

# THE FUTURE OF LEGAL AID IN AMERICA

## A Kenneth Pye

I have been asked to review briefly the history of legal aid in America and to state my views concerning its future. The object is to provide background which hopefully may be of assistance in charting the course of improvements in existing legal aid programs in Australia.

Before World War II, support for American legal aid was largely from charitable organisations which provided funds for legal aid as one of many worthy welfare programmes. Between 1947-1964 the programmes expanded as a result of substantial financial support from major American corporations and foundations, with a lower level of support coming from labor and the bar. The pattern was quite similar - offices with salaried lawyers supplemented by volunteers. By the end of 1964 there were 247 legal aid offices providing legal services to 414,000 indigents at a cost of U.S.\$4-1/3m. The number of offices had increased over 300% since 1949 and the number of persons served had increased by over 50% during the preceding decade.

### CRIMINAL LEGAL AID

Indigent defendants in criminal cases were serviced by a separate system. Most legal aid societies declined to represent defendants in criminal cases and counsel for an accused who was unable to afford a lawyer was provided either by a local lawyer appointed by the court, in most States without a fee, or in a few metropolitan areas, most notably in California, by a salaried public defender. During the 1930's the Supreme Court of the United States required that counsel be appointed to represent an indigent accused of a capital crime in state courts and that counsel be appointed for an indigent in all but petty cases in the federal courts. The indigent was not automatically entitled to a lawyer in a state non-capital prosecution unless his particular background and the difficulties of the case required legal services. By 1964 over half of the States provided counsel in every serious matter and legal services were provided to over 200,000 defendants by 162 defender organisations at a cost of U.S.\$5m.

The situation changed radically in the period 1963-1965. The Supreme Court of the United States, in the landmark decision of *Gideon v. Wainwright*,<sup>1</sup> required that counsel be provided to indigents in all felony prosecutions. The doctrine was subsequently extended to cover all misdemeanor prosecutions where a judgement of incarceration (as distinguished from a fine) is likely;

in the first level of appellate proceedings; and whenever the situation requires in proceedings it to revoke probation or parole.

In 1964, the federal government provided compensation for counsel appointed to represent indigents in all federal cases. All States now have similar systems and although the fees provided are generally less than a counsel would normally charge, the remuneration nevertheless approaches adequate compensation in most cases. The result has been representation of all indigents in substantial criminal matters by paid counsel. In most states, the method of providing counsel is still the assigned counsel system (private practitioners appointed by the court) although there has been an extension of the public defender system primarily in large metropolitan areas where salaried lawyers is a less expensive method of providing legal services.

### CIVIL LEGAL AID

The major step forward in civil legal aid occurred as a result of the *Economic Opportunity Act* of 1964, the so-called "War Against Poverty". Title two of that Act authorised the grant of federal funds to cover 90% of the cost for local "community action programmes". There was no mention of legal aid. Shortly after the passage of the Act a proposal was made to the administrators of the federal programme to fund legal aid programmes as a part of community action programmes. The argument was that the community organisations created to provide social and economic assistance in poor neighbourhoods should or could also provide legal assistance.

**BUREAUCRACY V. A.B.A.:** There was considerable opposition to the scheme. The existing legal aid offices concentrated on individual cases and rarely lobbied for legislation or attempted to change existing law through litigation. They were controlled by leading members of the bar whose private practices normally involved representation of the major political and economic institutions and business leaders. Legal aid lawyers were concerned that their independence would be compromised by support from government tax revenues. The government bureaucracy was loathe to expend funds which might be used simply to meet immediate personal needs rather than to attempt to "eradicate the cycle of poverty", the professed objective of community action programmes.

The American Bar Association<sup>2</sup>, however, saw an opportunity to meet unmet needs of many who could not afford a lawyer and exerted political power within the Office of Economic Opportunity, the Congress and

the White House. As a result of ABA efforts, funds became available for legal aid. During the first year U.S.\$3½m was made available, an amount almost equal to the funds previously made available from private sources.

Opposition from the bureaucracy who wished to use funds earmarked for legal aid for other purposes, persuaded leaders of the bar that specific statutory authority for legal aid was required, and the OEO Act was amended in 1965 to authorise that funds provided for community action programmes could be utilised to provide legal services. Within three years 265 communities had been able to expand or provide new legal services programmes supported by U.S.\$42m. in federal funds. By 1973, the legal services program comprised 250 community based agencies staffed by more than 2,600 full-time lawyers manning 900 separate law offices. Funds were provided by the federal government through annual grants exceeding U.S.\$60m. In less than ten years over five million clients had been served and over five million clients had been served and over 100 cases had been argued in the Supreme Court of the United States.

Some of the funds were provided to existing legal aid organisations. New programmes were created from other funds. All programmes were required to have a Board of Directors, one third of the members of which were poor people from the neighbourhood being served. Most of the programmes involved the creation of neighbourhood law offices in large cities. The offices were located in poor neighbourhoods with office hours that made them more available to neighbourhood residents.

**CONFLICTING PHILOSOPHIES:** The older legal aid societies tended to be more conservative, reflecting a conception of legal aid which placed emphasis upon close relationships with the organised bar; careful screening to avoid services to persons able to afford a lawyer; large caseloads primarily involving landlord and tenant, consumer credit, divorce and public welfare cases. Participation of the poor in policy making was kept at the minimum required by federal regulations.

Many of the new offices reflected a different philosophy. Some of these were manned by young lawyers unconnected previously with legal aid. They saw their mission as one of effecting social change for the better through a more effective use of the legal process; rather than the representation of every client with a personal legal problem. These programmes were prepared to eschew legal assistance to eligible applicants if providing representation to such persons would over burden staffs with caseloads that would hinder them in accomplishing social and economic reform through the litigation of test cases, the drafting of statutes and lobbying for their passage, and participation with other professionals and laymen in the organisation of neighbourhood groups to bring economic pressure and political power to bear on business, the police, the courts, school

principals, administrative agencies and city councils to obtain redress for real or imagined grievances and the assurance of equal or preferred treatment in the future. These programmes welcomed bar support but were prepared to regard the profession as an adversary if agreement could not be reached on issues such as indigency standards or involvement with groups. Many of these programmes expected or tolerated lawyers becoming involved personally in lobbying, political activity, and picketing.

The two approaches reflected the difference between the immediate needs of the poor to have the same kind of lawyers as others to assist them in the urgent personal problems of life and, in the alternative, the use of the legal process to attempt to change the political economic and social status of the poor. Most offices in practice did some of each, with major differences in emphasis.

The position of the leadership of the American was in the middle. Primarily it supported legal aid because it believed that poor people should have the same access to lawyers as the more wealthy. Its support for legal aid was not premised upon the desire to accomplish a fundamental redistribution of wealth or reallocation of political power. If, however, the representation of an individual required that counsel seek to change existing law by litigation or legislation the ABA insisted that counsel should do whatever in his judgment best served the interests of the client. In short, the lawyer should behave the same as he would in any other representation; he was not expected to identify himself with his client; he was expected to act upon behalf of the client without regard to what changes in the social order might result if he was successful. This attitude reflected its strength when amendments were proposed in the U.S. Senate in the late 1960's which would have precluded legal aid lawyers from bringing suits against cities, states or local government entities. The ABA was largely responsible for the defeat of the proposals.

In general the leaders of the profession in the United States believe that a legal aid lawyer supported by federal funds has no obligation to seek social change through suits against government, but if the interests of his client requires the lawyer should be free to do exactly that.

**NIXON, AGNEW & A.B.A.:** The original leadership of the national legal services programmes within the Office of Economic Opportunity supported the notion of participation by the poor in policymaking and a heavy commitment to "Law Reform" and "Community Organisation" at the price of denying services to some eligible persons who needed them. In the Nixon administration the situation changed drastically with demands that programmes abstain from controversial representation (usually involving two poor persons) and landlord and tenant (usually involving one poor person and one more affluent person, but not challenging any basic tenets of the legal process of legal institutions). In 1972, the then

Vice-President Agnew attacked the Legal Services programmes on the grounds that much of the resources provided by the federal government were being expended on efforts to change the law on behalf of the poor at the price of providing representation of those who needed it. His frequent example was a "destitute mother of five who cannot get legal help with an eviction notice while a middle class school 'dropout' is able to obtain legal counselling in setting up his underground newspaper". He expressed concern that the legal services programmes were unresponsive to demands of their clients and that "the federal system manned by ideological 'vigilantes'" had been created.

The ABA responded by expressing its concern that politics should not affect the kind of representation provided by lawyers to poor clients. It again asserted that the poor man should as far as is possible be put in the same position as a more fortunate citizen in that a lawyer should be available to represent his interests without interference. The lawyer should in turn behave in the same manner whether the client is poor and his salary is paid by an organisation or whether his client is rich and pays his fee personally.

#### LEGAL SERVICES CORPORATION:

The ABA proposed to isolate the legal service progress from the "avant garde" reformists or the conservative reaction to them by creating a Legal Services Corporation, the directors of which would come from different segments of the community and would be charged with the responsibility of shaping equal justice for the poor. The Corporation would be supported by federal appropriations from which it would make grants to local legal services organisations. It was clear that this structure would be primarily run by lawyers and that the participation of the poor in the most important decisions would be minimal. It would however provide stability and provide some protection from political interference with the independence of the legal aid lawyer.

Both houses of Congress passed a bill creating a legal services corporation in 1972, but President Nixon vetoed it, objecting to limitations upon his power of appointment and the failure of the bill to prohibit lobbying.

In 1973, new legislation was introduced in the Congress. This time, however, the mood of the Congress was different. The House of Representatives imposed a series of crushing restrictions on the activities of attorneys, reflecting a general opposition to the emphasis upon lobbying and test case litigation, at the expense of representation of individual cases, which typified a small but highly publicised group of the federally funded programmes. The Senate was calmer but there was clearly little support for the idea that legal aid should be the chosen vehicle for restructuring government and redistributing wealth. Some conservatives asserted that the White House had promised to veto the bill while (contrary to the

images in the press) first John Ehrlichman and later General Haig sought compromise which would guarantee passage.

#### LEGAL SERVICES CORPORATION ACT, 1974:

The Legal Service Corporation Act became law on July 25, 1974. It authorised the establishment of a private nonmembership nonprofit Corporation for the purposes of providing financial support for legal assistance in noncommercial proceedings and matters for those unable to afford them. The Corporation will have a Board of Directors of eleven members appointed by the President with the advice and consent of the Senate, a majority of whom shall be lawyers and no more than six of whom shall be members of any one political party. State Advisory Councils will be established in each state. The Corporation is authorised to make grants to local organisations for the purpose of providing legal assistance to eligible clients, and undertake directly research training and technical assistance. No employee of the Corporation or any recipient may engage in or encourage others to engage in public demonstrations, picketing, boycotts, strikes, riots, civil disturbances, violation of injunctions or other illegal activity. Political action by the Corporation or recipients is prohibited, except insofar as any legal advice is rendered to a client by an attorney. The professional independence of the attorney is protected, as long as he complies with the Canon of ethics of the profession. Attorneys are prohibited from handling a substantial number of matters including draft evasion, abortion, school desegregation, and group organisation cases. The sum of \$90 million is authorised for expenditure.

**INADEQUACIES:** The level of government support will still be inadequate, at least in the short run. This is the result of a number of facts. The fear of conservatives that funds will be used for social engineering through the legal processes has been mentioned. Other opponents are less visible. Many in the field of public welfare believe that legal services are amongst the least important of a number of welfare programmes because (depending on the philosophy of the critic) either

- (1) the principal short run objective should be income maintenance or
- (2) programmes should deal with the root causes of poverty not alleviations of its symptom.

In addition, most of the money for legal services have been concentrated in the largest cities of the North and meet with the result that there is no national political base for increased funding. Furthermore, during the last five years the number of lawyers in America has increased dramatically. There is renewed concern within the profession that broadening programmes providing free services to the poor may make it less easy for marginal practitioners to obtain paying clients. The small number of legal aid lawyers who may have sacrificed the interests of clients to vindicate a principle have been magnified out of proportion at the bar and bench.

## FUTURE DEVELOPMENTS

The enactment of the Legal Services Corporation Act for the first time provides a firm foundation for a federally supported national programme for legal services to the poor administered through local organisations. In the foreseeable future, it seems likely that most of the resources will be concentrated on providing services which poor people want and with relatively little effort aimed at major law reform. This will occur both because the political situation requires it and because many observers doubt the effectiveness of test case litigation or lobbying without a fundamental re-allocation of economic and political power which in turn will require little drastic changes in attitudes by the middle class or a successful revolution, neither of which appears imminent.

Changes in the structure of programmes will probably result from the incorporation of "judicare" into some existing programmes. In a "judicare" programme a poor person is screened by a public agency which determines his need for certain kinds of legal services and his inability to pay for them. Instead of being referred to a salaried staff lawyer, the indigent is referred to a member of the practising bar who has expressed a willingness to participate in the project. The services are rendered by the lawyer who then is paid by the public agency on the basis of an agreed scale of fees. Australian schemes basically fit into this concept. The poor man has the benefit of access to the same Counsel as does the more affluent citizen.

Unquestionably the cost will be considerably greater. In all probability there will be less law reform effort. It may, however, greatly expand the level of support for legal aid within the legal profession as lawyers not only can look to the program for compensation but will become more familiar with the deficiencies in the legal process which plague the poor. It is probably the only system that can provide legal services in rural areas.

Ultimately there will probably be a move towards the merger of civil and legal programmes which are now separate. This, however, will require much rethinking of the responsibility between the States and the Federal Government in providing legal services, as the States now bear almost the entire costs of representation in criminal cases and the Federal Government bears almost the entire costs in civil matters. More importantly, it will require an understanding that poor people have legal problems, some of which are civil and some of which are criminal, and that no distinction is necessarily required. These combined programmes will probably involve both salaried staff officers and private "judicare".

## CONCLUSION

In America, there is now general acceptance of the belief that poor people must have access to the legal system for the redress of their grievances if society expects them to eschew violence and self-help. The profession in general recognizes that it cannot expect that a democratic society will continue to grant a monopoly

to any group unless it makes its services available to all. There is general recognition that neither the *pro bono publico* activities of a private lawyer nor the humanitarian concern of those who can contribute to charity, are adequate to meet the need for legal services. The only way to make the system work is a national system financed by taxation. The only way to assure the quality of the services is to protect the independence of the lawyer who is rendering them. There is still much to be done before these principles are complemented fully. There is hope in the realisation that more has been accomplished in the last decade than in the first 175 years of the nation's independence.

The Australian Government is now establishing Australian Legal Aid Offices which resemble in some ways the neighbourhood law offices in America. Many of the problems faced by legal aid programmes in rural areas and on Indian Reservations in the U.S. are now being met and solved in new legal aid programmes for Aborigines. It is an appropriate time for all interested in the legal process to examine these programmes, explore the direction in which they are proceeding and attempt to provide helpful suggestions for their improvement.

## FOOTNOTES:

1. Fla, 153 So 2d. 299
2. The American Bar Association as a private organisation. Approximately 1/2 of American lawyers are members.

