

OPINION

Legal aid: Start again

Current reforms

The Legal and Constitutional References Committee of the Australian Senate is currently considering the operation of legal aid in Australia, and is due to report in April.

The Committee was given a wide ranging brief to enquire into the operation of legal aid; its report will no doubt be directed towards ensuring that legal aid — the provision by the state of legal advice and representation, confined in practice to dispute resolution — works differently and better. This may well translate, in blunt terms, into funding cuts: at the best the report will recommend adjustments to the existing system of legal aid.

In this issue, Steven Reynolds' article tests the approach of the Federal government to legal aid against agency theory; this is an important contribution to understanding the current Federal/State dispute. Mary Anne Noone's article examines the adverse effect that a dry economic approach to legal aid has on the distinctive identity of community legal centres; the article reflects the urgent need to seriously analyse the future of legal centres in the context of legal aid.

Starting again

While there are many ways of analysing, and perhaps improving, the existing legal aid system, it may be time to rethink legal aid at a conceptual level.

Legal aid once had the overtly political, and wholly unrealistic, aim of achieving social change. A lesser but largely unrealistic, current aim is to ensure equality of access to justice, or at least to the courts' processes. The current and deeply entrenched aim for the state's provision of legal aid in Australia (and generally in industrialised democratic countries) is the unremarkable, charitable one of helping people who cannot help themselves: legal aid is seen in current debate as a form of welfare, of subsidised state assistance.

Rightly or wrongly, welfare is not in vogue, not just this year or for the current Federal Government, but in the western industrial world in the 1990s.

To the extent that the term 'welfare' identifies a hand-out mentality, critics see legal aid as another unproductive drain on public resources. It is also vulnerable to the criticism that it is poorly targeted and inequitably distributed. And that is to attack it without invoking the common and ill-informed complaint that legal aid simply lines lawyers' pockets.

The almost exclusive criterion for assessing government expenditure is now, again rightly or wrongly, the extent to which the resulting activities contribute to the community's wealth. For these purposes the community's interests are assessed by corporate standards, and 'wealth' is measured by conventional financial indicators such as capital, corporate profitability and turnover, retail spending and investment activity. A further measure, less emphasised, might be the accumulation of social capital, features such as knowledge, confidence, health and self respect.

As legal aid is commonly characterised, it fails this 'wealth' test and is a marginal, even endangered, form of government expenditure. But the truth is that, stripped of its historical welfare tag, legal aid does contribute to Australia's financial and social 'wealth', and is already an important part of a productive and growing economy; it could be even more so if fundamentally reformed. This is as true of legal aid in civil and family matters as it is in criminal matters; only the assistance given to recidivists would be at the lower end of the social wealth scale, and then is necessary as a consequence of simple human rights obligations.

Legal services and wealth

Access to legal services — strategic advice, documentation of transactions, monitoring of regulatory developments, rule compliance and dispute resolution — is necessary for effective participation in a capitalist society.

Economic analysis shows that legal services do not merely redistribute wealth, but enhance wealth and preserve social capital. An individual's participation in the economy, not in business but simply in a functioning lifestyle, is enhanced by access, when necessary, to legal assistance.

Access to legal services does not mean an increase in disputes: it is an exercise in knowledgeable activity and dispute avoidance. What is true for a corporation or business person, for whom access to legal advice and representation is taken as integral to efficacy, is true for any person whether as a purchaser of goods and services, an investor, or as a vendor of their own labour.

Informed participation in the market makes the market work. Indeed, the need for regulation of the market, undesirable if not anathema to those who believe in the market's strengths, is less necessary as the players, particularly consumers, become more knowledgeable and better resourced.

Even at the lowest level of individual participation in the market, a person's access to legal assistance is ultimately a saving for the state. Investments for want of legal advice might fail and lead to bankruptcy; an unfair dismissal for want of legal advice might be uncontested and lead to unemployment. Either event may result in dependence on social security, in family breakdown and health problems: loss of social capital and cohesion, loss of market participation, and a direct cost to the state.

While legal aid in its current form is confined to dispute resolution and delivers only a part of the panoply of legal services, it ensures that some citizens to some degree are better able to take part in the wealth transfer and creation, and to conform to the regulation, that define a market economy.

A new 'legal aid'

Legal aid — the state's guarantee — needs to be re-characterised as 'access to legal services'. A citizen's security, confidence, and level of constructive participation would be enhanced by access to the broad range of legal services, as it is now by access to comprehensive medical services. Both good health and legal security are part of a fair and civil society.

If legal aid was all it could be: the guarantee by the state of a sufficient level of access to general legal services for every citizen, the state would be investing in the capacity of consumers and players in the market to participate constructively and effectively.

Implementing such a system would be unique in the common law world, and would be complex, quite apart from the political dimensions. As is the case with medical services, access to such public legal services would be circumscribed: participation would require degrees of financial contribution from the individual; there may be a rebate system in operation; and the system is likely to depend on establishing the necessary tax base.

In any event, expenditure of tax dollars in this way would not be 'welfare' payments and, in current thinking, 'lost' expenditure: the provision of universal access to legal services is integral to a secure, participatory and productive society.

Simon Rice
NSW Editorial Committee
Simon Rice is a Sydney lawyer.