

Law Talk

3 JULY 2015

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Access to **JUSTICE**

An investigation of the state of
Legal Aid, by Sasha Borissenko



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869



LEGAL AID & ACCESS TO JUSTICE

In 2009 Dame Margaret Bazley's controversial report Transforming the Legal Aid System sought to completely overhaul what was described as a system that was "open to abuse by lawyers and defendants".



Six years later and changes include a new eligibility test for those wishing to acquire legal aid, a new rotation system and fixed fees among lawyers working in the courts and the expansion of the Public Defence System (PDS) to what has become "the largest public criminal law firm" in the country – all of which has led to increasing fears of limited access to justice for the public. New Zealand Law Society journalist **Sasha Borissenko** investigates.

From the Government

Associate Justice Minister Simon Bridges says the Government significantly reformed the legal aid system, namely by disestablishing the Legal Services Agency and rolling its functions into the Ministry of Justice and expanding the Public Defence Service (PDS) to provide “high quality criminal legal aid defence services in the 14 busiest criminal courts around New Zealand”.

“We made changes to ensure the quality of legal advice, and altered the way lawyers are paid to avoid any incentive to keep cases in the system for longer than necessary.

“There may well be further improvements needed in the future. However, the reforms to date have helped to ensure the long-term sustainability of the legal aid system. This means that those who need legal aid most, now and in the future, will be able to access it.”

Ministry Legal Aid Services general manager Michele McCreadie says of the 86 recommendations made in the Bazley report, 79 were accepted by the Government. The majority have been implemented but there are likely to be further changes to the system.

Reaching \$172 million in 2010 and climbing, legal aid expenditure was not sustainable for New Zealand, she says.

“The country was just not in a situation where it could effectively and efficiently have that spending and there were systems in place that needed tightening up.

“Some of the changes came about to stop the rorting of the system by a small number of lawyers. Some lawyers had so many cases that they weren’t able to provide good legal services and also the cases were not evenly distributed – the rotation system has improved this situation,” she says.

Eligibility for legal aid is set out in legislation and regulations, all of which are available to the public. Whether eligibility should be changed is a question for government to decide, she says.

“We understand that the changes have been really hard on lawyers – especially criminal lawyers. We really value the work they do and recognise that they are really important for legal aid.

“Without legal aid lawyers we could not provide services for legally aided people. We are working as hard as we possibly can to improve the services we provide to New Zealanders and build and maintain our relationship with the legal profession.”



Associate Justice Minister Simon Bridges

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What the profession has to say

Criminal Bar Association Vice-President and Wellington criminal lawyer Noel Sainsbury says the system is completely in disarray and he takes particular umbrage at the fixed fees for lawyers and the expansion of PDS.

“First you had the ‘powers that be’ create moral panic – the ‘car boot lawyer’ was completely blown out of proportion. Sure, the bill was high but that was just after the eligibility test for legal aid was extended. The ministry’s claims that the trajectory was unsustainable wasn’t an accurate depiction of the situation they, in fact, created.”

There were certainly abuses happening, but they could only happen in places such as Auckland’s Manukau because of the sheer volume of cases, he says.

“Imagine I’m a new lawyer finding it difficult to get work so I go to Manukau where there’s a shortage of staff. I could potentially become a duty solicitor for five days a week at \$90 per hour. \$150,000 per year isn’t a bad income, but that’s only if you are working from your car so-to-speak.

“A typical lawyer might have to pay \$75 per hour in overheads. While most criminal lawyers all work in yellow-stickered buildings with no harbour views that are without cappuccino machines, you still have to pay legal subscriptions, the rent et al. You’d be paid more as a mechanic, frankly.”

But then the poaching of lawyers, further legal aid loopholes and assignment schemes happened, he says.

“If you were entrepreneurially minded the money was there to be harvested. But this was only the result of few lawyers taking advantage of the system in Auckland. Why should the rest of the country be punished for Manukau’s dealings?”

While the Bazley report sought to solve some of these issues, it was used as a “stick to beat everyone with”, Mr Sainsbury says.

Now, for a straightforward assignment on a basic police prosecution that would provide a fee of \$265 (GST excluded), he says, to be a legal aid provider, private criminal lawyers are expected to have an office, they need to take instructions, meet the

client, provide client care material, write to police, consider the case, identify factual issues, undertake necessary research and discuss it with the client, negotiate the charge, review the evidence, conduct DVD interviews, deal with such things as unopposed bail, name variations and name suppression, attend court, have discussions with the prosecution, enter the plea, report that to the client – and the list goes on.

“Say you managed to squeeze the job into five hours of work, with overheads costing \$50 per hour at the very least, you might have made a healthy \$3 on that bad boy.

“It’s so obvious to see that the fixed fees are inducing the archetypal ‘car boot lawyer’ – the very thing the ministry was trying to combat. You’re incentivised to do a shoddy job, to enter a guilty plea at the fastest moment, to cut corners and cut everything to the bone because there’s no way you can do the work in those time frames.”

But because the system hasn’t entirely imploded, the ministry assumes “all is well”, he says.

“I do enjoy the trial work. The law is fantastic and the people are fantastic. I feel passionate for my clients but I could do without not being properly paid and valued. It sends me a message that I shouldn’t bother. These cuts have been quietly sapping the morale out of the whole system.”

While PDS has an important role with its aim to train lawyers, it becomes a “legal ghetto” because there’s nowhere to go thereafter because of the increasing “private criminal law” drought.

With there being no other option but for PDS to do much of the legal aid work, “you’re left with that terrible feeling that PDS is empire building, that it’s a device to extend the scope of the ministry”, Mr Sainsbury says.

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Public Defence Service — now the ‘largest criminal law practice in the country’

PDS director Madeleine Laracy says PDS is now the largest criminal law practice in the country “offering high quality, independent and sustainable defence services”.

Ministry figures show that the total number of lawyers approved to provide criminal legal aid services (including the number of PDS lawyers) has not significantly reduced since the changes were made to legal aid.

In fact both Ms McCreadie and Mr Bridges do not agree with the claim that criminal law is dying as a profession.

“Ministry of Justice data shows the number of lawyers undertaking legal aid work has remained stable for the past three years at around 1,900 lawyers, and there is no evidence to suggest that lawyers do not want to undertake criminal legal aid work,” Mr Bridges says.

Ms Laracy says it is important when talking about “the profession” and the effect of the PDS on the criminal defence profession, to remember that PDS lawyers are part of the profession, not separate from it.

PDS Workload

The PDS takes up to 50% of criminal legal aid cases available on rotation in the courts where the PDS operates, which amounts to around 30% of criminal cases nationally, she says.

While the emergence of the PDS has therefore shifted a percentage of the criminal legal aid work from the private bar to the PDS, that work is still being done by lawyers at the criminal bar, she says.

The real distinction is that PDS lawyers perform their independent criminal legal aid work pursuant to an employment contract with the ministry, whereas the members of the private bar perform their independent criminal legal aid work pursuant to a contract with Provider Services, a team within Legal Aid Services, which is a part of the ministry.

“The reduction in legal aid work going to the private bar as a result of the emergence of PDS has no doubt had an impact on some lawyers who relied substantially or wholly on criminal legal aid for their work.

“However, that does not mean that there is less opportunity for lawyers to enter the criminal law profession. The PDS provides an alternative option to the private bar for junior lawyers wanting to enter the profession or lawyers seeking to develop their skills in a managed and supervised environment.”

Approximately 44% of the PDS’s current legal staff are classified by the PDS as junior lawyers. There is movement of lawyers between the PDS and the private bar at all lawyer levels, but particularly at the junior level, she says.

“Many lawyers who were trained as juniors at PDS go on to fine careers at the private bar or take up senior lawyer positions within PDS.”



What about those going through the system?

The Law Society’s Gisborne branch President, criminal defence lawyer and former Crown lawyer Tiana Epati says PDS and fixed fees aren’t the only problem. She fears the eligibility test “doesn’t capture all the people with real issues”, and if it does, they are – for all but the most serious charges – denied the right to choose their own lawyer.

There have been “so many instances where you see solo mums on a benefit, or people who are struggling financially who will be charged with a relatively minor offence and will not meet the eligibility threshold”.

While they are not at risk of imprisonment, there are nonetheless life changing consequences like disqualification from driving and forfeiture of property, she says.

Either the defendant is forced into a



New Zealand Law Society Gisborne branch President Tiana Epati

self-representation situation – which is a false economy because they usually require considerable assistance from the judge and it slows the hearing – or more lawyers are forced to do pro bono work, Ms Epati says.

Women's Refuge chief executive Dr Ang Jury says either not qualifying for legal aid or failing to find a legal aid lawyer means more domestic violence victims are resorting to self representation.

“The courts can be a scary enough process at the best of times, let alone if you are subject to domestic violence. Seeking a protection order, for example, would be an entirely new experience. You need that helping hand in my opinion.”

Women's Refuge has set up a fund to assist women who don't qualify for legal aid.

“The money will run out because more and more people are needing to access it. I think the limits for legal aid are unrealistic. If you have women who are working not on a particularly fantastic wage, and then they decide to leave their abusive partner – for many of them it all gets too hard.”

From the Ministry

Ms McCreadie says there are legislative/regulatory provisions that set out the eligibility criteria for legal aid in a clear and transparent way.

“The rules are clear and the ministry is not in a position to comment on whether the criteria should be changed. That's a question for government. The government is to decide whether the system needs changing or not.”

Meanwhile Mr Bridges says those people who are eligible for legal aid receive it – “there is nothing to indicate that

people are ‘falling through the cracks’.”

Income is only one of the factors considered when assessing a person's eligibility for legal aid, he says.

Discretion can be exercised in certain types of cases and where there are special circumstances to ensure that a person is able to access justice. This discretion is likely to be exercised where the person seeking legal aid is especially vulnerable – for example, in domestic violence and mental health cases, Mr Bridges says.

Ms Epati says in the instance a client qualifies for legal aid, a lot of serious offences (including three-strike offences) that have a maximum penalty of less than 14 years' imprisonment are included within that PAL 1 and 2 category – which is problematic for people who, in these circumstances, would want to choose their own lawyer.

These people start on the back foot and are not as well equipped, “unlike their well-heeled counterparts who can afford a lawyer and therefore can choose”, she says.

“I can see at the coalface if you don't get to choose your lawyer it can be really unfair. There's a school of thought that suggests this situation is contrary to one's fair trial rights.”

The situation is particularly dire for repeat offenders, she says.

Trust threatened

Ms Epati recalls situations where she has represented defendants where it has taken a great amount of time and energy to create that trust and

rapport with them (and their families) only to find when they return for another offence, they are assigned a new lawyer.

“The Criminal Procedure Act is aimed at early resolution and engagement by both sides. This is only going to work if the client trusts you, is willing to communicate and engage with you.

“Where you have clients who are not willing to engage, or where you have not established the necessary relationship, it is difficult to get vital information. It means these people mightn't be represented to the best standard, which could impinge on their access to justice.

“Where I have someone with a significant criminal history, and there are communication barriers, I often ask the defendant who their previous lawyer was and gain their permission to discuss their case with that lawyer. I then phone that lawyer and try and get some background information.

“There have been instances where I have been able to uncover information like mental health issues, psychological abuse, a significant head injury and substance abuse, which helps me understand what is going on for the client. Because of the personal nature of such information, I would never have otherwise obtained this from a client who doesn't know me,” Ms Epati says.

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Community Law Otago managing solicitor Caryl O'Connor

The real issue: access to justice

Community Law Otago managing solicitor Caryl O'Connor says access to justice is the ultimate worry and it's lawyers throughout history who have been leaders of social change.

"They recognise the social and economic framework in which the work correlates directly to the justice outcomes of the rich and the poor in that society, and the impacts on social cohesion disparity and barriers can have."

Support then, from lawyers in recognising the work undertaken by law centres, and working with them to increase capacity through resourcing, is essential in allowing law centres to continue their role of engagement and protection of the vulnerable in the changing (and increasingly threadbare) fabric of society.

Access to justice, although impossible to canvass simply, is community law centres' core business.

"Suffice to say that the generosity of spirit determining the discourse behind the definition is subject to economic and political vagaries, is of global concern in western democracies, and has become urgent in tone in post GFC/austerity budget discussions."

Participation in state sanctioned dispute processes is crucial to the maintenance of

the rule of law and being part of a democratic society, she says.

"Community law centres work to reduce barriers to accessing justice in a number of ways – by engaging with the disengaged, disenchanted and dispossessed; and seeking to prosecute and protect the rights of those unable, for a number of reasons, to do so on their own behalf.

"This is not an easy task. Innovation and adaptation are key, both in methods employed to engage and educate, and in seeking and creating resolutions to legal disputes most appropriate and satisfactory to the client group. Observation demonstrates what a powerful effect and change a

positive outcome can have on someone used to expecting nothing."

Legal education goes further than legal rights and responsibilities, she says.

"Participation in a legal system in an attempt to gain justice can be a formidable undertaking for anyone, but for those without the knowledge, skills and most importantly, the belief of a positive outcome, the obstacles can become insurmountable.

"This results in apathy and inaction, and for those in a vulnerable situation, the adoption of the path of least resistance in the short term despite long term disadvantage arising from this passivity.

"Therefore the skills, commitment and belief of those working in these situations – that a circumstance can be changed, that a positive outcome can be obtained, that justice can be done – is fundamental to achieving supportable outcomes for the disempowered," Ms O'Connor says.

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