused.

Proposed legislation before the Australian Parliament inaptly titled the *Human Rights Legislation Bill 1997* is likely to further compound the capacity for people to seek redress when they are wronged. It must be noted that after the humiliation caused by an act of discrimination, the bringing of an action by a person can take great courage and the awards of compensation in such cases are often minimal. The likely increased costs of the transferral of the Human Rights and Equal Opportunity Commission’s hearing function(which is currently free) into the Federal Court, when combined with the new “costs follow the event” (this means that the losing party or the party who withdraws from an action for whatever reason, has to pay the other party’s legal costs) provisions are likely to deter, any complainant whose human rights are infringed and who is impecunious or who has limited means, from seeking the remedy they are entitled to by law. Furthermore, the broader society will be disadvantaged. This is because the implications of having to pay significant legal costs, will deter those with a genuine desire to prevent systemic injustice from ever bringing these cases to the attention of the general public, thus opening the way for it to occur again and again. Often the outcome of such cases in the past has been law reform, the modification of business practices to avert ongoing discrimination, or an addition to the development of the principles of law. ¹⁷ The Attorney General’s office has noted that the Attorney General’s waiver of payment of

¹⁴ eg Racial Discrimination Act 1975, Disability Discrimination Act 1992, Sex Discrimination Act 1984 (all Commonwealth)

¹⁵ VLA Civil Cases Guidelines, Guideline 13,12 December 1996

¹⁶ *Legal Aid: A Return to the Sixties?* Mary Anne Noone, *Alternative Law Journal* Vol. 22, No.5 October 1997 p251

¹⁷ In a case before the Human rights and Equal Opportunity Commission between AMP and Mr P a man made a complaint when he was refused income protection insurance on the grounds of his visual disability . A ground breaking agreement was made stating that just because of a disability you are not prevented from taking part in society or employment. Not only did Amp provide Mr P with insurance as the outcome of the case, but the company also has taken the initiative to review its policies in relation to people with a disability. See CLC Notebook, Issue 8 September 1997

legal costs could still operate in cases of such impecunity, but, the reality is that the criteria for this waiver are extremely limited and you have to pay for the legal costs “up front”. This is useless for poor people who are not in a position to do. Such anomalies are conveniently overlooked by government.

As state governments respond to law and order agendas by limiting fundamental protections such as the right to silence or dispensing with judicial discretion under mandatory sentencing laws, the capacity for citizens to defend themselves and circumnavigate the complexities of the legal system are undermined through cuts to legal assistance.

The response of some states to the Commonwealth cuts to legal aid has led to a fragmentation of the delivery of legal aid services. The Commonwealth in defending the cuts stated that it wanted the Commonwealth to only fund Commonwealth matters. This premise ignored the fact that many Commonwealth matters are tried under States’ systems, that the joint approach between State and Commonwealth averts unnecessary duplication, cost and that legal issues are not of their nature compartmentalised but may have some areas of overlap between State and Commonwealth laws.

Queensland and New South Wales in response to the Commonwealth’s “State/Commonwealth matters” rationale have indicated that they will now run their own State-based legal aid systems. Queensland is looking at “effective and economical ways” and innovative commercial arrangements”¹⁸ Again, the consequences of such splits in legal aid commission work will only further disadvantage the people with a legal problem who will not be sufficiently conversant with the legal system or able to decipher whether their matter is a State or Commonwealth matter. The poor are to suffer at the hands of a legal system which is complex by virtue of our Federal system of government.

Ideas such as computer legal information instead of person to person legal advice and increased pamphlets containing legal information have been publicly mooted as ways around the funding cuts. The Queensland Commission has been a huge advocate of this as an alternative to legal advice. We question the effectiveness of such manoeuvres. Any one who has a legal problem knows that often the circumstances in each case are unique or complex and a computer print-outs, computer interaction or pamphlets will not guarantee quality nor appropriate legal advice.

The fact that many people do not have access to computers, do not have the relevant computer skills are from non-English backgrounds or are semi literate

¹⁸ Legal Aid Queensland Act 1997, s3 (1)

are ignored. When the television breaks down normally you call a television technician. When the toilet is blocked you call a plumber. Now if you have a legal problem you may be expected to solve it by reading a pamphlet. Is the next logical progression, given health care cuts, that a person be expected to read a pamphlet to diagnose their illness. Such a course would clearly be fraught with danger. Ascertaining the correct and most beneficial legislation or determining how best to resolve a legal problem requires a personalised and skilled professional to give advice or if needs be representation in court. Community education about legal rights, responsibilities and information are important but they cannot substitute good, quality, appropriate and tailored legal advice. If this is the way the poor are to receive legal advice, then they are again at a disadvantage compared to those individuals, corporations and government departments who can afford a number of Queens Counsel, barristers and solicitors.

Sadly lacking in the whole debate from governments and legal aid commissions has been a discussion about the importance of justice, fairness and equality before the law.

The fundamental protections of access to legal representation and advice which ensure that people can defend themselves, make claims when they are wronged or seek the laws protection are increasingly becoming the domains of only the very rich. Claims by senior bureaucrats that the "good old days" of "handing the cap around" will need to be reactivated are based on a myth and ignore that in an increasing climate of unemployment and user pays, poor people in poor communities such as Melbourne's West do not even have the money to spare to buy the hat let alone put money in it.

In the recent global clamour for privatisation, corporatisation, managerialism and the free market economy it appears that justice is a victim. Governments at all levels are abrogating their role as regulator and assurer of the common good. Justice is becoming an item to be purchased, it also now seems to have a price. Justice appears to be losing its important status as a right intrinsic to every citizen and as the principle underpinning our democracy. In the past the legal framework has never adequately catered for the marginalised and poor. This is a good reason to improve it rather than compounding existing inequities. It is important for those of us who value the capacity for all citizens to participate fully in the life of the Commonwealth to advocate for respect for human rights and dignity. The capacity to activate a human right in today's society or to resist unwarranted intrusions upon those rights is integrally linked to the operation of an accessible, just legal and administrative system.

As Christians, as members of a community each of us have a responsibility to each other to ensure justice and peace in our society. It is said that evil prevails where good people do nothing. It is important that our policy-makers and institutions both public and private, whose conduct impacts negatively on members of the community be accountable for their actions. One way to achieve this is to voice our disapproval of actions which undermine our inherent humanity.

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