

## **Some reflections on 30 years of a National Legal Aid Scheme**

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### **1. Introduction**

Good afternoon.

I'd like to begin by thanking National Legal Aid for inviting me to speak at this session.

I want to begin by explaining that I'm not a legal practitioner, a legal aid lawyer, or a legal aid provider. But I've spent quite a lot of time over the past 18 years in writing about legal aid, doing applied research, and more recently looking at labour market and workplace changes affecting lawyers.

What I've been asked to do in my presentation this afternoon is to present something of an overview of the 30 years of the National Legal Aid Scheme, and to consider the question, "Where have we got"?

My presentation covers three main topics:

- The Origins of the National Legal Aid Scheme
- The Experience of the National Legal Aid Scheme
- Where are we now with the National Scheme?

### **2. The origins of the National Legal Aid Scheme**

So, I begin with the origins of the National Scheme. This is a very brief account. For those interested in this topic I can let you have details of a paper that Frank Regan from Flinders and I have published recently on the lead-up to the National Scheme over 1973-1976.<sup>1</sup>

The National Scheme emerged from the Hobart SCAG meeting in January 1976. Like the mixed model in Canada the scheme was a political compromise, in this case between the Commonwealth, the States and the private legal profession.

A federal legal aid scheme appealed to the Commonwealth as a means of capping its expenditure on legal aid, and devolving operational responsibility to the States. A mixed model scheme was consistent with its commitment to maintaining a healthy, self-regulated, private enterprise legal profession.

A federal scheme also suited the States, which historically had little interest in legal aid, with a few exceptions. The States were attracted to a joint approach to legal aid, especially a largely Commonwealth-funded scheme, which involved little real State expenditure. The States were accustomed to spending very little on legal aid. They had resisted, for instance, legal profession pressure in the 1960s to fund Judicare schemes.

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<sup>1</sup> Fleming D & Regan F, "Re-visiting the origins, rise and demise of the Australian Legal Aid Office" (2006) 13 (1) *International Journal of the Legal Profession* 69.

State Governments also stood to benefit politically (at little cost) from the establishment of LACs. The ALAO, for instance, had proven very popular.

The plans for the National Scheme also suited the private legal profession. Ensuring continued Commonwealth funding, eliminating the ALAO, and extinguishing fears of nationalization. The legislative framework establishing the mixed model scheme ensured continued spending on work performed by private lawyers, safeguarded professional independence, and recognised lawyers' occupational privileges.

As well, in acknowledging that, as Richard Abel, puts it, "legal aid is a social reform that begins with the solution – lawyers – and then looks for problems that it might solve", the scheme offered the legal profession not only opportunities for work, but in the administration and shaping policy direction of the scheme itself.<sup>2</sup>

A mixed model also offered the private legal profession a means of re-affirming its commitment to social professionalism, but with cost shifting to governments.

### **3. The Experience of the National Legal Aid Scheme**

I now turn to the second topic.

In preparing this paper I struggled with deciding how to talk about the experience of 30 years of the National Legal Aid Scheme in only 5 minutes. After a few false starts, it was obvious that even a very potted summary was impracticable.

My solution has been to pick out some major issues, and to divide the 30 years into three periods.

Inevitably I've missed other issues, and have not even attempted the detail. But once again, if you interested, I cover quite a lot of the experience in a 2000 UBC paper and in a 2002 paper for the Canadian Department of Justice, and, of course, there are other accounts.<sup>3</sup>

#### **3.1. The period of the mutual interest approach 1976-c1990**

The first of my three periods is what I've called the "mutual interest approach". This is a term that the Canadians have used to describe the operation of their mixed model scheme.

What does the "mutual interest approach" mean? In Australia it was an approach to managing and supplying legal aid that emphasized:

- High levels of reciprocity, agreement and co-operation amongst governments, LACs and the legal profession
- A real sense of shared purpose and responsibility
- Acknowledgement of legal aid (and its solutions of providing lawyers) as the dominant access to law policy template

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<sup>2</sup> Abel R L, "Law Without Politics: Legal Aid Under Advanced Capitalism" (1985) 32 *UCLA Law Review* 474, p. 598.

<sup>3</sup> Fleming D, "Australian Legal Aid Under the First Howard Government" (2000) 33 (2) *University of British Columbia Law Review* 343; Fleming D "The Purchaser-Supplier Approach in Legal Aid" *Legal Aid Research Series*, Department of Justice, Canada, June 2002, (see <http://www.justice.gc.ca/en/ps/rs/rep/2003/rr03lars-6/rr03lars-6.pdf>). See also Noone, M. A. & Tomsen, S., "Service beyond self-interest? Australian lawyers, legal aid and professionalism", (2001) 8 *International Journal of the Legal Profession* 251.

Over 1976 until the early 1990s the approach served as the governing paradigm of the National Scheme. A series of relationships that NLAAC in 1990 described (perhaps optimistically) as the “partnership which has evolved between Federal, State and Territory governments, legal aid commissions, community legal centres and the private legal profession”.<sup>4</sup>

What were the advantages of the mutual interest approach?

An important one is that it worked, a fact, which NLAAC noted, “which ought never be underestimated”.<sup>5</sup> In the late 1980s the LACs gained experience and maturity as service providers. The National Scheme developed as a reasonably effective and generally efficient system of legal aid. Remembering that efficiency has always been difficult to demonstrate, at least to the satisfaction of the Commonwealth Department of Finance. It has taken a long time for good, nationally comparable data to become readily available.

The mutual interest approach also mobilised the social justice and legal responsibilities of governments, and provided opportunities to (and often actually did) build tangible levels of goodwill between legal aid funders, providers and suppliers.

It harnessed the expertise and experience of participant partners, particularly the organised legal profession and its legal practitioners, and delivered to the States and the legal profession on the compromise brokered with the Commonwealth in 1976.

Agreement on core principles also facilitated conflict resolution (at least between LACs and the private legal profession) in what was a new and inevitably complex, multi-interest national public policy project.

The mutual interest approach also had downsides.

Funding was always less than demand, and restricted the availability of legal aid, and probably the performance of the National Scheme.

The benefits to the Commonwealth were less than it had hoped for. In the 1980s the Commonwealth had difficulty in achieving transparency in LAC spending, controlling and monitoring expenditure and ensuring national uniformity in access to legal aid in Commonwealth/Federal matters.

The Commonwealth did not play a big role in policy (other than seeking better control of money), which advantaged the LACs, who developed policy expertise, and also encouraged the establishment of NLA (in the form of the Director’s Meetings).

Nor did all other legal aid interest groups benefit. The voices of social welfare organizations such as ACOSS were muted, and social welfare policymakers frustrated by the concentrated on “in litigation” services.

The CLCs were also on the sidelines (of the government, LAC and legal profession partnership).

### **3.2. The crumbling of the mutual interest approach**

By 1990 the foundations of the mutual interest approach were crumbling.

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<sup>4</sup> National Legal Aid Advisory Committee, *Legal Aid for the Australian Community*, (Canberra, AGPS, 1990), p. 109.

<sup>5</sup> *Ibid*, p. 108.

One reason is that it was increasingly out-of-step with developments in Federal public policy.

In 1990 the TPC gave notice that the work practices of the professions, including the legal profession, would be reviewed.<sup>6</sup>

Beginning in 1983, neo-liberal economic policy, NPM, privatisation and corporatisation and other market-inspired changes had substantially transformed what Castles describes as the workers' welfare state, central to the Australian economy since the early 20<sup>th</sup> century.<sup>7</sup>

Governments had accelerated the re-negotiation of legal professionalism, important because legal aid was the social dividend which governments since the 1910s had demanded from the private legal profession.

In 1993 the Commonwealth accepted the Hilmer Committee recommendations for micro-economic reform, and in 1995 these were applied to the re-regulation of professional work, including lawyers' work.<sup>8</sup>

That same year the Commonwealth Attorney-General commissioned AJAC to recommend reforms to the legal services system, including legal aid, and to apply competition framework principles in assessing the evidence, and making its recommendations.

In 1995 the Keating Government accepted the AJAC report, and a new, access-to-justice approach, shaped in the shadow of National Competition Policy, and replacing legal aid as the cornerstone of Commonwealth popular access to law policies and programs.

At the same time growing internal and external competition and other market changes, State-based regulatory changes and consumer discontent were fuelling the trajectories of change affecting the legal profession, its work, and its commitment to social professionalism, all of which had made participation in the National Scheme so attractive in 1976.

### **3.3. The purchaser-supplier period 1996-2006**

The mutual interest approach almost disappeared in mid-1996, when the Howard Government abruptly terminated the Commonwealth-State legal aid agreements, and cut funding for the National Scheme by about \$30m.

As many of you are better aware than me, these actions were very damaging. The return to a model of Commonwealth and State matters and funding cuts aggravated already falling levels of access. Reduced expenditure (and rising costs) in the early 1990s led LACs to ration spending "to spread limited legal aid funds among as many matters as possible", and this was continued after the 1996/97 changes.<sup>9</sup>

<sup>6</sup> Trade Practices Commission, *Regulation of professional markets in Australia: issues for review*, (Canberra, Paragon Printers, 1990), p. 1.

<sup>7</sup> See Castles F G, "The dynamics of policy change: What happened to the English-speaking Nations in the 1980s" (1990) 18 *European Journal of Political Research* 491.

<sup>8</sup> See Scales B, "National Competition Policy" (1996) 55 *Australian Journal of Public Administration* 68, p.69. See also National Competition Policy Review, *National Competition Policy - Report by the Independent Committee of Inquiry*, (Canberra, Australian Government Publishing Service, 1993).

<sup>9</sup> See Fleming D & Daly A, "Private practitioners and the Australian mixed model: Changes in labour markets for legal aid 1990-2003", (see AGD website: [http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/Publications\\_2005\\_Private\\_Practioners\\_and\\_the\\_Australian\\_mixed\\_model](http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/Publications_2005_Private_Practioners_and_the_Australian_mixed_model)).

The 1996 intervention also caused a lot of heartfelt anger amongst the legal aid communities in the States. As an example in 2001, for instance, one senior Commonwealth official, when asked when he thought the LACs would forgive the Commonwealth, replied, “not in my lifetime”.<sup>10</sup>

However, intervention by the Commonwealth was not entirely a surprise, as I’ve argued in the UBC paper. Since 1983 its focus has been to get better and more targeted value for its legal aid spending.

Moreover, as I’ve suggested, the mutual interest approach was crumbling, by 1996 compounded by the growing retreat of the private legal profession from legal aid, and legal aid work.

Nor, at least in the longer term, were the 1996/97 changes all negative. A purchaser-supplier approach and other administrative technologies of the market welfare state such as, contracting out, partnering, and an emphasis on efficiency and competition, have advantages, as well as disadvantages.<sup>11</sup>

The changes also put the heat on the Commonwealth to take a greater role in policy development, and guiding the allocation, distribution and provision of national legal aid services.

As well as putting pressure on the States to increase legal aid funding, and, importantly, increasing spending on the community legal services sector.

#### **4. Where are we now with the National Scheme?**

I now turn to the third part of the presentation, that is, to consider the question, where are now with the National Legal Aid Scheme?

In this part I’m continuing to look at the National Scheme as a system of legal aid, and not issues of funding, or unmet demand and needs. Although there are clearly serious gaps in provision, as the Senate Committee 2004 report concluded: “various groups are particularly restricted in gaining access to justice”.<sup>12</sup>

And my colleagues on the panel will talk about the experience of LACs, and the Commonwealth.

My purpose is to make two helicopter points.

##### **4.1. The National Legal Aid Scheme as a successful mixed model**

The first is that as a delivery system the National Scheme has been a great success. Mixed models are now regarded as the optimal delivery model, and the Australian scheme has more than played its part in proving this.<sup>13</sup> England and Scotland have recently supplemented their Judicare schemes with salaried lawyers, and, like Canada in modifying its own mixed model, have looked to the Australian experience.

But an immediate and probably long-term problem is ensuring continued participation by private practitioners, a problem that also faces mixed model and Judicare schemes in England, Scotland, The Netherlands, Canada and the US.

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<sup>10</sup> See Fleming, “Australian Legal Aid Under the First Howard Government”, above n 3.

<sup>11</sup> Fleming D, “The Purchaser-Supplier Approach in Legal Aid”, above n 3, pp. 26-37.

<sup>12</sup> Senate Legal and Constitutional Committee (2004), *Inquiry into Legal Aid and Access to Justice*, p. xvi.

<sup>13</sup> See Paterson A, “Legal Aid at the Crossroads” (1991) 10 *Civil Justice Quarterly* 124.

Money is one reason. Firms doing legal aid work incur real opportunity costs, measurable not only against fees paid by self-funding clients for comparable work, but also against opportunities for more highly remunerated legal work than family law or crime in a buoyant market for legal services.<sup>14</sup>

But money is not the only reason. A study of workplace changes in law firms in Sydney and Canberra in which I was involved last year showed the choice offered by *pro bono* options, greater specialization, targeting commercial work, a dislike of legal aid clients, complaints about bureaucracy, the fading of social professionalism – and new interpretations of the social obligations of the legal profession – were contributing factors.<sup>15</sup>

We are starting to better understand supply (the AGD will soon have the results of its survey). But we must work to conserve existing legal aid labour markets, and intervene to make legal aid work attractive to new entrants and younger lawyers. In England, for instance, since 2001 the LSC has provide training contracts for young solicitors, and, in priority areas, financial incentives for barristers to do legal aid work.<sup>16</sup>

#### **4.2. Moving to a complex mixed model of legal services**

My second helicopter point is about how we might continue to reproduce the successful experiences of the National Legal Aid Scheme.

The National Scheme is now one amongst many providers. The past 10 years have seen a more complex and diversified access to justice project. LACs also now provide a much wide range of services than legal representation and advice. There is a revitalized CLC sector. *Pro bono* and other free legal services provided by private lawyers and developments such as PDRR and other Commonwealth initiatives such as family counselling have increased legal services options.

In 2004 Scotland looked at the issue of growing complexity and diversity in its Judicare scheme. The Scottish Executive identified a “perplexing array” of legal aid, advice and information services in Scotland, all intended, in different ways to ensure equal ability to use the law, ensuring equality before the law, provide a means to enforce rights, or contribute to social inclusion.<sup>17</sup>

The Scots found that neither the mixed model nor Judicare or even complex mixed models of legal services (which is what Australia probably has now) were up to the task of adequately “using complementary methods of service delivery for complementary purposes”. In other words, making a complex mixed model legal services delivery system work effectively.

Instead, a new model was needed, a model which the Scots have described as a “planned complex mixed model”, to mobilise the planning and co-ordination at a national level to deliver legal services to citizens.

We can learn from Scotland. Moving to a planned complex mixed model of legal services is the immediate and on-going challenge for governments, LACs, the

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<sup>14</sup> See Fleming & Daly, above n 9.

<sup>15</sup> See Fleming D, Daly A & Lewis P, “Firms Existing Legal Aid Work: New Evidence from the Workplace” Legal Services Commission Research Centre International Conference, Queens University, Belfast, 19-21 April 2006.

<sup>16</sup> Legal Services Commission, *Annual Report 2001/02* (London, The Stationery Office 2002), p. 2.

<sup>17</sup> See Scottish Executive, *Strategic Review on the Delivery of Legal Aid, Advice and Information: Report to Ministers and the Scottish Legal Aid Board*, (Scottish Executive, Edinburgh, 2004).

private legal profession, the CLCs and the growing number of other groups with an interest in improving levels of effective popular access to law.

## 5. Conclusion

I am going to conclude with one brief observation.

In 1985 when Richard Abel sought to explain developments in legal aid since the mid-19<sup>th</sup> century he concluded that one "irony of legal aid ... is that was becoming obsolete even as it was established".<sup>18</sup>

In effect, he was saying that in modernity legal rights and lawyers had done little to advance the position of the poor. Instead their salvation had been the social welfare state. And that legal aid was in practice merely an adjunct to the state, helping to regulate family life, and processing criminal accused.

Australian society has changed dramatically since 1985. Legal aid still serves state functions. But the end of the workers' welfare state and its policies of social protection have produced forgotten levels of social exclusion, and the market welfare new and unprecedented demands for legal aid, not just by the poor, but for most of us, in our new roles as its new consumer citizens.

Thank you.

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<sup>18</sup> Abel, above n 2, p. 594.

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