

CHANGING DIRECTIONS IN LEGAL AID

A Litigation Assistance Fund was recently launched in South Australia by the Attorney-General and the Law Society. It has been reported that the fund has been given a \$1 million starting grant and will be funded from the legal practitioner's guarantee fund.

The reason for the creation of the fund is that the legal aid system (as administered by the Legal Services Commission of South Australia) is suffering from funding pressure which has made it more difficult for individuals to obtain assistance from that source. At this point one might be forgiven for thinking that the South Australian legal profession has broken out in a rush of concern for those failing to qualify for legal assistance.

However, the fund arose simply because its creators are concerned that the middle class are the real losers in the litigation funding stakes. It has often been said that the legal aid system caters for the poor; the rich are able to fund their own legal actions; and the middle class miss out. Like many myths, if it is repeated often enough people will begin to believe it.

The cold reality is that the legal aid system does not adequately cater for the poor. The application of the means and merit tests excludes many poor people from accessing legal assistance. One only has to consult any Annual Report of a Legal Aid Commission to see the profile of applicants who are denied legal assistance. Similarly, community legal centres are only too well aware of the cases which the Commissions are unable to handle, cases which are not turned away because of the economic affluence of the applicants.

As for the 'middle class' — assuming we can agree on a definition — it is no doubt true that most are unable to meet the costs of their own legal actions. It is also clearly the case that few, if any, will qualify for legal aid given the low income and assets

thresholds which the Legal Aid Commissions employ. These tests, as already noted, exclude many people who would not even consider themselves middle class.

The fallacy on which the Litigation Assistance Fund is built is that it is assumed because middle class people do not qualify for legal aid they do not therefore have access to the legal system. Yet in a number of areas middle class people do have such access and do find themselves in a much better position than the poor. They are more likely than the poor to have insurance policies which provide legal representation where necessary; they are more likely to be employed and thus have access to Union lawyers in work related matters; and they are more likely to be users of grievance procedures which do not rely on lawyers such as ombudsmen, consumer affairs bureaux, Equal Opportunity Commissions and other complaint mechanisms.

So why do we need a Litigation Assistance Fund? The middle class may feel in need of more legal assistance, but these people do not represent the area of greatest social need. The legal aid system should be more adequately funded if we are really serious about providing the poor with the means to seek justice through the legal system. That is where the greatest need lies.

This points to why there is a need for this new fund. The legal aid system has been run down to the level where it is principally concerned with the provision of legal assistance in criminal and family law matters, areas which drain many of the funds available for legal aid in the Commissions. Redressing social inequalities through test cases and education has taken a back seat to managing the daily legal needs of the poor — important work, but hardly likely to threaten the status quo.

The Legal Aid Commissions do not have the capacity to accommodate the legal problems of the middle class. The often quoted reason for this is that they have insufficient funding to do so, but there is another reason. The legal aid system has been designed around the legal needs of the poor. Even though those needs are not adequately met, to attempt to redefine its role as having to also service the middle class would require either a wholesale change in priorities (which would be politically unwise), or a huge injection of funds (which would be fiscally difficult).

The solution? A separate fund, drawing on the traditional sources of legal aid funding, with a separate set of priorities. Such different priorities are evidenced by the Litigation Assistance Fund manager's reported comment that '[t]his will help middle Australians, including small businesses involved with civil matters' (*City Messenger* (Adelaide) 5.8.92).

It will be important to monitor the way this fund develops. There is no doubt that the legal aid system (in the shape of the Legal Services Commission) could have used an injection of funds such as has gone into the new fund. Given the source of the new fund's money, one wonders whether we are witnessing a subtle redirection of legal aid funds away from the poor towards the middle class. The danger is that as the Litigation Assistance Fund becomes more entrenched, its users — the articulate middle class — may make more and more demands for a greater share of the legal aid pie. The losers, once again it seems, will be the poor. The winners, of course, are the lawyers as yet more money is poured into paying for their services.

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