

Fiji

Fiji became a Republic in 1987 after a coup. In 2012 a Constitution Commission was established, chaired by Professor Yash Ghai, an eminent legal scholar.

Their draft constitution says this, in part, at Section 4 (1):

Secular State

1. Religious liberty, as recognised in the Bill of Rights, is a founding principle of the State.
2. Religious belief is personal.
3. Religion and the State are separate ...

The Fijian Constitution 'recognises' all religions, whereas the stricter 1905 French legislation does not recognise religions at all, allowing them as voluntary associations to register with the government; at the same time, in Fiji, there is an intention that the state is to be secular, a bridge that Australia and New Zealand are yet to build let alone cross.

Professor Ghai explained: 'This doesn't mean the state is anti-religion, but just a feeling that the function and responsibility of religion or beliefs within societies should be separated from the functions and policies of the institution of the State.'²¹

While the Methodist Church wanted Fiji to be a Christian state, the Catholic Church²² and the Church of England²³ both supported the move by the government to formally separate church and state in the new constitution. In addition, the Queen's face is to be removed from the currency and the Union Jack is to be removed from a new Fijian flag.

Conclusion

It will be some time, if ever, before the provisions of the new Fijian Constitution are tested in the courts to see whether government funding of religion through tax exemptions, grants and school subsidies could be held to be constitutional.

Be that as it may, the Fijian move makes a mockery of Australian and New Zealand political parties, and the Australian Republican Movement (not the Australian Republican Party or the New Zealand Republican Movement) all of whom, which the exception of the Australian Democrats, have had very little to say about constitutional separation of church and state.

The question, it seems to me, is: can constitutional monarchists and most Australian republicans, joined at the hip in their opposition to constitutional separation of church and state, blindside the public forever about an idea that should be a cornerstone of a future republic, and thereby protect the cosy trade-off between religion and government from the 'militant' intentions of citizens who think government should be truly impartial between religion and atheism? Or will Lionel Murphy, Thomas Jefferson, and Roger Williams²⁴, come back to haunt them?

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FOOTNOTES

1. Max Wallace, 'Clericalism in New Zealand: A Conspiracy of Silence', in M. Wallace (ed) *Realising Secularism: Australia and New Zealand*, ANZSA, Melbourne, 2010, p.72.
2. A.T. Kuru, 'Passive and Assertive Secularism: Historical Conditions, Ideological Struggles and State Policies Toward Religion', *World Politics* 59.4, 2007, p. 568.
3. Peter Hollingworth, *Focus* (magazine of the Anglican Church, Brisbane) June 2001.
4. Australian Associated Press, 2 March, 2006.
5. See backintheact.com. Last accessed 13/07/2013
6. *Sydney Morning Herald*, 31 December 2005/1 January, 2006.
7. *The Australian*, 4-5 February 2006.
8. M. Moore, *Sydney Morning Herald* 20-21 September, 2008.
9. See Jean Ely, *Contempt of Court: Unofficial Voices from the DOGS Australian High Court Case 1981*, Dissenters Press, Melbourne, 2011.
10. *Everson v Board of Education of the Township of Ewing*, 330 US 1, 1947.
11. Australian Taxation Office, Interpretive Decision, 'Fringe Benefits Tax, Religious Practitioner's Exemption', 2001/332, 15 September, 2001.
12. Max Wallace, 'Conflict of Interest?' *Dissent*, Autumn/Winter, 2011.
13. Anne Twomey, 'Bringing down the House? Keeping school chaplains means a surrender to the Executive', *theconversation.com*, 27 June, 2012.
14. Max Wallace 'Rich Enough? Do Church Schools Really Need Government Money?' <http://www.concordatwatch.eu/kb-37945.934> June, 2013.
15. Nicky Hager, 'Christian Right-Wing Activism in New Zealand', *Realising Secularism*, Op. Cit.
16. Jim Dakin, *The Secular Trend in New Zealand*, NZARH, Auckland, 2007, pp 126-7.
17. Cited by N.S.B. Cox, *The Evolution of the New Zealand Monarchy*, PhD Thesis, University of Auckland, 2001, p.286.
18. Max Wallace, 'Religious Wealth in New Zealand', *The Open Society*, June, 2013.
19. 'First charter school set to open next year', *New Zealand Herald*, 5 June 2013.
20. Bryce Edwards, 'Race, religion, lobbying and gambling', *New Zealand Herald Online*, 18 June 2013.
21. 'Separation of church and state guaranteed', *Fiji Times*, 6 September, 2012.
22. 'Fiji: Catholic Church supports secular state', *Oceania News*, 15 September, 2012.
23. 'Separation of church and state for Fiji', *The Church of England Newspaper*, Suva, 14 October, 2012.
24. For Roger Williams see Muriel Fraser, 'Introduction', *Realising Secularism*, Op. Cit.; Amanda Vanstone, *Hansard*, Senate, 18 March 1997.

The hurdles in accessing the legal system for the disadvantaged

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THIS ARTICLE SEEKS TO broaden the understanding of why legal aid services are critical, why they need

adequate funding, how the most disadvantaged face increased hurdles and the challenges that lie ahead.

In Australia there has been recent discussion about changes in guidelines as to what legal aid will and will not fund due to funding

shortages. The Senate Legal and Constitutional Affairs Committee report *Legal aid and access to justice* lamented the chronic under-funding of legal aid over the past decade by Commonwealth and State Governments and noted the increasing demand.¹

The danger with debates on legal aid services (including legal aid commissions and funding of community legal centres [CLCs]) is the public perception that the issue is about more money for lawyers and is limited to the right to a fair trial. Legal aid services do not just involve criminal and family law, as is commonly understood, but rather an array of diverse legal problems such as child protection, mental health, sub-standard housing and debt. Think of all the other areas where law governs people's lives.

Critical for people encountering the impact of the law in their lives is that they know their rights and responsibilities but also that they can protect and enforce their rights. Such elements are essential in a democracy where the Rule of Law is supposed to operate. If people cannot seek advice and support as they navigate their way through an increasing number of laws that affect their day to day lives then they become silenced and can be taken advantage of. A recent example of this was a successful challenge by Victoria Legal Aid in the High Court in early May 2013 over retrospective changes by the Federal Government to the social security laws enacted in July 2012. Under this law Centrelink recipients would have been liable to criminal charges for failing to inform Centrelink of things that might affect their benefit when the obligation to do so did not exist at the time. The fact that a person made a genuine mistake and had no intent to commit a fraud would be irrelevant. When one considers that the vast number of people on Centrelink are on low incomes and many experience some form of vulnerability such a law becomes even more concerning. The ruling affects 15,000 Australians prosecuted for fraud under these retrospective laws.

The overwhelming number of

clients that legal aid commissions and CLCs assist earn under \$26,000 and experience disadvantage. For a grant of legal aid to be represented in a court or tribunal the applicant must pass a means test and the case must be assessed as having merit. Other services are offered by legal aid commissions and CLCs which include advice, legal education, law reform and assistance but often only in relation to certain types of matters and, in the main, their clients are on low incomes or experience disadvantage. So there are significant thresholds in order to obtain legal assistance given the funding shortages and many already miss out.

New research commissioned by National Legal Aid² ('The Legal Australia Wide Survey: Legal need in Australia, 2012') – never before conducted in Australia – has underlined the critical importance of legal assistance. The recent research has largely gone unnoticed and has not informed much of the recent legal aid debate.

Based on empirical data about the advice-seeking behaviour and barriers in accessing the legal system, the research suggests that there are different ways in which legal aid services need to deliver services. The research reveals the significant and often long-lasting impact on lives that a lack of timely access to legal assistance can lead to and notes how complicated it is for people who experience disadvantage to navigate the complex legal system. For many years, research has been identifying issues around 'referral fatigue' where if community members approach more than one service three times they just give up. Why? Many CLCs have had to make hard decisions about the areas of law they can offer assistance in and have long waiting lists.

Often disadvantaged community members do not realise the significance of the documents or the case against them or that they have legal rights. They lack the relevant knowledge or leave things to the last minute and don't realise their matter is urgent or the consequences of inaction. I recall

one client who was homeless and had a severe mental illness. He had no clocks and did not own a watch and so missed appointments. Many services would no longer see him due to missed appointments. We were concerned he would not get the help he needed and would miss his court date. He was facing severe penalties for non-payment of fines. These included urinating in a public place (when he slept in the park and the toilets were locked) and travelling without a ticket. He had no money and no income. This is the nature of the client that legal services are working with and so making an appointment and expecting him to come to the office for legal help is not realistic. Buying him a clock he can carry with him or indicating the public spaces with clocks or delivering the legal services to the charitable organisations where people like him are likely to be may be the way forward. The Homeless Persons' Legal Clinic in Melbourne is one example of this approach.

The research³ identifies that many of those experiencing disadvantage are least likely to go to lawyers for help for a range of complex reasons. This group is also most likely to have not just one, but often multiple and cascading legal problems. This suggests that legal services which isolate and deal with only one legal issue may not make real inroads into addressing the person's full range issues. The findings of the research illustrate the flow-on implications of people not gaining access to effective legal services. The research highlights that people experiencing disadvantage often seek the assistance of a social worker, youth worker or friend and that these groups are often not able to identify a problem capable of a legal solution and so people do not get help. Their problem is likely to escalate. This has significant flow-on effects in terms of cost and on society.

The research argues that, in order for legal aid services to be effective and have an impact they need to do some things differently. Some CLCs and legal aid commissions are realising that

rather than the traditional mode of sitting in their office and waiting for clients to make appointments, they need to assist non-legal workers to be able to identify legal issues and go to where the clients are in order to make the legal system accessible. This will lead to effective services but it is also resource intensive and, given the limited resources available, affects choices about where to allocate resources. This forms part of the backdrop to some of the decisions and shifting priorities around how legal aid services are being delivered and is often ignored in the debates.

Other research findings note that unresolved legal problems increase anxiety and stress and have serious impacts on people's health.⁴ Take David, (not his real name), an elderly man on a low income. He was being pursued by debt collectors, when these debt collectors had no legal right to pursue him. They threatened him with loss of household items, a bad credit rating and the spectre of court and further legal costs. David, not knowing his legal rights and thinking he could not afford a lawyer, was found by the ambulance men clutching a bogus letter of demand made to look like a court document. He had had a seizure. David's whole family were affected. This type of situation is preventable if services are known about, are accessible and available to men like David.

The legal aid debate is about more than funding (although this is critical). It is about human beings seeking redress, having the protection of the law and understanding the law and their place within it. People experiencing disadvantage, my experience shows, often face entities which have many more resources and take advantage of them. For example, one client with a mild intellectual disability had been given advice about his legal rights and seemed confident talking to the seller who had taken advantage of him. The reality was that this man lacked confidence and deferred to authority and needed more support than just

legal advice. When confronted with the adamant and articulate seller he was told, erroneously, that he had no rights. The client cowered and gave in. As a consequence, when followed up by the legal advisor he was distressed and still having to deal with the situation the seller had placed him in. This simple example illustrates the diversity of issues that members of the community face beyond the common perception that legal aid services are just about criminal and family law. The case also highlights that where disadvantage is great, sometimes more assistance is required and that matters can be complicated by disadvantage. These circumstances need time and tailored support for different types of clients to be effective.

Government is understandably asking legal aid services to focus on those who need their help the most. What they do not realise is that this work is not easy and cheap to undertake. Little recognition of this is revealed in discussions about the adequacy of funding.

It seems a waste of limited resources to keep solving the same legal problem over and over when you can prevent it from occurring at all. To counter this and to use limited resources to have a broader impact CLCs in Australia are using strategic multi-pronged approaches to prevent the revolving door of the same legal problem. If you can stop the problem arising for hundreds if not thousands of people, then surely this is better and less costly than delivering individual case work repeatedly. Rather, some CLCs focus is on identifying significant and recurring problems and identifying multi-pronged strategies such as case work, complaints to regulators, bulk negotiation, raising community awareness and law reform. The idea is to solve the problem at its core and save a lot of people stress and frustration, save resources and enable more efficiency. The effect is to have the most impact and bring about change for many.⁵ This means the CLCs cannot take on as much individual casework given limited resources. In one such strategic approach, millions

of dollars have been saved where clients were being pursued where there was little merit.⁶ In the end, the systemic issues have been addressed and the companies in hot pursuit of the clients have realised their poor practices and the resource intensive nature of their processes. A 'win-win' situation.

Due to inadequate funding and increasing demand legal aid commissions and CLCs have now been forced to make difficult decisions about how their services need to be targeted. This means those people who are the most seriously disadvantaged, face the most barriers and are vulnerable are prioritised. Such work is not easy and straightforward in view of how difficult working with these clients can be. For example, it takes time to take instructions from a woman traumatised by years of domestic violence and abuse and similarly from her children who are the victims of their father's incest. It takes time to seek instructions from a man with an intellectual disability who has difficulty explaining himself and needs care taken to ensure he understands the advice he is given.

It is easy to shoot the messenger, namely legal aid services, but governments at state and commonwealth level have been woefully underfunding this sector for decades, despite increasing demand. They continue to change and introduce laws with abandon without thinking about the impact on legal aid services and on people's lives. It is hoped this article may assist in throwing a spotlight on why people's access to legal services is important in a democracy.

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FOOTNOTES

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and the Opportunities of Cooperative Federalism', Law Council of Australia, Price Waterhouse Coopers, 2009.

- 2 C Coumarelos, D Macourt, J People, H M MacDonald, Z Wei, R Iriana, & S Ramsey, 2012, 'Legal Australia-Wide Survey: Legal need in Australia', Law and Justice Foundation of NSW, Sydney.
- 3 *ibid.*
- 4 P Pleasence, NJ Balmer, A Buck, A O'Grady and H Genn, 'Civil Law Problems and Morbidity', *Journal of Epidemiology and Community Health*, July 2004, 58, pp. 552-557; and NJ Balmer, P Pleasence, A Buck and HL Walker, 'Worried Sick: The Experience of Debt Problems and their Relationship with Health, Illness and Disability', *Journal of Social Policy and Society*, 5(1), pp. 39-51.
- 5 See L Curran, 'Solving Legal Problems: A Strategic Approach - examples, processes and strategies, a report examining issues in community legal centre practice', Melbourne, 2013, <http://law.anu.edu.au/legalworkshop-gdip/publications>.
- 6 *ibid.*, p. 22 and 26.