JUSTICE-ILAG

Legal aid newsletter

March- April 2010

Opening note

Welcome to what for the Northern Hemisphere is the Spring issue. This issue, as an experiment, contains more contributions and rather less news coverage than previous ones. Let me know if you like this approach or would prefer a shorter newsletter.

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1. Major themes of the issue

This issue is brought to you by the number three. There are three contributions:– on the major reform of legal aid launched in New Zealand which shows signs of influencing developments elsewhere; a contribution about the growing interest of the European Union in legal aid within Members States which raises the possibility of a new influence on developments within 27 European countries; and a discussion of the relationship of access to justice and human rights. There are three noteworthy elements in the news coverage: the impact of cuts and the financial situation; a rather unpleasant backlash against certain 'unworthy' defendants obtaining criminal legal aid; and, finally and again rather unpleasantly, the brief emergence of a manufactured controversy in the US over the 'Al Quaeda 7', seven lawyers in the Department of Justice smeared by association with their past clients.

2. Contributions

Reforming Legal Aid in New Zealand

Professor Kim Economides

(photo: Z Economides)

The following article by Professor Kim Economides, formerly of Exeter University, England and now at the University of Otago New Zealand, is reproduced from the New Zealand Law Journal ([2010] NZLJ 5), published by Lexis Nexis, part of the Reed Elsevier group with the kind permission of author and publisher.

The article considers the recommendations of a review of legal aid in New Zealand by Dame Margaret Bazley and, in particular, the proposal to abolish the Legal Services Agency. Those attending the last ILAG

conference in Wellington will recollect that the review was announced on its opening day. No doubt to the concern of those employed in legal aid administrations around the world, New Zealand, followed now by England and Wales, has taken the view that legal aid can be managed from within government. The article is slanted towards the New Zealand audience for which it was written but raises issues of concern that will be more general.

Like it or not, Dame Margaret Bazley's controversial report is likely to dominate future discussion of legal aid in New Zealand. It calls for a "sea change" in legal aid administration and has unleashed a tidal wave of reform already washing away the moribund Legal Services Agency (LSA) while placing the profession in the position of King Canute. The legal profession may temporarily have delayed the tide of regulatory reform sweeping over many other legal professions throughout the world, but I doubt if it will halt it. The writing is now on the wall: if you don't deal with your bad apples someone else will.

LACK OF EMPIRICAL DATA

The report pulls no punches and provides ammunition for both lawyer-bashers and those who prefer to target bureaucratic ineptitude. More reflective observers will find a thorough and penetrating analysis of the state of legal aid along with an intelligent set of recommendations designed to improve legal aid delivery and meet the legal needs of the public. But will the report's recommendations actually achieve a fair balance between stakeholders' conflicting interests (increased access for litigants, more trust and reasonable remuneration for the profession and greater economic and bureaucratic efficiency for the public) while moving forward in the right direction? Few would query the intended goal of raising quality standards whilst simultaneously lowering costs in legal aid provision in order to further access to justice and control public expenditure, but is there a danger that unintended consequences could take us in the opposite direction?

This is an honest account of the operation of legal aid that exposes and confronts perceived defects in the system. Even if some of its evidence is shaky, if not unreliable, this does not negate the main thrust of the report's critique of legal aid. The headlines highlighting egregious behaviour of certain lawyers understandably have generated heat in both the popular and legal press, but the report also helpfully exposes some significant and neglected areas of legal service provision, particularly initial advice and assistance and the needs of Maori and Pacific Islanders. Denial may not serve the profession well in the long-term, though clearly any factual inaccuracy should be corrected swiftly. The real problem here, also acknowledged in the report, is the lack of "good quality data" to underpin strategic planning (p 25). I shall return to this point.

Given the limited time and resources (intellectual as well as material) available, Dame Margaret has with determination and verve tackled remediable and structural defects afflicting legal aid and genuinely tried hard to raise the quality of legal services for everyone, but especially those who cannot afford lawyers or are currently denied access. Her report is full of

paradox: it is tough yet sensitive, radical but also conservative, both complex and at times simplistic but, ultimately, although a valuable springboard for reform, it is not without flaws.

The Bazley report offers both diagnosis and prescription for the ills afflicting the system based largely on anecdote and an experienced civil servant's nose for reform. For most of the time whilst reading it, one feels inclined to trust Dame Margaret's instincts, but not always. The consumer perspective is pervasive and the report is perhaps at its strongest and most original when focusing on "customer service" in order to make legal aid more comprehensible to the ordinary citizen and on a uniform and comprehensive basis. I welcome the report's effort to highlight the focus on "initial legal advice", present in the Law Commission's earlier report *Delivering Justice for All* (NZLC R 85, 2004, pp 20-24). The Bazley report takes this idea further and makes a valuable contribution to "joined-up thinking" with other public agencies but, as I argue, goes a little too far in this direction, while recognising the valuable role of the public sector in developing legal service provision through the network of community law centres, about which we shall hear more at a later date.

Remuneration is key to understanding the physical presence and motivation of legal aid lawyers in the private sector, not to mention its impact on the quality of the work they provide. In the United Kingdom there has been widespread withdrawal by the private profession from the provision of legal aid because of perceptions about the adequacy of legal aid rates and intrusive managerialism with the result that "advice deserts" have arisen in which the supply of legal aid has virtually dried up across whole counties. Lawyers, even those deeply committed to legal aid provision and the service ideal, have been forced to abandon legal aid because, even with cross-subsidisation from more profitable work, it proves to be uneconomic and unsustainable over time. Similar trends of lawyers withdrawing from the legal aid market in New Zealand have also been reported. In Queenstown, for example, legal aid lawyers are said to be very thin on the ground and the recent ten per cent increase in rates was, according to the New Zealand Law Society, inadequate to stem this tide. But where is the objective scientific evidence or economic analysis on which to base policy changes and long-term strategy?

The report recommends that remuneration be reviewed and that there should be no parity with Crown Solicitors, at least until quality issues have been resolved (p 91). A recent international study of legal aid expenditure found that, despite its comparatively low crime rate, in New Zealand:

> *a large number of cases per head were brought to the criminal courts [and that] ... spending per head on legal aid ... was very low compared with [England and Wales]. Spending per case ran at around 60 per cent of levels in England and Wales, probably in part because of lower per capita income levels in New Zealand* (Bowles & Perry International Comparison of Publicly Funded Legal Services & Justice Systems, Ministry of Justice (MOJ) Research Series 14/09, October 2009, p 16).

The Bazley report is unable to give a clear enough direction on meeting or targeting legal need, levels of consumer satisfaction or the quality of legal aid work, because of the paucity of empirical evidence which, to be fair, the report itself acknowledges. The truth is there is so much we simply do not know or understand about how the legal system operates on the ground. Anecdotal evidence, or even just gossip, is - with few exceptions - all we have, but this is simply not a solid enough foundation for future policy. Dame Margaret admits:

> *... I have not been able to commission sufficient empirical data to enable me to quantify the problem or make specific recommendations on how the legal aid system should respond (p 56).*

Any of the Bazley report's shortcomings are not so much analytical as evidential, and it is unfair to place all the blame on the author for this. Legal practitioners have become an easy scapegoat and it is regrettable that good legal aid lawyers have been tarnished by the alleged dubious or corrupt behaviour of a few. One group that has successfully escaped criticism are my university colleagues, particularly those teaching and researching in law schools. There is no established tradition of socio-legal scholarship in New Zealand's law schools, though my impression as a relative newcomer is that there is in fact much valuable policy-oriented and doctrinal research being carried out, particularly in the fields of family law and criminal justice. Civil justice and legal service provision, however, appear neglected and not so well served and these areas seem not to have been subjected to sustained and rigorous academic scrutiny. Had Dame Margaret been better supported by academic research I believe her report might have been less vulnerable to criticism and better able to identify and confront the challenges ahead. There appears to be little university-based research on class actions, costs, legal needs and alternative sources of funding litigation, or on rural legal services, to identify just a few areas ripe for further investigation.

The University of Otago Legal Issues Centre (UOLIC) has, however, begun to address this information deficit and is currently investigating a range of topics including court user perceptions (www.otago.ac.nz/law/lic/survey.html) along with other projects that aim to explain the nature of cost and delay in the court system. While our preliminary data suggests, contrary to Dame Margaret's findings, relatively high levels of consumer satisfaction with lawyers and courts, we should be cautious about concluding that these are reliable or objective indicators of quality, or that legal services might not be better delivered through means other than professional lawyers or formal courts. Hopefully, over time, the UOLIC will become a beacon for quality research on the operation of the legal system and will work with all interested parties to strengthen the delivery of legal services for New Zealand citizens with a view to exporting good practice elsewhere. It is also important that future lawyers are committed to professional ethics and the fundamental values of the legal system.

I think that legal academics should recognise that some of the ethical failings uncovered by Dame Margaret are not just regulatory or market failures attributable to the lack of remuneration or monitoring, whether by the LSA or the professional bodies. Law teachers

need to ask whether they are doing enough to motivate future lawyers to meet the public's needs.

WHO SHOULD ADMINISTER LEGAL AID?

While I agree with much of the Bazley report, I have serious reservations about the proposal to streamline legal aid procurement by remodelling the basic architecture of legal aid administration. As I write, there are reports that Cabinet will sign off Justice Minister Simon Power's plan to place the LSA inside the MOJ. Is this wise? The report notes that administrative costs have reached $20.4 million and that the LSA struggles outside the bosom of government bureaucracies and cannot "keep abreast with trends and developments" (p iv). The proposed move is not presented as a simple cost-cutting exercise; it is supposed to rationalise administration and permit economies of scale. My concern is that this could prove costly in terms of undermining the legitimacy and integrity of the justice system.

The alacrity of the decision to disestablish the LSA as an independent Crown entity and give responsibility for legal aid administration to the MOJ (with more sensitive functions vested in an "independent" Statutory Officer based inside the Ministry, and answerable to the Chief Executive of the MOJ for select matters) is alarming, not only because of its undue haste but also because, both from a procedural and substantive standpoint, it poses a potentially serious threat to independent decision-making in legal service provision. The report states that this move will not save money but the proposed statutory officer:

> *... will be able to leverage off synergies and ensure that administration of the legal aid system remains in line with modern bureaucratic practices (p 38).*

The Statutory Officer model is claimed to guarantee independence and the Chief Electoral Officer is cited (p 36) as a precedent that preserves the balance between independence and accountability in the field of electoral administration. However, the Electoral (Administration) Amendment Bill 93-1 (2009) canvasses a range of models in its regulatory impact statement yet concludes that the preferred option is:

> *... to establish a new Electoral Commission as an independent Crown entity, as it will provide the best balance of high independence with good accountability and the ability to administer the electoral functions to a high standard* (see www.parliament.nz/enNZ/PB/Legislation/Bills/9/2/e/00DBHOH_BILL9636_1-Electoral-Administration-Amendment-Bill.htm).

It is difficult to see why, in the context of legal aid administration, there appears to have been no regulatory impact statement or consultation on other (possibly more expensive) options, including the option to replace the LSA with a more powerful Legal Services Commission, perhaps along the lines of the one operating in England and Wales, with the capacity to independently research, administer and guarantee quality in the delivery of legal aid. The impression given is that, for whatever reason, the government was keen to be seen to act quickly and close down the LSA while firing a warning shot to the Law Society.

The writing is on the wall for the profession: address issues of quality swiftly or regulation will be handed over to an independent regulator. Dame Margaret's report, whose earlier discussion paper posed a simple choice between the LSA and Law Society as the body responsible for administering legal aid, has conveniently provided the justification for closure of the LSA. Even if we concede that this is the right way forward, and necessary in order to restore confidence and efficiency in legal aid administration, the process itself appears defective. Given that the Legislation Advisory Committee issues such thorough guidance regarding the establishment of new public agencies, including Crown entities (www2.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_9.html), it appears anomalous that the fate of such agencies, including their disestablishment, should be wholly dependent on Ministerial whim.

NEED FOR FURTHER INVESTMENT

As Dame Margaret notes, legal aid is essential to ensuring that the justice system is accessible for all. It supports the rule of law and gives citizens the opportunity to make rights effective. While there is much in the report to build on, and a convincing case is made out for reform, the report suffers from a lack of reliable evidence to support the targeting of proactive services on areas of greatest need. Also, the new framework outlined in the report is too close to government, and this risks undermining the confidence of those who demand and supply legal services.

I hope I am wrong and that imaginative reforms will be implemented that actually deliver quality legal services to the New Zealand public which all stakeholders can have faith in and be proud of. Access to justice is a cause worthy of investment.

Professor Kim Economides

The Future of European Criminal Justice under the Lisbon Treaty

Excerpt from Speech of Viviane Reding, Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship, Trier, 12 March 2010.

The European Union has embarked on an ambitious plan to guarantee minimum safeguards in aspects of criminal justice. Within the UK and a small number of other states, this is highly contentious because reforms made by the recently agreed Lisbon Treaty carry the implication that the European Union's court, the European Court of Justice, will have oversight of this provision, with the capacity to overrule domestic courts. The UK has five years to decide whether to opt-in to this programme of activity. This is an excerpt from a speech by the European Commissioner in charge of the justice programme. Highlighted in italics below are key elements of the programme of work to which the Commission is committed. These were decided at a meeting in Sweden and are thus known as elements of the 'Stockholm programme'. Even if the UK opts out, they are likely to dominate developments in legal aid and access to justice in criminal cases within the EU.

Earlier this week, the European Commission took the first step to improving mutual trust between judicial authorities by establishing EU-wide standards for procedural rights. On 9 March, the Commission proposed a Directive that protects citizens' fair trial rights by obliging Member States to provide interpretation and translation to suspects. The Commission plans a series of measures to improve procedural rights in criminal cases. Let me tell you why we have done this. And what we are going to do next in the field of criminal justice. We need to create a real single area of justice in the EU. Citizens should be confident that their rights will be protected no matter where they are in the 27 Member States – either a French, Swedish, Portuguese or Romanian court. There should be no differences in protection when citizens work, travel or live outside their home countries.

In recent years, progress in justice in Europe has been rather limited, and the focus has been more on security issues. Of course, there is no freedom without security, and there is no security without justice. With the Lisbon Treaty now in force, we can finally rebalance our actions … Nowadays more and more people travel, work, study and live abroad. Criminals are also keeping pace. Crime has become more sophisticated and more international … Without minimum common standards to ensure fair proceedings, set out in EU law that is enforced, EU measures to fight crime – such as the European Arrest Warrant – will not be fully applied. Because judicial authorities will always be reluctant to send someone to face trial in another country without knowing that some minimum procedural safeguards will be respected …

At the start of this week we took the first steps on this journey when the European Commission made a proposal for improving suspects' minimum rights during procedures such as investigation and trial. The European Commission believes that there should be high EU standards obliging all 27 Member States to ensure effective right to interpretation and translation in criminal proceedings. You cannot have a fair trial if the accused does not understand the language of the proceedings. In the future, I foresee better EU rules protecting the right to a fair trial that can consequently have an impact on the back-log of cases in [the European Court of Human Rights in] Strasbourg. Of these about 25000 cases are related to the right of fair trial. This is why this week I took the first step towards a full set of procedural rights in criminal proceedings. Over the next four years I hope that we will give citizens rights that will accompany them throughout the EU:

- *The next step will be presented in the summer this year, and consists of the right to information about rights;*
- *This will be followed by a proposal on ensuring legal advice in 2011;*
- *After that, we will look at the right to communicate with family members,*
- *consulates or employers;*
- *The last step will be the protection of vulnerable suspects.*

When we take this last step it will be 2013, and we will be moving into a better future for criminal justice. I do not exclude that we will by then have identified further necessary improvements for procedural rights, and we will then work further o complete the existing set of rights. These procedural standards, even if they may not be popular in some quarters at

first, will not just guarantee some vital human rights; they are also a crucial building block of the mutual trust upon which the new house of European criminal justice will be constructed. This summer, the European Commission will start out the process by publishing a policy document to begin a debate on the principles we should use to create consistency in the field of European criminal justice aiming at more consistent definitions and sanctions.

It's not dark yet, but it's getting there: access to justice and human rights

This is a speech given in February 2010 by Roger Smith to the Human Rights Lawyers Association in London. Readers may find the argument expressed in a somewhat Eurocentric way but the same points can probably be made by reference to less European sources of reference.

This event takes place against the backdrop of a legal aid budget which has been held at roughly the same figure - just over £2bn - for six consecutive years. The most recent tranche of £23m cuts were announced in December, aimed largely at solicitors. More are promised, aimed at Crown Court advocates. I would guess that in the end the legal aid budget must be vulnerable to proposals for a cut of at least 10 per cent or £200m within the next couple of years, possibly 20 per cent, £400m.

Conservative shadow spokesman have suggested in the recent past that a right to legal aid might join a right to jury trial as protected by its proposed British Bill of Rights. I wouldn't bet on it and, if it happens, I would read the small print with care. The dreadful truth is that there is probably little difference between what we can expect from a government of any complexion. The UK fits within a global picture of severe pressure on legal aid. Exasperated criminal legal aid practitioners protested outside Melbourne's criminal courts before Christmas. Lawyers in Ontario have currently withdrawn working on murder cases and those relating to 'guns and gangs'. Here, legal aid practitioners - and their clients - face a crisis unprecedented in the 60 years of the legal aid scheme. As other public services are decimated to pay for the banking debacle and expensive foreign wars, it will be hard to argue legal aid's corner as a special case.

To what extent can the concepts of access to justice and the articulation of human help to defend, or even advance, the current levels of provision?

Let us begin with 'access to justice'. There is a rhetorical - even a real - sense that human rights are fundamentally about providing access to justice. This is inherent in guaranteeing the rights of the individual. In general, however, the phrase 'access to justice' has a well-accepted, rather vague meaning and denotes something which is clearly – like the rule of law – a good thing and impossible to argue that you are against. The strength and the weakness of the phrase is its nebulousness.

In the context of publicly funded legal services, it is worth remembering that 'access to justice' is a recent and a precise political construct. Its use in this context derives from an influential group of academics, led by Professors Cappelletti and Garth, in an ambitious study of publicly funded legal services entitled *Access to Justice: a world survey* published in 1978. They had a distinct vision of developments in legal services. Looking globally, they saw three successive waves of advance as countries that had seen themselves as wealthy grappled in the 1960s and 1970s with the rediscovery of poverty and recognition of unmet legal needs in their midst. The first wave brought a demand for legal aid and more lawyers; the second recognised that was not enough and fostered new ways of reaching out to 'hidden' groups unreached by existing provision such as consumers or those raising environmental protest. The third was the 'access to justice approach'. This recognised the failure of both prior waves fully to address the issues and sought 'to attack access barriers in a more articulate and comprehensive manner'. More lawyers and more outreach were not enough. They needed to be supplemented by a range of other measures such as resolution techniques like small claims courts and tribunals where people could handle their own disputes.

Thus, the access to justice approach incorporated a critique against over-reliance on lawyers. This was very attractive to governments. They rapidly became the most enthusiastic converts, attracted a rhetoric that justified alternatives that were cheaper than the provision of legal aid. Access to justice reviews were initiated, and access to justice reports published, in Australia, Canada, the United States, here and, doubtless, elsewhere. In England and Wales, aside from providing the title of a chapter of the Civil Justice Review 1988, the title of Lord Woolf's report on civil justice, the statute currently covering legal aid is proudly named the Access to Justice Act 1999. Such government interest precipitated some fight back from those who thought the phrase vacuous or even dangerous. One Canadian academic, Rod Macdonald, pithily lamented that: 'Before there was access to justice, there was just justice'.

Our own domestic common law tends to deploy the more precise – if limited - notion of access to the courts rather than to justice. Blackstone himself intoned that:[1]

> *Since the law is in England the supreme arbiter of every man's life, liberty and property, courts of justice must be open to the subject*

Lord Justice Laws, as now he is, put himself within that common law tradition in a celebrated case where he decided that the Lord Chancellor, acting without statutory powers, could not indiscriminately charge court fees to all litigants, including those on income support: [2]

> *The executive cannot in law abrogate the right of access to justice, unless it is specifically permitted by Parliament; and this is the meaning of the constitutional right.*

The assertion of a constitutional right of access to the courts underlay opposition to the attempted ouster of judicial review from asylum claims in what became the Asylum and Immigration (Treatment of Claimants) Act 2004. Lord Donaldson, with all the freedom of a

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[1] R Kerr (ed) *Blackstone's Commentaries on the Laws of England* John Murray, 1876, 111

[2] R v Lord Chancellor ex parte Witham [1998] 8 QB 57

retired judge, was particularly trenchant. He said that if the attempted ouster was enacted, the judges:

> *Would have to say 'We are an independent estate of the realm and it's not open to the legislature to put us out of business. And so we will simply ignore your ouster clause.'*

It seems, therefore, that the common law might *in extremis* be called in aid to defend access to the courts – absent, in Lord Justice Laws' formulation, Parliamentary authority, or in Lord Donaldson's, in any event.

Since use of the phrase 'access to justice' emerged only in the late 1970s, it is unsurprising that the major international human rights treaties drafted after the Second World War do not use the term. The most relevant provision in the European Convention on Human Rights is Article 6. This guarantees a general right of fair trial for the determination of criminal charges and 'civil rights and obligations'. It supplements this with a set of specific rights relating to criminal proceedings. The somewhat narrow approach of the Convention is revealed by comparison with the most recently drafted all-embracing international human rights instrument, the EU Charter of Fundamental Rights and Freedoms. This has a whole chapter of eight specific 'citizens rights', including a right to good administration and to documents' as well as a specific right to an effective remedy and fair trial. In addition, Article 47 states that:

> *Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.*

As the result of the Lisbon Treaty negotiations, the impact of the European Charter may be somewhat blunted for those in the UK.

Article 6(3)(c) of the ECHR is much more restricted. It guarantees the right of someone facing a criminal charge:

> *To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free where the interests of justice so require.*

A study of the impact of this provision reveals a paradox. Just as cuts reach a level where the UK's compliance might just begin to be questioned, its impact overall in Europe is growing. This is for at least three reasons:

- First, the European Court of Human Rights is becoming bolder and is extending the period when representation is required to prosecution or police interviews prior to charge or its equivalent: access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.

  This was elaborated in the recent case of Salduz v Turkey and is sometimes known as the 'Salduz doctrine'. Countries throughout Europe are now reconsidering the adequacy of their provision and the doctrine may already have impeded cuts to the police station duty solicitor scheme here.

- Second, over the last two decades, a number of European countries have taken steps to embed the Convention into their domestic law. The UK enacted the Human Rights Act 1998. The French reformed their Civil Procedure Code in the same year to incorporate defences directly derived from the Convention. Italy incorporated the fair trial Article 6 protections the next year. Doubtless some of this activity was inspired by the expansion of the coverage of the Convention to the east with the fall and breakup of the Soviet Union. Thus, countries like Finland, Poland and Hungary brought the Convention into effect – and began changing their criminal justice systems to make them compatible – during the 1990s. There are now at least rudimentary legal aid systems in all the new EU countries to the east and even in those countries just over the border that may aspire to membership one day, such as Moldova and Georgia. There is no doubt that this provision has raised, and is still raising, standards of legal aid within the EU.
- Third, the role of the European Union has grown in supplementing that of the Council of Europe. All accession countries were monitored against three 'Copenhagen criteria', the last of which was respect for the rule of law, taken to include provisions for legal aid. In addition, the Union has been working on common safeguards for suspects to balance such prosecution-favourable moves as the European arrest warrant.

The result is that, slowly (haltingly and sometimes reluctantly), improvements can be seen over Europe. Only last week, the French announced that they would extend post arrest legal representation, recognising that existing arrangements for a 30 minute consultation prior to initial police interview were not sufficient. The Dutch are contemplating amendment of their constitution to include greater reference to Article 6 rights. There are still major problems. Italy still cannot provide a hearing within a reasonable time. Polish legal aid is manifestly insufficient and reform currently stalled. It is difficult to see that payment at the rate of €12 an hour is sufficient for a reasonable service even in Hungary where it is a standard figure for lawyer remuneration. And Belgium's system of paying lawyers in arrears when a pre-determined pot of money can be divided by all the cases undertaken in a year would appear a somewhat unstable structural basis for funding.

The European Convention provides only the broadest basis of protection. In England and Wales, with a well established legal aid scheme, it has been of relatively little practical assistance. It did allow Morris and Steel in the McLibel case to establish that legal aid must not be excluded from libel proceedings. It has operated to protect the criminal legal aid budget, albeit at the expense of civil, which is squeezed by the overall capping of the combined legal aid budget. The problem is that, on the whole, eligibility, scope and remuneration are all higher than in most countries in Europe. England and Wales spend considerably more per head of population than any other country. We may note with humility, however, that Finland which has uses public defenders and private lawyers in criminal cases has an eligibility level of around 80 per cent of the population for criminal legal aid – well above our means-tested rate.

Adequate representation is crucial to the effectiveness of an adversarial system of justice. It is conceivable that there might be a time when the quality of legal representation can be shown to be reduced beyond an acceptable minimum by cuts to funding. That would provide a challenge to which the European Court of Human Rights would have to respond. The court has tried to stay out of debates about the quality of legal representation though it may be that there are opportunities successfully to challenge too great a decline. In Imbriosca v Switzerland, the court said:

> *A state cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes*

But went on to offer an interesting possibility of challenge over systemic breakdown of quality because, for example, of cripplingly low remuneration: States are:

> *Required to intervene only if a failure by counsel to provide effective representation is manifest of sufficiently brought to their attention*.

The General Council of the Bar has recently announced the threat of judicial review over botched consultations where the underlying problem is 'the absence of a clear strategic direction and poor management'. You have to say that there are probably rather too many areas of government policy where the same case could be made. It is difficult to see a challenge succeeding at all or, if so, being limited only to the process of consultation not the substance. More generally, let us be honest. Only at the extreme will human rights provide a basis to defend access to justice, the courts and legal representation. The real battle is going to be political. The issues are made more obscure by the current state of the legislation which, in the form of the Access to Justice Act 1999, fails to state any over-riding principle or purpose, dealing with legal aid simply as a matter of management and administration.

Our demand should be for access to justice in the Cappelletti and Garth sense: we do need to use all possible levers to deliver justice and frankly to minimise the cost and expense of lawyers as part of the solution. However, with that caveat, there was never anything wrong with the purpose of the 1949 Legal Aid Act as it was explained to Parliament:

> *To provide legal advice for those of slender means and resources so that no one will be financially unable to prosecute a just and reasonable claim or defend a legal right and to allow counsel and solicitors to be remunerated for their services*.

That must be the basis of a political campaign to save what it is still, overall, close to the best legal aid scheme in the world.

So, the outlook for legal aid and access to justice in a broad or narrow sense may not be that bright. As Bob Dylan once sang:

> *It's not dark yet but it's getting there.*

As a postscript, all should not perhaps be reduced to depression and gloom. The United States has legal aid at levels in both civil and criminal matters which we would not regard as anywhere near acceptable. Nevertheless, it has 3.8 lawyers per 1000 population. England and

Wales has around 2.3. Lawyers round the world are awfully resilient, remarkably inventive and survive in very hostile territory. They – you – will need to be.

3. News: summaries and links

These reports are largely compiled from news reports on the internet on the basis of a simple search under the words 'legal aid'. Readers must, just as buyers, beware of authenticity. The links worked at the time of writing but some will fail after a period of time.

Canada: New Brunswick sets up self help family law website: http://www.cbc.ca/canada/new-brunswick/story/2010/03/23/nb-family-law-website.html; Nervousness over funding of civil cases and legal clinics in Ontario: http://www.thestar.com/news/ontario/article/793183--legal-aid-cuts-funding-for-civil-cases?bn=1;

Cayman Islands: Resistance to funding 'criminals' through legal aid: http://www.caymannewsservice.com/headline-news/2010/03/05/mac-sees-red-legal-aid;

China: Legal aid to be funded by lottery contribution: http://www.chinacsr.com/en/2010/04/21/7523-lottery-to-fund-legal-aid-cases-in-china/;

England and Wales: controversy over legal aid test for bombing victims: http://www.mirror.co.uk/news/top-stories/2010/03/02/london-7-7-bombing-victims-humiliated-by-intrusive-test-115875-22079483/ ends with decision to grant it to all victims: http://news.bbc.co.uk/1/hi/england/london/8560352.stm; criticism of government take over of legal aid decision-making: http://www.guardian.co.uk/commentisfree/henryporter/2010/mar/03/legal-aid-binyam-mohamed-legal-services-commission; negotiation offer over alleged lack of legal aid consultation and consequent litigation by Bar: http://www.lawgazette.co.uk/news/bar-offers-legal-aid-olive-branch-criminal-fee-proposals; Cost of trying to keep torture allegations secret of Guantanamo detainee tops £750,000: http://www.dailymail.co.uk/news/article-1263225/Binyam-Mohamed-legal-torture-case-cost-taxpayers-750-000.html; Controversy over three MPs who get legal aid to defend allegations of dishonest expense claims: http://www.businessweek.com/ap/financialnews/D9F1LLN80.htm; Financiers with frozen assets also quality: http://www.businessweek.com/ap/financialnews/D9F1LLN80.htm;

Indonesia: allegations of violence against 80 per cent of police detainees: http://www.thejakartapost.com/news/2010/04/09/rights-group-80-percent-detainees-tortured.html;

Ireland: Trial halted over contested refusal of legal aid: http://www.herald.ie/national-news/bradleys-trial-halted-over-legal-aid-refusal-2085725.html; second 8 per cent cut to legal aid payments: http://www.irishtimes.com/newspaper/ireland/2010/0327/1224267173609.html;

Iraq; UN funds tentative legal aid scheme: http://www.un.org.sy/forms/news/viewNews.php?idField=653;

Malaya: Human Rights Commission condemns arrests of legal aid lawyers: http://thestar.com.my/news/story.asp?file=/2010/4/24/nation/6123871&sec=nation;

New Zealand: victims want same legal aid as defendants http://www.stuff.co.nz/national/crime/3546292/Victims-ask-for-same-legal-help-as-accused; controversy over legal aid version of 'three strikes and you are out': http://www.scoop.co.nz/stories/PA1004/S00055.htm; competence tests may lead to up to 20 per cent drop off in legal aid practitioners: http://tvnz.co.nz/politics-news/legal-aid-lawyers-prove-competence-3450974; but details of the test are still to come: http://www.stuff.co.nz/sunday-star-times/news/3569645/New-legal-aid-rules-more-of-a-puzzle-than-a-test;

Scotland: Scottish Legal Aid Board extols its tinkering 'nuts and bolts' approach: http://news.scotsman.com/comment/Tinkering-with-the-nuts-and.6169328.jp; Law Society president not impressed by coverage: http://www.heraldscotland.com/news/crime-courts/legal-aid-underfunded-warning-1.1018872;

United States: worries on DIY divorces: http://www.detnews.com/article/20100301/METRO/3010332/1409/metro/Divorcing-couples-leave-out-lawyers; scam exposed as firm trades on names implying involvement in legal aid: http://www.examiner.com/x-6256-Denver-Legal-News-Examiner~y2010m3d4-Fake-legal-aid-company-shut-down-ordered-to-pay; controversy over new guidelines for criminal legal aid in New York: private practitioners build up warchest for litigation over fewer referrals: http://www.law.com/jsp/article.jsp?id=1202446397806&Criminal_Defense_Attorneys_Build_War_Chest_Gain_Support_in_New_York_City; New York Civil Liberties Union challenges legality of New York eligibility in criminal cases: http://www.jsonline.com/news/statepolitics/87712522.html; Harvard law dean among successful Obama nominations to Legal Services Corporation: New York Civil Liberties Union challenges legality of New York eligibility in criminal cases: http://www.jsonline.com/news/statepolitics/87712522.html; court challenge to effectiveness of criminal legal aid provision in Michigan: private practitioners uneasy at new rules for legal aid in New York: http://cityroom.blogs.nytimes.com/2010/03/05/new-rules-trouble-some-public-defender-groups/; the strange case of the 'Al; Quaeda Seven' - rightwing attempt to tarnish

reputations of lawyers now in government by reference to their past work in acting for 'terrorist' clients: http://www.newsrealblog.com/2010/03/11/leftist-swine-squeal-over-liz-cheney-ad/; Wisconsin, as the alleged stingiest US state for public defender eligibility, raises means test levels: http://www.jsonline.com/news/statepolitics/87712522.html; Report criticises Idaho criminal legal aid provision: http://www.mtexpress.com/index2.php?ID=2005130640;

4 Reports and Publications:

5. Conferences

Forthcoming: Legal Services Research Centre

The next Legal Services Research Centre's International Research Conference on 'Research into Practice: Legal Service Delivery in a New Decade will be held at Downing College in Cambridge. The conference will run from Wednesday 30th of June pm to Friday 2nd July 2010. Those wishing to attend can obtain a booking form from www.lsrc.org.uk or by contacting catrina.denvir@legalservices.gov.uk. Late abstract proposals may be considered. Please contact Catrina at the above email address for further information.

6. And finally

This newsletter has been compiled by Roger Smith of JUSTICE in London, UK. If you would like to be taken off the circulation list; add someone or contribute some content: contact rsmith@justice.org.uk.