

Rolls Royce

or

Rundown 1970s Kingswood?

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Australia's legal aid in comparative perspective.

The Commonwealth Attorney-General, Daryl Williams, is by all accounts a thoroughly decent person. He appears genuine, cautious, thoughtful and trustworthy, all qualities that most of us would probably wish in a Minister. In most cases, he also seems to be in command of his wide ranging portfolio.

There is one area, however, where he does not seem to be on top of his portfolio. His comment in January this year that Australia's legal aid was a 'Rolls Royce' scheme was surprisingly ill informed¹ and created an unfortunate perception that legal aid commissions (LACs) were well funded but mismanaged, bloated and wasting public money. The comment was made in order to support the 1996 Budget decision to cut Commonwealth funding to legal aid but as I demonstrate below, it showed a surprising lack of knowledge about Australia's scheme. In particular, Williams ignored the evidence demonstrating that Australia's legal aid is, by comparison with similar large, publicly funded schemes, one of the meanest in the western world.²

Little attention has been given to why Williams made that decision, nor has his Rolls Royce remark been submitted to detailed scrutiny. In this article I explore some context issues which may help to explain why Williams cut legal aid and then I examine Australia's scheme in a comparative perspective.

The context

It is common knowledge that in the 1996 budget the Commonwealth cut \$33 million from its legal aid budget for each of the following three years.³ This represented a cut of approximately 20% to the Commonwealth's legal aid expenditure. Surprisingly, the legal aid program was targeted to absorb approximately one quarter of the total cuts to the Attorney-General's Departmental budget for the period. Cuts to other programs were small by comparison. The public reaction to the cut was also surprising. The media, after many years of virtually ignoring legal aid, gave a surprising amount of attention to the issue and the campaign that was mounted by various interest groups, including State governments, legal professions, judges, community legal centres, to resist the cut. However, there has been little media attention given to why the decision was taken in the first place.

It is not always a simple matter to explain why ministers make particular decisions and this case is no exception. There are a number of factors that may shed some light on the matter. First of all, it is important to realise that at the time Williams was not in Cabinet. (He was moved into Cabinet in the ministerial reshuffle announced by Prime Minister Howard on 5 October 1997.) Unlike previous Attorneys-General, Williams is still not a particularly powerful figure within the Government. This partly reflects the fact that legal policy is not a priority to this Government as it was to previous Labor and Coalition Governments. Instead this Government's priorities are focused on economic reforms. As a result, Williams was not involved

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in the key debates within Cabinet and, more importantly, he holds little sway when he does want to fight for causes that he wishes to promote. So even if he was passionately committed to legal aid, which he does not appear to have been, he may not have been able to prevent a cut to his departmental budget or to legal aid expenditure.

Recognising that Williams is not a key figure in the Coalition does not, however, explain how the cut came about in the first place. There are a number of possible explanations to ponder here. For example, the fact that Williams not only accepted the need for the Attorney-General's Department to share the budget cuts, but also allowed the legal aid program to take more than its share of the cut, suggests that something rather odd was happening. Where did the idea originate to use legal aid to absorb most of the Department's cut? It may be that Williams was not actually involved in the decision-making process in the first place. Staff within the Attorney-General's Department may have made the decision and then advised him that this was the best thing to do. That would not be very unusual as ministers rarely consider all the fine detail of their decisions, especially when they have been in office for only a few months. It is conceivable that senior administrators decided that legal aid could bear the brunt of the cuts and advised Williams accordingly. He may then have acted on that advice and been prepared to do so because he does not have a demonstrated personal commitment to legal aid unlike some previous Attorneys-General including Lionel Murphy and Michael Lavarch.

Why would the administrators have given Williams such advice? Two explanations spring to mind and both are at least partially accurate although other possibilities should not be ruled out. First, the decision may have simply been pragmatic, bureaucratic decision making. When an organisation has to make significant cuts there are basically two choices. One is to cut proportionately in all areas and weaken all areas of the organisation as a result. The alternative is to designate one area to carry the bulk of the cuts, preferably an area that is either generously funded or declining in importance. The choice between these two options is not unknown to university administrators who, under the new Federal Government, had to decide whether to cut many departments or dismantle small, weak and declining areas. This is undoubtedly a painful choice for any organisation and is likely to have played a part in the thinking of the Attorney-General's administrators. However, it may not have been the only consideration at the time.

The second explanation is the internal politics within the Department. There is substantial evidence to suggest that legal aid was not welcomed within the Attorney-General's Department when Lionel Murphy established the Australian Legal Aid Office in 1973. Legal aid was not considered part of the 'real' or legitimate legal work of the Department. Instead it was thought the Department's work should consist of high level legal advice to the Government and the like. Legal aid should not therefore have been established within the departmental structure. Instead it belonged with other 'welfare' programs in a department like Social Security.⁴ One possible way to read the recent cuts is, therefore, to see them as a symbol that internal departmental hostility towards legal aid has not disappeared.

It may never be absolutely clear why Williams agreed to the legal aid cuts. Nevertheless, these explanations, at a minimum, offer some food for thought. They also go some way to explaining the infamous Rolls Royce remark, in that the remark may have been based on advice from departmental advisers who partly wished to save their own pet programs and partly wished

to inflict a wound on Murphy's brainchild. In this way the phrase may have been plucked out of the air to try to create the perception that legal aid had done exceptionally well under the previous Labor administrations, that it was indeed a Rolls Royce scheme. But is this correct? One way to assess the comment is to compare our scheme to those in other western societies. Comparatively speaking, is it really a Rolls Royce scheme?

Australia's 'mean' legal aid

An historical perspective helps to make clear that Australia's legal aid is not, and never has been, a Rolls Royce scheme. In fact, in most respects, it has always been quite mean because legal aid has only been available to a small proportion of those who needed it. Since European settlement most of the poor in Australia have been abandoned to their own resources in court cases. In the pre-war period, in most States, very few poor people received legal aid. They usually had to defend themselves in court although private lawyers occasionally provided assistance. There were some exceptions.⁵ In South Australia, for example, the State Government appointed a Public Solicitor in 1926 to represent poor people in criminal, matrimonial and civil cases. He also gave legal advice in all areas of the law. When this office was closed in 1933, the South Australian Law Society took over the work of providing legal aid for a wide range of legal problems. The private lawyers worked hard and free of charge for their poor clients but could help only a small group of people.

In the post war years other State Law Societies established legal aid schemes similar to South Australia's and in addition some State Governments, including New South Wales, established Public Solicitors Offices to provide legal aid. But despite the generosity of the private legal profession and the best intentions of governments, these schemes were undoubtedly mean in the number of people they assisted and in the range of legal problems for which aid was available.

The Commonwealth Attorney-General, Lionel Murphy, transformed legal aid when he established the ALAO in 1973. The ALAO granted legal aid on a uniform basis across the country for a wide range of cases, including most criminal, family and a small proportion of civil law problems. Nevertheless, while the ALAO was a significant advance on the previous patchwork of schemes, it was also designed to be cheap. For example, the stringent means test applied to applicants meant that only a small proportion of the population was eligible for help in court cases. The one very generous aspect of the ALAO that has survived within the State LACs to the present day, is the legal advice service which, in most States, is free and not means tested. Australians make extensive use of this service to help them decide what to do about legal problems. In 1993-94, for example, the LACs provided about 185,000 legal advice interviews and a similar volume of advice services over the telephone, most of them for family and civil law problems.⁶ Almost certainly the advice service results in many legal problems not proceeding to court.

Legal representation has continued to be a mean service to the present day and has, according to the LACs, Law Council and other commentators, become a lot meaner since the LACs were established. Funding has declined, eligibility criteria have been tightened inexorably, the range of cases for which aid is available has been narrowed and more and more emphasis is placed on client contributions. Indeed the tragic irony is that we appear to have come full circle, that is, we appear to be returning to the days when legal aid was only available for a small number of poor people with serious criminal or matrimonial cases.⁷

Expenditure comparisons

One of the best ways to illustrate the present state of Australia's legal aid is to compare it with similar schemes elsewhere, for example, those in Europe and North America. In 1996 National Legal Aid calculated legal aid spending for a number of western societies.⁸

TABLE 1
National expenditure on legal aid

Society	Expenditure per head of population (Aus\$)	Total expenditure (Aus \$ million) (year)
Australia	13	240 (1995)
New Zealand	16	48 (1993)
Canada	18	514 (1992)
The Netherlands	22	325 (1993)
United Kingdom	65	3550 (1995)

Attorney-General Williams disagreed with the Australian figure provided by National Legal Aid and on the basis of advice from his Department advised the Parliament through Senator Amanda Vanstone, that the Australian figure should be \$17 per head if expenditure on community legal centres and Aboriginal legal services was taken into account. Regardless of which figure is used, Australia's legal aid scheme is shown to be either the meanest or the second meanest in this group of societies. To get an idea of the scale of the difference, consider this calculation: if Australia spent an amount per head of population on legal aid similar to the United Kingdom (UK), we would spend something like \$1200 million instead of the \$240 million we currently spend on the LACs.

How is the money spent by these schemes? There is undoubtedly a need to be cautious when comparing schemes. Traditionally, legal aid comparisons have examined total expenditure, usually expressed as a per capita figure, but this approach ignores a number of problems and, as a result, can be viewed as raising more questions than it answers. Expenditure on its own tells us very little. At least two further points need to be considered. First, what is the money spent on, particularly the legal aid services? Ideally, comparisons should focus on particular services for particular types of law in different countries rather than expenditure *per se*. It could be the case, for example, that country A spends a lot of money on legal aid but primarily on expensive criminal cases and very little on civil and matrimonial cases. On the other hand, country B may spend less money overall but more on family matters and less on criminal. Total expenditure on its own does not capture these differences but the consequences for services are very different. Second, the social and legal context in a given society shape the need both for legal services generally and for legal aid services. Some countries have, for example, established 'no-fault' insurance schemes for accidents. As a result there is little need for court cases or legal aid for injuries resulting from car crashes.

If these concerns are taken into account it is possible to make meaningful comparisons of legal aid schemes in different societies.

Indicators

One way to compare schemes is to use a cluster of indicators that together give a number of glimpses of government

commitment to legal aid. The trick is to choose indicators that give an idea of a society's overall commitment to legal aid, plus some idea about the way priorities differ between schemes. Some useful indicators include:

- overall public expenditure on legal aid, gross and per head of population;
- generosity, that is, the proportion of the population eligible for services;
- comprehensiveness, that is, the range of legal problems for which aid is available; and
- total number and type of services calculated per 1000 population.

Fortunately there is comparative legal aid data for a group of countries for the early 1990s. At the International Legal Aid Conference in 1994, sponsored by the Dutch Ministry of Justice, a research paper⁹ collated a large amount of data which allows us to compare Australia's legal aid to other societies at that time.

Expenditure

The expenditure data reflects the same pattern identified in the National Legal Aid paper. Sweden spends half as much again as Australia while the UK spends four times as much per head of population on legal aid.

TABLE 2
Legal aid expenditure 1992-93

Society	Total expenditure (US\$ million)	Population (millions)	Expenditure per head of population (US\$)
Canada	196	27	7
Australia	139	17	8
The Netherlands	123	15	9
Sweden	103	9	12
United Kingdom	1780	55	32

Eligibility

Australia's scheme is also mean in terms of the proportion of the population which is estimated to be eligible for legal representation. The South Australian Legal Services Commission estimated in 1992 that after the effect of means and other tests, only 18% of Australians were eligible for legal representation from the LACs in the early 1990s. This proportion is lower than for all the other societies in this group and the contrast with Sweden is particularly spectacular. No other society is as mean in the limits that it sets to this service. Now we begin to see how and why the amount of money spent on legal aid can result in vast differences in services.

TABLE 3
Proportion of the population eligible for legal aid (legal representation) services

Society	Proportion of the population eligible for legal representation (estimated %)
Australia	18
Canada	32
United Kingdom	48
The Netherlands	68
Sweden	90

Societies have made choices about the proportion of their population they are willing to fund for legal aid. Where there is a high proportion of the population eligible, as in Sweden, governments fund the middle class litigants for expensive cases because they recognise that the costs of litigation can be catastrophic even for people with a comfortable standard of living. Australia, however, abandons the middle class to bear its own costs of litigation and targets legal aid to the poorest members of the society to a much greater extent than other countries.

Is it any wonder then that the Australian middle class resents the funding to legal aid and, as a result, is unlikely to object to funding cuts? The Swedish middle class is more likely to support ongoing funding due to the fact it may benefit.

Comprehensiveness

The range of matters for which legal representation is available also varies considerably across societies. Again Australia is close to the bottom — we have restricted the range of legal problems for which legal aid is available more than most societies. Why? Primarily, limited funding has caused the LACs to make these restrictions. Australia, for example, abolished legal aid for straightforward divorce cases in the late 1970s but most other societies still provide aid even where ‘no-fault’ provisions exist. The Swedish and Netherlands schemes have, by contrast with Australia, placed few restrictions on the type of problems for which legal aid is available.

Services per head of population

Finally, the number of legal aid services provided in a society is a measure of the effectiveness of legal aid and therefore a Government’s commitment to it. We can measure this by the total number of services, but the figure per head of population adjusts for the different size of the national populations. I noted earlier that comparisons are very complex due to the differences in societies’ legal systems and legal aid schemes. In addition, it is difficult to obtain comparable data for a large group of societies. In order to overcome these difficulties, I compare the number of legal aid services in two societies, Australia and England/Wales, for the year 1993–94. These countries have similar legal systems and the range of legal aid services is also comparable. That is, they provide legal advice, duty solicitor services, and legal representation in court cases.¹⁰

In view of the differences that we have seen between the two countries in previous tables it is not surprising to find in *Table 4* that England/Wales provides more than double the number of services per head of population that Australia provides.

TABLE 4
Number of legal aid services provided in Australia and England/Wales, 1993–94

Society	No. of legal aid services provided	No. of legal aid services provided per 1000 population
Australia	536,000	30.2
England/Wales	3,366,000	67.3

In round figures, in 1993–94, England/Wales provided a total of 1,678,000 legal advice services, 897,000 duty solicitor services, and 791,000 legal representation services. Australia meanwhile provided 185,000 legal advice services, 219,000 duty solicitor services, and 131,000 legal representation services.

Conclusion

Contrary to Attorney-General Williams’ claims about a Rolls Royce scheme, Australia’s legal aid is undoubtedly mean compared to those in other societies on nearly all the measures considered here. It is not just a matter of lower legal aid expenditure although this obviously affects the number of cases for which aid is granted. Instead, to be granted aid for legal representation in Australia, you have to be poorer than in most other societies and the case needs to be within a narrower range. Taking all the Australian services together, compared with England/Wales, you are less than half as likely to receive any legal aid services in this country.

The decision to cut the Commonwealth’s legal aid budget does not seem to have been based on a considered appreciation of the character of Australia’s scheme. If this were the case, the Attorney-General would have recognised that it was designed on the cheap in the 1970s and has since that time, suffered from gradually declining funding. It would have been accurate for the Attorney-General to conclude, therefore, that rather than a Rolls Royce, Australia’s scheme is, by comparison with those in other societies, more of a poorly maintained 1970s Holden Kingswood.

References

1. For example, ‘Legal Aid Providing “Rolls Royce Justice” for a few’, *Sydney Morning Herald*, 20 January 1977. Williams was reported as saying that Australia’s legal aid provided Rolls Royce justice for a few and ‘jelly bean justice’ for the rest. This judgment is of course debatable. In this article I respond to the *perception* created by the comment that Australia’s legal aid is generally of a Rolls Royce standard.
2. I distinguish here between two groups of western societies. First, those with relatively well developed publicly funded schemes including Australia, England, the Netherlands, Sweden, Canada and the USA. In a second group of western societies, including France, Italy, Ireland and Switzerland, funding and eligibility are relatively low by comparison. For a recent introduction to differences between some of these schemes see Cousins, M., ‘Civil Legal Aid in France, Ireland, the Netherlands and the United Kingdom — A Comparative Study’, (1993) 12 *Civil Justice Quarterly* 154.
3. During the first half of 1997 the Commonwealth and the States continued to negotiate a new funding agreement. Apart from New South Wales which agreed to the full \$10.6 million cut to its budget, the final agreements were substantially smaller than those proposed originally. For example, South Australia’s cut was \$1.7 million not the \$2.7 million proposed. However, in addition to these cuts, the Commonwealth also substantially cut funding to the ‘Access to Justice’ projects, some of which were based in the legal aid commissions, initiated by the previous Commonwealth Labor Government in 1995. These projects, including funds for family law cases and legal advice, were designed to redress some of the inadequacies of legal aid and the justice system generally identified by the Access to Justice Advisory Committee. See: Access to Justice Advisory Committee, ‘Access to Justice: An Action Plan’, AGPS, Canberra, 1994. Also see the details of the projects in, Attorney General’s Department, ‘The Justice Statement’, AGPS, Canberra, 1995.
4. For example, see the discussion in Armstrong, S., ‘Labor’s Legal Aid Scheme: The Light That Failed’ in R. Scotton and H. Ferber (eds), *Public Expenditure and Social Policy in Australia*, Longman Cheshire, 1979.
5. For a brief description of the origins and development of the public and private profession schemes in Australia prior to 1973, see Sackville, R., *Legal Aid in Australia*, AGPS, Canberra, 1975.
6. *Legal Aid and Family Services, Legal Aid in Australia 1993/4 Statistical Yearbook*, AGPS, Canberra, 1995.
7. Noone, Mary Anne, ‘Legal aid: A return to the sixties?’, (1997) 22(5) *Alt.LJ* (this issue).
8. See National Legal Aid, ‘Meeting Tomorrow’s Needs on Yesterday’s Budgets’, NLA, Canberra, 1996.
9. The paper, was compiled from national data for 1992–93 supplied by policy makers or researchers in each country. See Klijn, A. and Huls, F., ‘The International Legal Aid Scene: A Concise Comparison’, paper to ‘Legal Aid in the Post Welfare State Society’, Den Haag, The Netherlands, April 1994.
10. The source for England/Wales is Legal Aid Board, *1995–96 Annual Report of the Legal Aid Board*, HMSO, London, 1996; and for Australia, Legal Aid and Family Services, 1995, above, ref. 6.