A Mixed Model Without The Legal Profession?

Exploring the Australian evidence of changes in private lawyer participation in legal aid

Don Fleming

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1. Introduction

The national legal aid scheme in Australia is a mixed model.

The involvement of the private legal profession and its lawyers in legal aid administration and service delivery has been essential to the success of the Australian scheme.

Since the mid-1990s there have been widespread claims that private lawyers have disengaged from the national scheme. Lawyers are said to be doing so because:

- Payments by legal aid providers are too low
- Legal aid work is unprofitable

Disengagement from legal aid is said to have been most marked amongst experienced private lawyers.

These claims often infer that private lawyer disengagement will imperil the operations and efficacy of the mixed model, and impact adversely on the quality of service delivery, although these associated claims are rarely made overt.

Professor, School of Law, Division of Business, Law and Information Sciences, University of Canberra, ACT, Australia, 2601. The material on which this paper is based on a work-in-progress paper expected to be completed and published later this year. Anyone wishing to obtain a copy of that paper should e-mail me at don.fleming@canberra.edu.au.

These claims have created an influential orthodoxy. The orthodoxy that "lawyers are leaving legal aid" has been applied as an effective lever to extract increases in legal aid funding, agreed to by most if not all non-state actors in legal aid politics.

But the orthodoxy is not without its problems, e.g.:

- The evidence that private lawyers are leaving legal aid is predominantly anecdotal

- The evidence of any actual negative impact on the supply of legal aid services is equivocal (at least until 2000)

2. The research-based evidence

Since 1998 there have been three (3) major research projects that have tested, or attempted to quantify, the anecdotal orthodoxy:

- A 1998 report examining inter alia changes in participation in legally aided family law and criminal law work in Queensland ("the Griffith report")

- The 1998/99 Justice Research Centre family law study

- The 1999 National Legal Aid survey of approx. 250 solicitors' firms

3. The similarities and differences in the Australian research

The question is, to what extent does the evidence adduced in these three research projects support the anecdotal orthodoxy, i.e., that since the mid-1990s Australian private lawyers have left the national scheme in significant numbers?

There are important similarities in the results of the Australian research.

The research does support the essential claim that private lawyers are ceasing to perform legal aid work. And it seems likely on the basis of the research that this is a trend that was probably accelerated by 1996/97 the Commonwealth dictated changes to legal aid funding and management. But none of the research tells us with any reliability how many and which lawyers and firms have left legal aid, or why.

The research also supports the claim that payments by legal aid providers to private lawyers acting for legally aided clients were low (if compared to fees paid by self-funding clients for similar legal services). On this issue the results of the NLA survey provided indicative evidence of this disparity:

- In 1999 the mean hourly rate in legally aided family law matters was AUS$92.00

- Whereas the mean hourly rate charged to non-legal aid family law clients across all 250 solicitors' firms was AUS$176.00

- And the mean rate across the 60% of firms' charging greater than scale (AUS$125.00) was $216.00 per hour

In addition the Griffith and JRC research contain consistent indicative evidence that the actual value of hourly legal aid rates paid are significantly less than nominal hourly rates. Cost and service caps imposed by legal aid providers mean that effective hourly rates may be as much as 50% less than nominal rates, thereby compounding the disparity with fees charged to self-funding clients.

None of the research corroborates unequivocally anecdotal claims that legal aid work is as a consequence an unprofitable activity for private lawyers. Why?

- We have no agreed conception of profitability (an issue discussed in the Griffith report)

- At least some private lawyers obtain some indirect financial benefits from legal aid work (notwithstanding low rates

- One example being practice/client building (possibly partic. in criminal matters (*see* Griffith report))

- Another example being legal aid work as training for new entrant/inexperienced solicitors (*see* JRC report)

- There are significant differences in incomes amongst private lawyers

- Indicative evidence in the NLA survey results that at least for some solicitors legally aided family law work was a viable activity over 1994-99

Nevertheless, the research evidence strongly supports the proposition that legal aid work is an unrewarding source of income for private lawyers, if compared to income generated from comparable work performed for self-funding clients. Furthermore, the indicative evidence from the research with the income and profitability data in ABS Legal Services Industry surveys and the NSW Law Society solicitor's profiles clearly indicates that legal aid work appears insufficiently profitable to allow a majority of:

- Solicitors' firms to achieve parity of operating profit with industry peers

- Principals and employed solicitors to maintain parity of income with their counterparts in similarly sized firm, or, in the case of barristers, years of call

There are also significant differences in the Australian research.

The Griffith researchers found that significant numbers of experienced family law and criminal law practitioners had abandoned legal aid work in Queensland. Thereby supporting the anecdotal evidence that this phenomenon was present across all Australian jurisdictions.

The other research contests, or is at least not entirely consistent, with this evidence:

- The JRC research found family law solicitors in the survey sample performing legal aid work had a mean number of 13 + years of experience

- The NLA survey results showed that some experienced solicitors had ceased to perform legal aid work. Yet in both 1994 and 1999 60% of all solicitors in respondent firms performing legal aid work had at least 5 years experience, with a significant number reported as possessing 10 + years of experience

- The NLA survey results also indicated the presence of a stable core of experienced solicitors who persisted with legally aided family law work over 1994-99 (notwithstanding low legal aid remuneration, and a worsening financial climate for the national scheme)

The findings of the Griffith researchers also supported anecdotal claims of juniorisation, or the presence of disproportionate numbers of new entrant or inexperienced lawyers in the delivery of legal aid services. A phenomenon said to result from the response of solicitors' firms to the departure of experienced practitioners from the market, and the low price paid for legal aid services.

On the other hand the results of the JRC and NLA research were different:

- The JRC research found no evidence of a greater prominence of new entrant or inexperienced solicitors in legally aided family law work

- The NLA survey showed no significant changes in the numbers of solicitors performing legal aid work in respondent firms over 1994-99

It needs to be kept in mind that the Griffith report sought to assess wider dimensions of juniorisation. Nevertheless neither the JRC or NLA research supports a generalised claim that new entrant or inexperienced lawyers had become more prominent in legal aid delivery.

4. The shortcomings in the available evidence

Comparing the Australian evidence revealed differences in the story of changes in private lawyer participation in legal aid. The research does not allow these differences to be explained, or to adequately explore the

implications of the research findings for policy making in the mixed model. Why?

- Neither the Griffith report, the JRC project nor the NLA survey was, or claimed to be, a definitive account of relevant changes in the market for legal aid services
- The research and the evidence adduced had many incomparable features
- The research results were based on snapshot evidence (or, in the case of the Griffith report, largely rehearsed the anecdotal evidence of practising lawyers)
- No reliable alternative data on markets for legal aid services existed

Moreover when this project began in 2000 there was not a great deal of interest in exploring the differences in the research results. Partly because of the anecdotal orthodoxy that "lawyers were abandoning legal aid" was a proven funding lever. Partly because of the Australian legal aid system is reluctant to invest in policy relevant applied research.

Accordingly we decided to investigate if relevant evidence of recent changes in lawyer participation existed in comparable countries with comparable legal aid systems. The purpose of these inquiries was twofold:

- To impose a reality check on the differences identified in the Australian evidence
- To discover if the cross-national experience helped us to better understand the Australian experience

5. The cross-national evidence

In 2000 we made inquiries of researchers and policy-makers in Canada, England, New Zealand, Scotland, The Netherlands and the United States. Further inquiries were made this year.

These inquiries revealed issues and problems associated with private lawyer engagement exist in the Judicare and mixed model schemes in Canada, England, New Zealand, Scotland and The Netherlands. Low salaries and difficult working conditions remain an issue in the salaried schemes in the United States.

Lawyers in all six comparable societies were dissatisfied with at least some aspects of legal aid work. The low price paid for service delivery was the principal complaint.

Nowhere was there conclusive evidence that legal aid rates were too low, or that legal aid work was inevitably an unprofitable activity for private lawyers.

As in Australia objective evidence of how legal aid markets operate, and the profitability of legal aid work awaits investigation in workplace and sector specific labour market research.

However in all six societies convincing prima facie evidence exists that legal aid work is a financially unattractive proposition for lawyers:

- In Judicare, salaried and mixed model schemes there is evidence payments for legal aid work do not remunerate lawyers for the actual value of the services supplied to legally aided clients
- In the mixed model and Judicare schemes the available evidence is that payments by legal aid providers are well below the amounts received by private lawyers from self-funding clients
- Complaints about transaction costs are evident in all mixed model and judicare schemes:
    - Private lawyers in Canada and England, for instance, complain of process costs or 'bureaucracy'
    - Fee or service caps imposed by legal aid providers are also said to reduce the real value of remuneration for legal aid work

The cross-national inquiries also revealed evidence that changes in private lawyer participation was an issue in other legal aid systems. But the evidence was mixed on whether that meant lawyers were actually ceasing to provide legal aid services:

- In Canada and England the weight of the evidence clearly indicates a trend away from legal aid
- Whereas in other societies there was either no evidence private lawyers were ceasing to perform legal aid work, or the available evidence was equivocal:
    - In The Netherlands in 2000 it appeared that sufficient numbers of private lawyers remained willing to accept legal aid cases (although problems existed in attracting young lawyers to legal aid)
    - In New Zealand a 1997 survey did not reveal "a large scale defection from legal aid work"
    - In Scotland in 2001 researchers could not substantiate claims solicitors had abandoned civil legal aid work (although noting there may be some cause for concern)

Moreover even in the two societies in which there was convincing evidence of private lawyers ceasing to perform legal aid work the impact on the supply of legal aid services was unclear. In Canada:

- It did not appear the supply of private lawyers was insufficient to satisfy the demands of legal aid providers

- In 2000 the Canadian Bar Association reported its members were "to a large extent, keeping legal aid delivery alive and functioning, though too often, this is taken on at great personal and professional cost"

- Although there was evidence of concerns about the quality of service delivery

In England similarly in 1999-2000 it appeared that significant numbers of solicitors remained active in the market for legal aid services. Although by 2003 both The Law Society and the Legal Services Commission were expressing concerns about supply, sufficient to prompt the latter to begin to intervene in the market for legal aid services to bolster the supply of new entrant solicitors and barristers in immigration matters.

The cross-national inquiries also showed that the issue of the age and experience of private lawyers providing services was an issue in other legal aid systems. In particular, Canada, New Zealand and Scotland.

However the available research did not always corroborate anecdotal and other evidence that experienced lawyers were ceasing to perform legal aid work, were prominent amongst those doing so, or had been replaced by new entrant or junior or less experienced lawyers, for instance:

- The 1997 New Zealand research showed that:

    - The majority of participant private lawyers had acted in legally aided cases for at least four years, and were a "relatively experienced group of practitioners"

    - "A fairly stable group of practitioners", the majority being "relatively senior", and expecting "to continue to work in this area", serviced legal aid needs

    - Those who had ceased to perform legal aid work had "for the most part, made alternative career choices

- Nor did researchers in Scotland find the case for juniorisation proven:

    - They observed that such claims carried "some logic"

    - But noted that "firms providing civil legal aid probably had fewer opportunities than solicitors in larger firms to delegate work to junior or less experienced solicitors" as many operated as "sole practitioners, or in outlets with a small number of qualified staff"

In two other societies there was evidence that private lawyers working for legal aid providers were likely to be older and more experienced practitioners:

- In The Netherlands it appeared service providers were likely to be older private lawyers who acted for legal aid clients "out of tradition or idealism", and were anticipated to continue to accept legal aid cases

- In England Law Society research in 1999 showed age was a relevant but minor factor in determining which solicitors acted in legally aided cases:

    - Middle-aged solicitors between 35-54 years of age were shown to be most likely to perform legal aid work

    - Practitioners under 35 years of age were amongst those found to be "less likely to carry a legal aid caseload", although prominent in some types of legal aid work

    - Workplace status had little overall impact on which solicitors performed legal aid work (although in a market dominated by small firms employed "solicitors were slightly less likely to have conduct of legal aid cases than partners")

In other words the cross-national evidence indicates that experienced private lawyers are well represented in markets for legal aid services. Indeed there is evidence that the problem facing legal aid providers may be less an over representation of new entrant or less experienced lawyers than an ageing workforce of those private lawyers willing and able to act for legally aided clients. For instance:

- In England in 2002 in response to shortages in new lawyers seeking training contracts with legal aid firms and the number of solicitors' firms in offering such contracts the Legal Services Commission established a scheme to "support the next generation of legal aid solicitors"

- In The Netherlands in 2000 the hourly rates for legal aid work were increased in part to address the problem of "a very low number of young people doing legal aid cases"

- In the United States it appears the salaried scheme might be confronting problems of seniorisation, or an ageing workforce of legal aid lawyers

The cross-national inquiries also revealed other factors influencing which lawyers and firms perform legal aid work not explored so far in Australian research:

- Gender may be an issue in determining which lawyers do legal aid work. In England, for instance, women solicitors are over represented in the market for legal aid services

- Size of firm appears to be a key participatory factor. In England, New Zealand, Scotland and The Netherlands reliable or indicative evidence exists that private lawyers working in small firms are more likely to participate in legal aid than those working in larger firms

- There is also evidence that unregulated markets for legal aid services typically comprise:
  - A significant number of low volume suppliers, or "dabblers"
  - A smaller number of private lawyers and firms that consistently act for a disproportionately greater number of legal aid clients

6. The lessons for an Australian policy response

It remains to consider what lessons emerge from the anecdotal evidence, the Australian research and the cross-national experience for policy-makers concerned to:

- Appropriately respond to claims that private lawyers have disengaged from the national scheme in significant numbers

- Maintain and foster the supply of private lawyers as providers of quality legal aid services

There are six (6) principal lessons.

The first is to acknowledge the wisdom of the cautionary advice of a prominent US socio-legal researcher at the ALRC Managing Justice conference three years ago to beware of generalizations about lawyers and their work. The reality of lawyers' work is not always as it is claimed to be, it is invariably more complex, and informed policy-making can only sensibly proceed from research based evidence (*see below*).

The second lesson is that changes in private lawyer participation pose a real problem for funding and managing the Australian mixed model. Interest group and ideological issue may be factors in the anecdotal groundswell reporting private lawyers leaving legal aid (*see below*). But the similarities in the findings of the Griffith report, the JRC study and the NLA survey results clearly indicate the anecdotal evidence is reporting real changes in the dynamics of legal profession and private lawyer engagement with legal aid.

We cannot yet say with any certainty how many and which private lawyers and firms have disengaged from legal aid, or how many and which continue to accept legally aided clients. Nor do we know how the changed dynamics of

private lawyers and legal aid have impacted on the supply of quality legal aid services. The available evidence does demonstrate these dynamics include:

- High levels of private lawyer disaffection with legal aid work
- Significant disparity in payments by legal aid providers and fees paid by self-finding clients (incl. other public sector users)
- Convincing evidence that legal aid work is financially unattractive for most private lawyers and firms
- The likelihood of a clear trend away from private lawyer participation
- Convincing evidence that the numbers of private lawyers and firms prepared to work at current legal aid rates is falling

At the very least the available evidence contains clear warning signs to policy makers. Not only of possibilities of market failure, or sufficient numbers of private lawyers exiting the market to reduce supply below the demands of legal aid providers. But also of the potential of the changed dynamics of private lawyers and legal aid to damage the integrity of the mixed model that underpins the national scheme, and the availability, accessibility and quality of legal aid services.

The third lesson flows from the cross-national experience. The experience in Canada, England, New Zealand, Scotland, The Netherlands and the United States cannot tell us how many and which Australian lawyers are leaving legal aid, or resolve the differences evident from comparing the Australian research. However the state and legal and legal aid systems in these societies exhibit many comparable features to Australia, including:

- The private legal profession and its practising lawyers has dominated modern markets for legal services
- All are welfare capitalist states applying comparable techniques to administer public policy projects such as legal aid
- All participated in the post-WWII expansion of legal aid (with similar objectives)
- In the English-speaking societies macro-economic and regulatory reform since the mid-1970s has diluted the original policy assumptions and scope of the post-war schemes (and legal aid has been subjected to comparable pressures for change in The Netherlands)
- The mixed delivery systems have all depended on private lawyers as service providers, as have the Judicare systems

The cross-national experience tells us that Australia is not alone. Legal aid providers in comparable societies are also encountering changes in the

dynamics of lawyers and legal aid. Whilst not explaining the Australian experience the cross-national evidence indicates that policy-makers need to explore factors impacting on the market for legal aid services not highlighted by the orthodoxy, including the following possibilities:

- That the market might include a significant presence of older and experienced private lawyers
- The existence of problems (short, medium or longer-term) in attracting and keeping new entrant and less experienced lawyers in the market
- That seniorisation or an ageing legal aid workforce may be an issue
- That women are over-represented in the market
- That size of firm is the premier indicator of activity in the market

The fourth lesson relates to research agendas. Clearly there is a need for applied research to inform policy responses. What form should this research take, an important issue conceptually, and financially in a cash strapped legal aid system, not predisposed to expenditure on applied, policy-oriented research? Applied research initiatives should not be premised on issues such as:

- Fees paid to private lawyers performing legal aid work
- The profitability of legal aid work
- Increases in legal aid payments to retain private lawyers in the national scheme

Instead research initiatives designed to assist governments and policy-makers to explore the problems presented by the evidence of private lawyers disengagement from legal aid should acknowledge:

- The purpose of legal aid schemes is to provide legal services to achieve access-to-justice policy objectives (and not to ensure the viability of private lawyers or their firms)
- The Australian mixed model is now less of a 'mixed model of legal aid' (as we knew it in the 1970s and 1980s) as a complex mix of legal services policy and delivery options (an often overlooked consequence of the shift to an access-to-justice approach in 1993-95).
- The Australian research and the cross-national evidence demonstrate that policy-makers are confronting changes in the market for legal aid services. Applied research initiatives need to adopt a labour market focus, investigating issues such as:

- Age, experience, gender and workplace status of private lawyers undertaking legal aid work (incl. changes over time)
- Types and volumes of legal aid work performed
- Incomes from legal aid work
- Size of firms performing legal aid work
- Cost of supplying different types of lawyers' services required by legal aid providers
- Career and employment changes
- Why private lawyers do, and, do not do, legal aid work
- Contextualising markets for legal aid in the market for lawyers' services

Labour market analysis is not a panacea. Price, profitability and income are not the only factors influencing private lawyer participation (*see below*). Moreover labour market analysis targeting specific lawyer workplaces and components of the market for legal aid will be most cost and outcome effective for policy-makers.

The fifth lesson is that price, or increasing payments for legal aid services, is not the only policy instrument available to encourage private lawyer participation in legal aid.

Indeed at present, if ever, legal aid providers can never compete on price alone. The labour market for lawyers in Australia is buoyant (as it was throughout the 1990s). There is a healthy and profitable legal services sector, attributable mainly to growth in demand for commercial and corporate-type legal services.

However price, profitability and income are not the only factors influencing private lawyer participation in legal aid. The available evidence demonstrates that:

- Legal professional ideals emphasizing a duty to assist the poor and 'battlers' still influence decisions by private lawyers to accept legal aid work (although probably a declining influence (see below))
- Legal aid remains an important mobilizing ideal of the institutions of the private legal profession (although no longer a dominant ideal (*see below*))
- Private lawyers perceive 'bureaucracy' and indirect costs in satisfying administrative requirements of legal aid providers as disincentives to undertake legal aid work

In addition research in England reports the negative impact of quality processes, service capping and other changes to legal aid administration on solicitors' expectations as knowledge workers and professionals. Research which must be understood in the context of a significant literature describing the challenges faced by professional models of work in comparable contexts, such as the civil service and health and education sectors in market welfare states.

Policy responses to the problem of ensuring an adequate supply of quality legal aid services from private practicing lawyers should include:

- Pro-active conservation and management of existing sources of supply
- Interventions to manage supply. Examples from the cross-national experience are:
  - Increasing legal aid rates in The Netherlands (for reasons incl. attracting young and new entrant lawyers to legal aid work)
  - Financial incentives in England to attract new entrant solicitors to legal aid work and barristers to immigration work
- Simplifying the administration of grants of legal aid (consonant with accountability and quality measures)
- Administrative flexibility to acknowledge differences in work and administrative cultures, e.g., between small and large firms, types of legal practice etc.
- Interventions to create attractive legal aid workplaces through measures such as:
  - Management to encourage opportunities for private lawyers to use their professional expertise
  - Appropriately designed purchaser/provider contracts, panel schemes and other delivery mechanisms
- Experimentation in supply, e.g.:
  - Contracting firms as suppliers of legal aid
  - Providing management expertise to legal aid suppliers

The sixth lesson for policy-makers is more of an observation. The anecdotal evidence of "lawyers leaving legal aid" demonstrates tangible concerns within the private legal profession about the viability of legal aid work and the mixed model of legal aid delivery. Particularly concerns expressed by:

- Private lawyers and firms that perform legal aid work, or would like to do so

- Legal professional institutions (the Law Council, and the law societies and bar associations)

Yet the expression of such concerns appears to far exceed the number of private lawyers and firms with a direct financial interest in legal aid. In part this simply demonstrates the scale of the continuing support for legal aid and the mixed model within the private legal profession.

On the other hand the private legal profession and most private lawyers now have fewer reasons to be committed to legal aid. Since the mixed model was established in the mid-1970s lawyering and the legal profession has been subjected to important and continuing trajectories of change, including:

- The commercialisation of legal practice

- New levels of internal and external competition in market for lawyers' services

- The application of access-to-justice policies

- Significant changes to the mixed model of legal aid in 1996/97

- Reforms intended to establish a National Market for Legal Services

- The challenges to professionalism posed by New Public Management and consumerism

In combination these changes have altered, depending on your perspective, the modern bargain between the private legal profession and the state, or legal professional hegemony in the market for legal services. The effects on the private legal profession include:

- De-stabilizing its established relationships with governments and society

- Diminishing the significance of legal aid as a mobilizing ideal

- Diminishing the socio-economic imperatives to control the legal aid system, or demonstrate its efficacy

For these reasons the anecdotal evidence may be telling us not only about the fact that some private lawyers are ceasing to perform, or scaling back, legal aid work, and that many private lawyers remain committed to the ideals of legal aid and the mixed model. This evidence may also contain expressions of:

- Disappointment with the failure of the legal aid project to match professional aspirations (the lament factor)

- Disengagement from legal aid as a mobilizing ideal (in favour of pro bono and other re-inventions of professionalism)

- Disaffection from the new relationships emerging between the private legal profession and the state and society

In the short-term these aspects of the anecdotal evidence may have little significance for policy-makers. In the longer-term they may indicate wider issues and are symptomatic of wider changes in the mixed model of legal aid delivery.

7. Conclusion

The success of the Australian mixed model of legal aid has depended on the involvement of the legal profession. Private lawyers and firms have typically provided 60% of legal aid services, and the legal profession has played a major role in legal aid administration. In the 1970s and 1980s professional agreement to accept 80% of standard fees meant that private lawyers made a significant indirect contribution to the cost of legal aid delivery.

The evidence reviewed in this paper strongly supports anecdotal claims that fees now paid to private lawyers are inadequate. It also supports anecdotal claims that significant numbers of private lawyers are disengaging from legal aid, ceasing to perform, or scaling back, legal aid work, or signalling a retreat from legal aid as the spearhead of the access-to-justice response of the private legal profession.

On the other hand the evidence in the paper demonstrates that we cannot say with any reliability which and how many private lawyers and firms are ceasing, or scaling back, legal aid work, why or assess the impact on the market for the supply of quality legal aid services.

This is not to say that the problems do not exist. The thrust of the paper is that we need to undertake labour market oriented research to quantify and better understand the phenomena revealed by the anecdotal evidence, and supported in large part by the findings of the Griffith report, the JRC study and the results of the NLA survey.

The changed dynamics of participation in legal aid, and how we might respond, are not only relevant to the private legal profession and its lawyers, but to governments and policy-makers charged with the responsibility of ensuring the continued supply of quality legal services and the efficacy of the mixed model of legal aid delivery in the access-to-justice policies of the market welfare state.

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