

JUSTICE-ILAG
Legal aid newsletter
May- June 2010

1. Major themes of the issue

In the immortal words of David Bowie:

It ain't easy, it ain't easy

It ain't easy to get to heaven when you're going down.

Two thoughtful contributions on legal aid in very different circumstances make this somewhat depressing point rather well. First, Mark Benton writes about the challenges facing British Columbia as it takes a second financial hit in a decade. Second, Ian Morrison reflects on the challenges facing work on legal aid in a developing country where the big foreign legally orientated NGOs can appear part of the problem rather than the solution.

If we can sustain this level of discussion of topical issues then we may be depressed – but well informed.

Roger Smith

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2. Contributions

Managing in Difficult Times

Mark Benton, CEO, Legal Services Society, British Columbia, Canada

The Legal Services Society (LSS) is the legal aid plan and public legal information provider in British Columbia, Canada. One of thirteen provincial and territorial legal aid plans in Canada, it serves a population of about 4.4 million in an area about the size of Germany, Switzerland, and France combined. Like all legal aid plans, the society's significant challenges are typically driven by external factors such as the economy, the number of people charged with criminal offences, family break up, immigration policies, the number of children placed in government care, as well as the revenues provided by the society's funders (90 per cent of our funding is from the provincial government, 10 per cent is from non-government, interest-based sources). Roger asked that I write a few words about protecting critical legal aid services at a time when demand increased and revenue dropped; circumstances that most of us are increasingly familiar with.

This short report for the ILAG readers recounts one legal aid plan's strategic response to two funding crises – one in 2002 and the other in 2008. It is largely about the importance of

legal aid leadership establishing a clear direction to guide legal aid organizations through difficult times and, I hope, illustrates the importance of adapting strategies and goals as the environment changes. The evolution of this last aspect of the society's work can be reviewed through the annual reports on our website at <http://www.lss.bc.ca/about/annualReports.asp>.

Until 2002, the Legal Services Society was a full service legal aid plan that integrated public legal education services with the more traditional legal representation model. The system used paralegals and community based clinics in a mixed service delivery model that included a full range of poverty law services. In 2002 the provincial government announced that legal aid funding would be reduced by about 40 per cent and that the bulk of the remaining funding would be restricted to providing the minimal levels of services that the courts would order government to provide. The government also dismissed the board of directors and appointed a trustee. LSS laid off two-thirds of its staff and closed three-quarters of its locations around the province. Family law services were significantly reduced and poverty law services were largely eliminated as funding for those services disappeared.

In response to these circumstances, the society adopted a strategy that gave priority to getting early and stable resolutions to legal problems rather than focusing only on ensuring fairness in justice system institutions. The society's longer term objective was to return to the full service organization that existed prior to 2002. Key elements to this strategy were securing the ongoing support of influential stakeholders, rigorous program evaluation to better demonstrate value, and using non-government revenue to develop service projects. The strategy was a significant success. From 2003 through 2008, government funding increased. Rising interest rates resulted in significant growth in the revenue from private foundations, which in turn allowed the development of more substantial projects.

In late 2008, as the global economy deteriorated, LSS was deficit financing about \$3 million of projects and related costs. The deteriorating economic conditions brought a significant increase in demand for legal aid. In November 2008, referrals for emergency family services were 21% over budget and refugee (asylum) applications were 76% higher than the previous year. Increased demand, however, was combined with static government revenues and declining revenues from interest-based sources.

The pressing short-term need was to stabilize LSS spending in the face of increased demand. To accomplish this LSS cut its infrastructure and services, allocating funding to the most critical legal aid services. Examples of those changes include eliminating coverage for some minor criminal offences (such as failure to appear and breach of probation), reducing some family dispute resolution services, and substantially eliminating our staff lawyer program.

Our long-term strategic approach assumed that the economic downturn was going to last for several years. LSS adopted an approach to protect core services and advance the society's longer term strategies of focusing on client outcomes and integrating legal aid services with other social services. The society continues to believe an integrated approach to legal aid (i.e., addressing a client's legal problems along with any contributing non-legal

problems such as a homelessness, poverty, or addiction) better serves low-income people, the justice system and the population as a whole, for example, including assistance with a foreclosure matter that is integral to family dispute.

The longer term approach has three elements. First, we reduced the scope of the society's work to those areas with secure funding. This meant eliminating a number of important civil services, including our telephone advice service, and limiting legal aid services to family, criminal, child protection and immigration law that receive government funding. Second, we developed a new service delivery model, involving the 40 per cent workforce reduction and the replacement of five of seven offices with a contracted services model. While these changes have had a significant impact on the society and its staff, they have maximized the funding available for core services. The third long-term project was to simplify the LSS system for paying lawyers by consolidating almost 200 tariff items into a smaller number of billing categories. This will provide greater cost certainty for the society, easily understood retainer parameters for clients and a streamlined billing process for lawyers.

We began these initiatives late in 2009/2010 and our primary focus in 2010/2011 will be their implementation and assessment. To date, as a result of the saving realized from the infrastructure changes, LSS has been able to reintroduce some, but not all, of the services that were reduced or eliminated in early 2009.

To date, LSS has not received any additional funding from government, but neither has it faced further reductions at a time when virtually every government-funded social service agency suffered significant funding cuts. We believe this is due largely to our ability to demonstrate sound fiscal management and long-term planning that focuses on cost-effective legal aid for low-income people.

The public response to these unwelcomed developments has been consistently critical of the lack of needed funding to sustain services in the recession. In one community, lawyers engaged in a partial service withdrawal for four months and an initiative is underway by the provincial chapter of the Canadian Bar Association to organize a private commission that will examine the type of legal aid services that should be available.

2009 was among the most difficult of years for legal aid in BC. While the choices made in reducing expenditures put services to clients ahead of the interests of lawyers, courts and employees, it has not made the loss of services and the firing of seasoned employees any more palatable. The real issue is that revenues did not rise to meet the increased demand that can reasonably be anticipated in difficult economic times. Absent government policy and funding commitments or substantial reserves, the outcome is that low income people are doubly affected by the economic downturn – at the time when they become most vulnerable and are in greatest need, services are reduced and access is more limited.

Although LSS has adopted a set of narrower service goals for the next several years, the longer term strategy is to position the society to benefit from government funding increases as the economy recovers. Elements of this plan include demonstrating that legal aid services make a material difference to avoiding and reducing health and social services costs and that

the legal aid program is well positioned to facilitate the delivery of multi-disciplinary services. The first stage of the strategy, engaging key stakeholders in the conversations that support that outcome, has begun.

Legal Aid in Bangladesh

Ian Morrison, director, Bangladesh Legal Aid Reform Project

These are some brief reflections on the work with which I have been engaged for the past six years, a Canadian funded development project supporting a government funded legal aid system in Bangladesh.

Government legal aid in Bangladesh has notionally existed since the late 1990s. The current version was enacted in 2001 as the *Legal Aid Services Act 2000 (LASA)*. It is a *judicare* program, delivered at the District level (Bangladesh is divided into 64 Districts for administrative purposes) through a committee chaired by the District and Sessions judge (the highest position in the lower judiciary at the District level), under the central authority of a semi-autonomous body corporate, the National Legal Aid Organization (NLASO). Legal aid is theoretically available for all sorts of criminal, family and civil matters and is defined to include legal advice, legal representation and (since 2006 amendments) limited ADR services in civil matters.

The “project” is a bilateral aid project funded by the Canadian International Development Agency, and delivered by the Canadian Bar Association and IBM Canada. The Project has been working in Bangladesh since 2003, and is currently in an extension phase scheduled to end in March 2011. The project goal in its current phase is to “improve access to justice for the indigent in Bangladesh through more effective legal aid mechanisms”, in particular to build capacity of the government’s own legal aid program.

The challenges to achieving this goal are considerable. Although developing quickly, Bangladesh lags far behind the regional Asian economic powerhouses, and is still one of world’s poorest and most overcrowded countries. Government is plagued by rampant corruption (Bangladesh topped Transparency International’s rankings of world’s most corrupt countries for years), nepotism and profound structural inefficiencies, lagging far behind the more vigorous private sector and civil society. The country’s bureaucratic shortcomings were summarized two years ago by the Country Director of the Asian Development Bank, including

...the pyramid bureaucratic structure and its archaic systems and procedures inherited from the colonial days characterised by inefficiency, centralisation, lack of delegation and job description; too many tiers in the decision making process; archaic filing and noting system and lack of e-governance; [and] poor pay structure...¹

The legal system itself is generally acknowledged by serious observers as a colonial hangover which has not changed fundamentally since its origins as a tool of imperial control.

The court system, particularly the lower tiers, is badly underfunded even by regional standards and hugely backlogged on both the criminal and civil sides; its procedures would be more immediately recognizable to Charles Dickens than to most first world lawyers. The police are notoriously corrupt and subject to routine political interference. The Bar is politically polarized and overall competency standards are very low. It is not quite true, as most people will assert, that there are no honest judges, lawyers or court staff, but it is true enough for the perception to be hugely corrosive to the legitimacy of the legal system. In short, while lack of access to lawyers, legal advice and legal information are a barrier to access to justice in Bangladesh, the problem of “justice” goes far deeper.

The long and winding road

Although the legislative framework has existed since 2001, the government legal aid scheme is still very much in its infancy. Shortly after *LASA* was enacted, the sponsor Awami League government lost national elections. The successor government talked much about legal aid but did little about it; the government never established the central authority envisaged by the legislation², nor did it choose to appoint any full time staff. “Directorship” of the NLASO was held as a part-time title by a series of Law Ministry functionaries, who were not relieved of any other duties in recognition of the post. The allocated legal aid fund was disbursed to Districts, but without any unaccountably (or any particular rhyme or reason, to an outsider). Things slowed even more when, in late 2006, the military ousted the government during a political crisis and replaced it with an appointed “Caretaker Government”, which ruled until elections were again held at the end of 2008 and the Awami League again took power in an electoral landslide.

With no legal aid staff or offices at the national or District levels, few people had even heard of the program. Indeed, until many judges were unaware of the provisions of *LASA*. For poor justice seekers who learned of the program, the application process (which essentially required the applicant to apply directly to the chief judicial officer of the District) was intimidating and often completely beyond reach. Most legal aid cases came as referrals by jailers for unrepresented inmates, but this too was a haphazard process. Where legal aid was granted, services were often never provided or additional fees were demanded by lawyers. Although there were honourable exceptions amongst some motivated judicial officers and lawyers who made efforts from time to time to use the legal aid fund, there were neither incentives nor mechanisms to move these beyond the level of individual initiative. As late as 2008-2009, only about 25% of the national legal aid fund was actually spent. The shortcomings of the system were catalogued quite exhaustively by, inter alia, the World Bank (in national review study done in collaboration with the Project), NGOs and external donor-funded investigation missions. However, none led to any significant movement by government.

¹ The Daily Star net edition 2008-06-18, *Reforms in bureaucracy not done yet*, www.thedailystar.net/story.php?nid=41665.

One exception to this pattern was in District-level collaborations between the Project and the government program. With no action at the national level, the Project focused on local delivery mechanisms, funding legal aid offices in two pilot Districts based on community based legal needs assessments, and a “duty counsel” program in the Dhaka criminal courts. The goal was to develop and test models that could ultimately be replicated nationally if government commitment ever developed. As legal aid initiatives, the project interventions were successful. By 2008, the pilot Districts had well-known and accessible offices, easy to locate for poor justice seekers (confirmed through tests using a person posing as a justice seeker looking for help). Applications had more than doubled, and the number and percentage of women receiving legal aid increased greatly. Processing time for cases was greatly reduced, quality standards for legal services were set and monitored, and panel lawyers received training, including gender training. More lawyers participated in legal aid (including a higher percentage of women lawyers). In the pilot Districts, government legal aid collaborated with NGO services with mutual referrals and supports. The possibility of delivering legal aid services to an acceptable standard through the government legal aid mechanism was clearly demonstrated.

However, at the end of the day, these pilot Districts remained orphans within the system, operating in the vacuum of national commitment and having little influence on other Districts, where no resources were available to replicate the model. By late 2008, the prospects for further government cooperation seemed so dim that the Canadian International Development Agency ordered the Project closed, and all local operations were wrapped up – just weeks before the newly re-elected AL government signalled a new commitment to developing legal aid. After a brief interim, the project resumed full in-country operations in July 2009.

The new commitment included the first-ever appointment of a full-time national Director for the NLASO (an experienced senior judicial officer), a promise to establish and staff a national office with new operational and program funding (on top of the national legal aid fund). With a revived partnership, the Project began a roll-out to further test the model, which now operates in seven pilot Districts. This is currently in progress – slow progress in many ways, but when none of the basic standards of rule of law or competent administration can be taken for granted, the simplest matters can present unanticipated problems – such as requesting assignment of a single clerk from court staff in a system where the same personnel may make more in a day from “speedy money” than their official monthly salary and refuse to work in a position with no extra income potential. Still progress is being made. Most encouraging of all is that with the small resources made available through Project support, some of the pilot Districts are introducing their own initiatives to improve the effectiveness of legal aid, beyond those suggested or encouraged through the project.

² This was not a mere oversight, as proposals to establish the national office were actually made by the relevant Ministry during this period and rejected by central government authorities.

One step forward and ...

The prospects for government legal aid services in Bangladesh are unclear. In the last ILAG newsletter, Roger Smith summarized the Cappelletti and Garth model of the three historical “waves” of the access to justice movement in the rich West. This is a standard organizing perspective for legal aid in the developed west, but in Bangladesh the waves metaphor is more of a circus mirror reflection: distorted and sometimes inverted. Government legal aid is dwarfed by – and to some extent a pawn of – far larger and richer NGO legal aid provision. Driven by donor interests and priorities, “legal empowerment” has been the dominant discourse of access to justice from the start, while the more mundane business of providing lawyers for the unrepresented as a basic legal and constitutional right remains in its infancy.

The government legal aid program currently has momentum and a reasonable level of political commitment. However, it does not yet have a clearly articulated and locally owned systemic vision for legal aid, let alone a clear plan for how to get there, once “there” is defined. There is no systemic commitment to access to justice in crucial places, including the judiciary. The dangers that an active legal aid system would pose in a system dominated by rent-seeking are considerable and the warning signs of resistance are already evident. Even amongst stakeholders of goodwill, the difficulties of trying to make a legal aid system that works on even a modest level are huge inside the context of a larger system that is “broke” in both senses of the word. In the words of one of our project staff lawyers, “I have the voluminous feeling to work more for the deprived people but am hurdled by red tapism.”

Traditionally, the big bilateral and multilateral donors have ignored government legal aid in favour of funding to a huge array of NGO legal services, mostly although not entirely focused on public awareness and mediation mechanisms outside the dysfunctional government system, with some components of representation and public interest litigation. Given experience with the program to date and the practical realities of Bangladesh, the chances of institutionalizing and sustaining the program are very much linked to the prospects of future donor involvement. This is needed not to fund legal aid per se, but to provide technical assistance and exposure to a wider range of legal aid options and practices than has yet penetrated the still insular thinking of the government system. In a “blue skies” vision of access to justice in Bangladesh, government/NGO collaboration on agreed priorities could greatly magnify the effectiveness of current spending on the two areas separately.

Is the effort to support further development worth it? It is far easier and more immediately rewarding to work with NGOs, who have mastered the discourse of access to justice that donors want to hear, who can produce results fairly quickly and who can provide a more holistic service approach than will ever be possible under government legal aid. Nevertheless, the value of this approach in the long term must be questioned. Despite huge budgets (relatively speaking), legal aid NGOs still do not provide coverage to more than about one third of the country, and not always then to the most needy. Although NGOs are all about legal empowerment, rights-based approaches, and the other fashionable trends of modern

access to justice, at the end of the day NGOs, no matter how good their work, are not politically accountable and are not inside the system. Legal aid from NGOs cannot be claimed as legal and constitutional right, and when and if donor attention is distracted (as it invariably is at some point), large service edifices will quickly crash. This has in fact happened more than once in Bangladesh. If the current struggle within Bangladesh to strengthen rule of law as a component of democratic practice is to succeed – and it is certainly not a sure thing – then access to justice must be pushed as a value of the legal system itself and government itself must accept its proper responsibility to ensure this.

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.

Angola:

Angolans seeking legal aid to prove they are poor:

<http://www.afriquejet.com/news/africa-news/angolans-seeking-legal-aid-to-prove-they-are-poor-2010061451029.html>;

Australia:

Legal aid given \$10.5m boost: <http://www.abc.net.au/news/stories/2010/05/28/2911788.htm>;

Bushfire legal report calls for changes: <http://www.legalaid.vic.gov.au/2990.htm>;

Bangladesh:

Dist legal aid funds unutilised:

<http://www.thedailystar.net/newDesign/news-details.php?nid=143964>;

Canada:

Legal Aid Ontario enhances toll-free service to meet record demand:
http://www.legalaid.on.ca/en/news/newsarchive/1005-05_cscpressrelease.asp ;

One in three Ontarians fighting legal problems, study finds:
<http://www.thestar.com/news/gta/crime/article/816997--one-in-three-ontarians-fighting-legal-problems-study-finds?bn=1> ;

Civil justice system seen as catering to the rich:
<http://www.theglobeandmail.com/news/national/civil-justice-system-seen-as-catering-to-the-rich/article1587524/> ;

Late fees for legal aid:

<http://www.thestar.com/opinion/editorials/article/827094--late-fees-for-legal-aid> ;

Public Commission on Legal Aid Established in British Columbia:

<http://www.marketwire.com/press-release/Public-Commission-on-Legal-Aid-Established-in-British-Columbia-1281474.htm>;

Hearings to focus on funding for legal aid:

<http://www.vancouver.sun.com/business/Hearings+focus+funding+legal/3204597/story.html#ixzz0s62pyTb6>;

Cayman Islands:

Legal aid still unsettled:

<http://www.caymannewsservice.com/headline-news/2010/05/10/legal-aid-still-unsettled-0>

England and Wales:

Are some cases beyond the pale when it comes to legal aid?:

<http://www.lawgazette.co.uk/blogs/news-blog/are-some-cases-beyond-pale-when-it-comes-legal-aid>;

It's not just asylum seekers who need to make a case for legal aid:

<http://www.guardian.co.uk/commentisfree/libertycentral/2010/jun/17/refugee-migrant-justice-asylum-seekers>;

Asylum seekers need good legal help:

<http://www.guardian.co.uk/theguardian/2010/jun/22/asylum-seekers-legal-help>;

Time to debate how we can sustain access to justice for the poor:

<http://www.guardian.co.uk/law/2010/jun/23/access-justice-legal-aid-austerity>;

Kenneth Clarke announces review of legal aid - Review of legal aid likely to lead to cuts:

<http://www.guardian.co.uk/law/2010/jun/24/legal-aid-review>;

Kenneth Clarke plans to shut 157 courts:

<http://www.guardian.co.uk/uk/2010/jun/24/kenneth-clark-courts-criminal-justice>;

Legal aid payment regime blamed for RMJ collapse: <http://www.lawgazette.co.uk/news/legal-aid-payment-regime-blamed-rmj-collapse>;

New international hub to promote pro bono work:

<http://www.lawgazette.co.uk/news/new-international-hub-promote-pro-bono-work>;

The deficiencies of the legal aid payment regime:

<http://www.lawgazette.co.uk/opinion/comment/the-deficiencies-legal-aid-payment-regime>;

Fiji:

Legal aid process under fire: <http://www.fijitimes.com/story.aspx?id=150623>;

India:

Lawyers ordered to give free legal aid for assaulting judge:

<http://sify.com/finance/lawyers-ordered-to-give-free-legal-aid-for-assaulting-judge-news-default-kgdv4eicabb.html>

Ireland:

'Legal clinics' planned in NI justice reforms:

<http://www.irishtimes.com/newspaper/breaking/2010/0607/breaking41.html>;

Legal Aid Board is keen to move mediation into the mainstream:

<http://www.irishtimes.com/newspaper/ireland/2010/0614/1224272433234.html>;

Barristers' legal aid fees top £1m in Northern Ireland:

http://news.bbc.co.uk/1/hi/northern_ireland/10319731.stm;

New Zealand:

Backlash on legal aid plans:

<http://www.stuff.co.nz/taranaki-daily-news/news/3804619/Backlash-on-legal-aid-plans>;

Russia:

Russian president approves legal aid agreement with Vietnam:

<http://english.vovnews.vn/Home/Russian-president-approves-legal-aid-agreement-with-Vietnam/20106/116052.vov>;

Scotland:

Law Society Warning over Legal Aid:

http://www.allmediascotland.com/media_releases/25751/law-society-warning-over-legal-aid;

Legal aid cases soar during the recession:

<http://news.bbc.co.uk/1/hi/scotland/10218545.stm>;

Advice outlets increase as recession spurs growing demand for civil legal aid north of the Border:

<http://news.scotsman.com/scotland/Advice-outlets-increase-as-recession.6344207.jp>;

Legal aid bills to soar in human rights law shake-up:

<http://www.heraldscotland.com/news/crime-courts/legal-aid-bills-to-soar-in-human-rights-law-shake-up-1.1034386>;

Lawyers demand to see Lord Advocate over suspects' legal aid rights:

<http://business.scotsman.com/news/Lawyers-demand-to-see-Lord.6370201.jp>;

Lawyer Ruling Could Wreck 100,000 Cases:
<http://www.dailyexpress.co.uk/posts/view/182077/Lawyer-ruling-could-wreck-100-000-cases/>;
Crisis talks on judicial system:
<http://www.heraldscotland.com/news/crime-courts/crisis-talks-on-judicial-system-1.1036125?localLinksEnabled=false>;
Solicitors in talks over suspects' right to a lawyer:
<http://news.scotsman.com/scotland/Solicitors-in-talks-over-suspects.6383835.jp>;

United States:

Top New York Judge Urges Greater Legal Rights for the Poor:
<http://www.nytimes.com/2010/05/04/nyregion/04court.html>
Lawyers offer their aid to veterans:
http://www.fbmonitor.com/2010/05may/052710/community/052710_community3.html;
Gap in Justice a 'Dramatically Understated' Crisis:
<http://www.mainjustice.com/2010/06/18/tribe-gap-in-justice-a-%E2%80%98dramatically-understated%E2%80%99-crisis-2/>;
Supreme Court Announces Justice For All Tennessee:
<http://www.newschannel5.com/Global/story.asp?S=12692247>;
Expand legal services now:
<http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202463009686&slreturn=1&hbxlogin=1>;
U.S. Supreme Court Decision Upholds Government Ban on Legal Advice to the LTTE and Other Terrorist Groups:
<http://www.prnewswire.com/news-releases/us-supreme-court-decision-upholds-government-ban-on-legal-advice-to-the-ltte-and-other-terrorist-groups-97169964.html>

4 Reports and Publications

E Cape, Z Namoradze, R Smith, T Spronken *Effective Criminal Defence in Europe* Intersentia, 2010, (657pp).

This nine country study of safeguards for criminal suspects and defendants will be the subject of an article in the next edition. It was funded by the European Union and released at a conference in Brussels at the end of July.

5. Conferences

The 8th Legal Services Research Centre International Research Conference

This will take place between 30 June and 2 July 2010 at Cambridge, UK. A review will be included in the next newsletter.

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.