

THE CRISIS IN LEGAL AID IN SOUTH AUSTRALIA

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While there is a strong move current in Victoria to introduce a legal aid scheme similar to that in South Australia, there are clear signs that the operation of South Australian legal aid under the *Poor Persons Legal Assistance Act* of 1936 is facing a crisis. In its annual report in 1959 the Law Society of South Australia stated that the present scheme "has become increasingly burdensome on members of the profession"¹. The number of the profession holding practising certificates has changed little in the period of almost 27 years in which the present system has operated². At the same time the number of legal aid cases dealt with has almost doubled³. It has been estimated that the approximate value of free assistance given in recent years has been approximately £50,000 annually. The total cost to the South Australian Government in 1958-9 was £25,000⁴. The twentieth century is an era when social services are increasingly becoming the responsibility of the State and so the question has been raised as to why legal practitioners should be called upon personally to subsidise, to the extent of about £50,000 every year, what many people regard as an essential social service.

Assignments of criminal cases to counsel and civil proceedings in *forma pauperis* have been part of English legal tradition for centuries. As long ago as 1791, the United States in seeking to embody legal concepts of English liberty in the Bill of Rights, as the first ten amendments to the United States Constitution are more generally known, provided in the sixth amendment that any accused person should have the right "to have the assistance of counsel for his defence". In this century various forms of legal aid have been adopted, statutorily or otherwise in most jurisdictions which are rooted in the common law. In England a government sponsored scheme under which the Government pays the entire cost of administering the scheme in

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1. Report of the Council of the Law Society of South Australia, year ending June 30, 1959, p. 5.

2. In 1933, 309 persons held practising certificates when the population of this State was 584,489. In 1958 there were 321 practising certificates with a population of 892,149.

3. See Tables C and D.

4. Report of the Council of the Law Society, 1959, p. 5.

addition to paying 85 per cent. of the taxed bill of costs in High Court matters and 100 per cent. of the taxed costs in County Court and other proceedings, has been in operation since 1950⁵. The United States, on the other hand, has a mixed bag of legal aid services. Today there are over 80 legal aid services in that country. Some are Public Defender offices supported by government funds; others are privately supported by organised charity, local government bodies or philanthropists. Another development has been the setting up of Legal Aid Clinics in some of the best Law Schools in the country where law students assist in Legal Aid work under the supervision of members of the Bar⁶. Similarly there is no uniformity in Australia. Victoria⁷ and New South Wales⁸ have Public Solicitors' offices. Western Australia⁹ has a voluntary panel of practitioners who do legal aid work in co-operation with the Crown Law Department, Tasmania¹⁰ and Queensland¹¹ have legal aid not dissimilar to South Australia's Legal Assistance Scheme. In addition to this, in Victoria, there is a legal aid clinic organised by a charitable body and primarily staffed by students of the University of Melbourne Law School, who work under the supervision of members of the teaching Staff and members of the profession who voluntarily participate in the work.

LEGAL AID IN SOUTH AUSTRALIA

The South Australian Scheme is administered by the staff of the Law Society (the Secretary (a solicitor), an Assistant Secretary (a stenographer) and four others) and an Administering Committee, which consists of three members of the Law Society Council and the Secretary. Members of the Council other than the Secretary serve in rotation for a period of six months and receive no remuneration or allowances for their service; they devote at least two or three hours a week in work for the Committee.

To obtain legal aid an applicant makes an appointment to see the Secretary or one of his assistants. There is normally a delay of some two or three days, but if the matter is urgent it will be given priority. Many matters can be disposed of by the Secretary, but if litigation or negotiations with other parties are likely to be necessary, he takes a written application for assistance and a statutory declaration. The

applicant must furnish information as to his capital and income, liabilities, marital status, dependents and similar matters¹².

The application is then placed before the Committee administering the Scheme, which meets weekly to decide in which cases assistance is to be granted. The members each have an opportunity to read the files and miscellaneous correspondence in advance and thus to prepare their recommendations. There is no rigid application of a means test either of income or assets and the Committee has a wide discretion where there are special circumstances to be taken into account.

Once the application is approved the Secretary assigns it to a member of the profession. He tries to give work to suit a practitioner's special field, and at the same time make an approximately equal spread of assignments. Practitioners who work only in such fields as company and probate matters must from time to time be given assignments outside those fields through insufficiency of that type of work. Members of the profession are not obliged to work under the scheme but on the whole practitioners have responded well and loyally continue to assist in making the Scheme a success.

Assistance under the Scheme is not necessarily free. The Committee determines what amount, if any, a successful applicant can pay towards the costs of the solicitor who will take the assignment. Should an applicant's financial position improve, his rate of contribution may be reviewed. The Law Society does not handle payments; on the conclusion of the assignment the solicitor concerned reports to the Society and forwards his bill of costs. The Committee checks the bill and determines what portion is to be paid. Payments may be made of a fixed amount or in instalments. No part of the Government's annual grant to the Scheme is used in payment of professional fees. The result is that Practitioners often work gratuitously and also suffer actual loss from outgoings by way of office overhead.

The Scheme is related to various social services provided by State and Commonwealth departments and by private organisations, in that these bodies send applicants regularly to the Law Society.

5. Legal Aid and Advice Act 1949.

6. C. C. Moreland, *Equal Justice Under Law* (Oceana 1957), Chapter 7.

7. Poor Persons Legal Assistance Act 1958. In particular Sec. 8. (The original Act was passed in 1928).

8. Legal Assistance Act 1943.

9. Poor Persons Legal Assistance Act 1928-1931.

10. Legal Assistance Scheme Act 1954. Reference is made in some detail to the South Australian Act.

11. The Criminal Code, 1899, section 671 C; The Public Curator Act 1915.

12. The conditions of the application by which the applicant agrees to be found are:—
- (a) that the Society has an absolute discretion to grant or refuse assistance;
 - (b) that the applicant to whom assistance is granted shall be liable to pay to the practitioner who is retained on his behalf such reasonable costs (if any) as the Society in the circumstances thinks fit;
 - (c) that the applicant shall disclose to the Society any change in his financial position whilst in receipt of assistance or within six months thereafter;
 - (d) that the applicant shall accept the advice of the practitioner retained on his behalf and act accordingly otherwise the Society may withdraw all assistance;
 - (e) that the practitioner may disclose to the Society any information given to him by the applicant, and to this extent the applicant waives privilege;
 - (f) that the applicant is to be entitled to appeal to the Council of the Society from any decision of the Committee administering the Scheme.

These organisations include the Children's Welfare and Public Relief Department, the Police Department, the Public Trustee, the Commonwealth Legal Aid Bureau, the Social Services Department, the Immigration Department, the Good Neighbour Council and Tuberculosis Association. There is as yet no form of reciprocity with legal assistance schemes in other States or overseas. There are, however, cases known where, as a matter of personal goodwill, the agent of a South Australian Solicitor in another State has undertaken to act for reduced costs or for no costs at all.

LEGAL AID IN OTHER STATES

There are four broad categories into which the forms of legal aid may be divided: (1) where Counsel is appointed by a Court or judge at or before the commencement of court proceedings (actions *in forma pauperis*); (2) where a Government official, such as a Public Solicitor is appointed; (3) where work is assigned to practitioners in general or to a voluntary panel of practitioners; and (4) where legal aid is organised by charitable or other voluntary bodies. The first class had its prototype in the system operating in England until 1949, and it still continues there in criminal courts under the "dock-brief" system. It also survives in New Zealand, but has been elsewhere discontinued as obsolete.

Most of the Australian States have schemes in operation which involve some combination of these various methods of approach. Thus, New South Wales has a Public Solicitor's Office which employs fifteen solicitors and handles some 2,000 matters annually. A voluntary panel of solicitors handles about fifty matters a year assigned to them by the Public Solicitor. There are also two Public Defenders who are members of the New South Wales Bar and who are instructed by the Public Solicitor. A panel of Counsel including Queen's Counsel act for legally assisted persons. As well as this, certain courts have their own schemes: the Divorce Court and the Workmen's Compensation Court have their own systems, and in the two larger Children's Courts private solicitors act as court solicitors. Legal assistance is granted to persons earning less than a certain sum which varies with the basic wage and which at present is £750 per annum and £75 for each total dependent. In respect of property the applicant is allowed £200 excluding clothing, tools of trade, household furniture and a £3,000 equity in a home. Government contribution to legal aid is between £30,000 and £35,000 a year.

Less complete systems exist in other States. Queensland has a scheme operated by the Queensland Law Society under which assignments are made to a voluntary panel of solicitors. The solicitor gives free advice and charges at a reduced rate where litigation is involved. In some cases the client arranges to pay a set portion of the fee. It is possible to institute divorce proceedings *in forma pauperis* provided

the applicant can prove that he has assets worth less than £25, but the method is cumbersome and seems to be obsolete now. Under the Supreme Court Rules a Court Judge may assign Counsel or a Solicitor to assist a defendant *in forma pauperis* proceedings. Since 1954 Tasmania has had a scheme which is similar to the one in South Australia. Assisted persons are required to make a contribution to solicitors' and counsel's fees if they can afford to do so; practitioners submit bills of costs and the costs paid are collected in a fund. A dividend is declared by the fund. During the last three years the dividend paid has been between 60 per cent. and 66 $\frac{2}{3}$ per cent. of the bills of costs submitted. The Government contribution is £3,000 per annum. The Western Australian scheme involves assignment by a Law Society sub-Committee to members of the profession. Applications are made in the first instance to a Poor Persons Officer in the Crown Law Department. A means test is applied; the wage being earned must be less than the basic wage. In Victoria legal aid is given by the Public Solicitor's Office. There is a means test fixed at a figure of £280.

ADVANTAGES AND DEFECTS OF SOUTH AUSTRALIAN LEGAL AID

A comparison of the South Australian Legal Assistance Scheme with systems in operation in the other Australian States and overseas shows that it stands with the most highly developed in its scope of assistance and in providing a service to the community by the legal profession. The success of the system is primarily due to the spirit of public service of the South Australian legal profession. Practically the whole of the profession has made itself available for legal aid work, including leading counsel. No case has been considered too difficult to deny legal aid to a deserving applicant.

As well as this outstanding record of public service, the present scheme has a number of advantages which cannot be overlooked. The Scheme is administered entirely by the legal profession itself. There is complete absence of control or direction from any outside source. For a profession that for centuries has prided itself on its independence any restriction on this might well be a retrograde step. There is the considerable advantage that under this form of organisation every person assigned to a practitioner is treated as an ordinary client and receives the same attention (with allowance for human nature) as any other client. No set rules determine what action can be taken by a practitioner in dealing with a legal assistance case. The result is that the practitioner has a complete discretion to pursue the course of action that he thinks best.

The lack of a rigid means test is an important advantage for the public at large, and probably also for the profession. For the public it means that there are no hard borderline cases excluded from

receiving legal assistance as, for example, at present occurs in Victoria, where the Public Solicitor's Department cannot give legal assistance where an applicant's assets exceed £280. The "fitness to pay" test in South Australia (from which results a sliding scale of fees according to a client's means), does not lead to the denial of adequate legal aid as not infrequently occurs in Victoria where an applicant for legal aid just fails to qualify under the means test. In some ways, this is an advantage for the legal profession in this State. Where an application for legal aid is denied by the Public Solicitor in Victoria the applicant often turns to a solicitor for assistance. The solicitor in these circumstances may find difficulty in recovering his fees. There is no ordered system of scaling charges according to means, as in South Australia, under which the solicitor can have some idea of the fees he will receive. In South Australia the onus is not on the practitioner to spend time and effort in investigating his client's ability to pay.

These advantages of the present scheme are undoubtedly challenged by some of the profession in South Australia. There are indications of a growing feeling that the present legal aid system needs modification. Those who propose modification point out that circumstances have changed radically since the present legal aid scheme was inaugurated. When the Scheme began operation the public at large had rarely, if ever, been in worse economic straits. Today, South Australia is enjoying an era of prosperity. The appalling need of 27 years ago has virtually disappeared and many applications for legal assistance arise from over-indulgence in Hire Purchase agreements and extravagant living.

In 1933 there were 309 legal practitioners and the population of South Australia was 584,489. In the intervening 27 years their number has hardly increased, yet the population of South Australia has multiplied by approximately 53 per cent.¹³ The result has been an ever increasing burden on individual members of the profession to keep legal aid operating on a satisfactory basis. Tables C and D show the increased legal aid work undertaken through the years. Legal aid therefore takes substantially more of a practitioner's time and increases his overhead expenses. Furthermore the number of lengthy and intricate criminal trials undertaken as aid cases has multiplied in a manner out of proportion to the rise in population.

At the same time the amount of ordinary non-legal aid work has become considerably greater since 1933. In the Supreme Court the number of originating proceedings has increased by 150 per cent., criminal cases by 125 per cent., criminal appeals by 900 per cent. and other processes by 250 per cent. In the Police Courts the number of cases has trebled. The burden of additional legal aid work on practi-

13. See Table B.

tioners thus overworked makes it difficult for them to give proper attention to their ordinary clients and legal aid cases.

In addition to these pragmatic problems which are placing increasing strain on the profession this is an era when essential public services are increasingly becoming the responsibility of the taxpayer. A form of legal assistance to deserving cases has long been recognised as a necessary prerequisite to ensure "equality before the law". The responsibility of providing this essential social service (in value approximately £50,000 a year) is borne by the legal profession who already contribute through taxation to the proper costs of government. The Medical Benefits Scheme has assisted in enabling the medical profession to lighten its financial burden and members of the legal profession may well ask why they are not similarly aided in providing a vital service to the community.

ALTERNATIVES TO THE PRESENT SCHEME

It is clear that the position would not be so critical if the membership of the profession in this State had increased proportionately with the rise in population during the last 27 years. However, there is little likelihood of this deficiency being rectified for some years to come. The first year class in the University Law School has shown a significant increase in 1960, but even if this upward trend continues the beneficial effect on the profession will take time to be felt. In these circumstances, it becomes necessary to consider what changes or modifications could assist in placing South Australia's legal aid scheme on a more satisfactory basis in the immediate future.

It is submitted that it would be unfortunate if the Law Society merely gave notice of intention to abandon the present scheme and called upon the Government to recast the basis of Legal Aid in this State completely. To return to the Public Solicitor system would be a retrograde step. A Public Solicitor system would bring arbitrary determination of the persons to whom legal aid is given and would almost certainly have to be limited to a narrow group of cases. It should be noted that the Victorian Government, which presently operates a scheme similar to that in South Australia before 1933, has indicated that it regards their present Scheme as unsatisfactory, and that the legal profession has shown interest in changing over to a system not unlike that in South Australia.

One minor modification already adopted in Tasmania which could be considered is to share such fees as are paid among members of the profession who assist in legal aid work. All fees for legal aid work could be paid into a fund which declares an annual dividend for all practitioners in proportion to the work undertaken by them during the year.

The question whether more Government funds should be made available to pay a share of the actual costs to practitioners in addi-

tion to the present grant for administration expenses, always looms large in discussions on the future of legal aid. Undoubtedly a scheme similar to that adopted in England, where standard fees are paid by the government for certain legal aid work, would help to overcome the financial drain which results under the present system. But standard fees, it is submitted, do have their disadvantages. Fees might well be expected in these circumstances to cover only limited types of cases, as in England, and the generous range of our present legal aid would be placed in jeopardy. As the operation of our legal aid scheme has shown, a number of clients who receive legal assistance now do pay a share of the costs of their matters. It would not be in the interests of the community to hand legal aid out on a "silver platter". Rather clients should still be required where they can, to pay a proportion of the fees for the work done. Additional Government funds should be made available to relieve the present burden; a satisfactory solution would be to use such additional Government moneys so far as possible to pay that proportion of the approved fees which are not recovered from the individual client. This could be done through the annual dividend system suggested in the preceding paragraph or by direct payments through the Law Society to the individual practitioner.

Money, however, is not the panacea for solving the present legal aid crisis in South Australia. Until the number of practitioners increases substantially, difficulties in administering legal aid will remain. One way in which the burden might be lessened would be to use students in the University Law School who have not entered into articles of clerkship. They could assist practitioners on a purely voluntary basis by working under the direction of the Law Society on small but time-consuming tasks, and even be seconded to practitioners on a legal aid case. The use of law students to assist in legal aid work has been quite successful in Victoria and in the United States for a number of years. In Victoria, volunteers from law students in their second and succeeding years have been able to play an important role in the successful operation of the Brotherhood of St. Laurence Legal Aid Service in that State. The use of Law Students in this work would have a twofold benefit. It would assist the working of legal aid and also familiarise students with the practice of the law a year or two before they enter into articles.

Legal Aid in South Australia clearly faces a critical time in the next few years. This article has attempted to canvass some of the problems and suggest possible lines of thought and action in future discussions. The profession in this State can justifiably claim that its Legal Aid Scheme is one of the most advanced in the world. The task remains to ascertain how best the administration and financing

of the system can be improved for the benefit of the legal profession and the community at large in the coming decade.*

STATISTICS ON SOUTH AUSTRALIAN LEGAL AID

The following are four Tables of statistics in relation to Legal Aid in South Australia. In some instances these statistics are not complete because of the absence of figures during some years of World War II.

TABLE A

Government Assistance to the Legal Aid Scheme

GOVERNMENT GRANT			
1933	.....	£ 500	
1952-3	.....	£ 3,200	
1953-4	.....	£ 3,680	
1954-5	.....	£ 3,400	
			1955-6
		
			£ 4,000
			1956-7
		
			£ 4,300
			1957-8
		
			£ 4,300
			1958-9
		
			£ 5,000

TABLE B

The number of Practising Certificates issued at various stages of operation of the Legal Aid Scheme.

	Practising Certificates	Population
1933	..... 309	584,489
1943	..... 207 (plus 68 on War Service)	616,027
1953	..... 319	785,665
1958	..... 321	892,149

TABLE C

Applications for Legal Aid and the action taken.

1935 (year ending Dec.)	Assigned to				Total
	Solicitor	Advised in Secretary's Office	Withdrawn	Rejected	
.....	784	296	73	280	1,388
1936-7	..... 429	797	49	205	1,480
1937-8	..... 374	568	81	231	1,254
1938-9	..... 362	670	85	252	1,369
1945-6	..... 409	371	29	135	944
1946-7	..... 375	397	29	72	873
1947-8	..... 515	333	39	168	1,055
1948-9	..... 576	265	59	142	1,042
1949-50	..... 550	344	36	166	1,096
1950-1	..... 644	285	38	142	1,109
1951-2	..... 865	220	17	119	1,221
1952-3	..... 766	560	6	151	1,483
1953-4	..... 776	300	29	90	1,195
1954-5	..... 874	303	30	104	1,311
1955-6	..... 934	258	30	109	1,331
1956-7 878	333	15	108	1,334
1957-8 966	294	26	122	1,408
1958-9 1,093	265	26	109	1,493

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TABLE D

The types of Cases assigned for Legal Aid.

	Divorce or Matrimonial	Police or Criminal	Tenancy	Accident Claims	Other Matters	Total
1951-2	292	155	110	—	308	865
1952-3	307	161	89	—	209	766
1953-4	360	150	55	66	145	776
1954-5	373	212	67	63	159	874
1955-6	385	237	60	78	178	934
1956-7	341	241	37	88	170	878
1957-8	377	263	57	87	182	966
1958-9	449	330	30	99	185	1,093