

2014 International Forum on Legal Aid

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Topic - Panel I - Cross-border cooperation: applying the standards proposed in United Nations legal aid principles and guidelines through cross-border cooperation between legal aid organizations.

1. What difficulties have legal aid organizations experienced in providing legal aid services to non-nationals? What are examples of workable or effective solutions?
2. Should legal aid organizations establish international mutual assistance schemes? If so, what are the possible obstacles in implementing such schemes? What might be effective solutions?
3. What should be included in international mutual assistance schemes?

Introduction

Although Australia is a signatory to the International Covenant on Civil and Political Rights, there is no right to legal aid in Australia's domestic laws, other than the limited right established in the High Court decision of Dietrich and some State legislation. Despite this Australia observes most of the United Nations legal aid principles on access to justice in criminal justice systems.

Importantly, for the purpose of this panel discussion, Australia's legal aid commissions do not distinguish between nationals and non-nationals in providing legal aid for criminal law matters. As legal aid is available for non-nationals in Australia for these matters, it is not currently a priority for legal aid commissions to enter into formal arrangements such as international mutual assistance schemes.

Legal aid in Australia

Australia is a federation that has a national government, which is our Commonwealth government, and also 8 States and 2 Territories, which are like provinces. There is no national legal aid commission. Instead each State and Territory has a legal aid commission. For example, I am the chief executive officer of Legal Aid Queensland, which has responsibility for delivering economical legal services to financially disadvantaged people in Queensland, which is Australia's third largest state by population. I should also note that the contents of my paper do not represent the views of any of the other legal aid commissions in Australia, nor of the Australian government or State and Territory governments.

Legal aid commissions are funded by the Commonwealth and State governments and are the largest providers of legal services to financially disadvantaged people in Australia.

Legal aid commissions use a mixed service delivery model, which means that we deliver services through employed lawyers and also through private lawyers. While the use of private lawyers varies between jurisdictions, across Australia about 70% of legally aided legal representation work is undertaken by private lawyers.

Applications for legal aid for representation in court are filtered through a means test, guidelines, and a merit test. The means test results in only the poorest Australians accessing legal aid.

The other providers of free legal assistance in Australia are primarily community legal centres and Aboriginal and Torres Strait Islander Legal Services. There are 200 community legal centres in Australia located in metropolitan and regional areas across Australia, who provide advice and information and community legal education – but only limited case work services. There are also 8 Aboriginal and Torres Strait Islander Legal Services, who are funded by the Commonwealth government to provide legal assistance to Aborigines and Torres Strait Islanders. Indigenous Australians are also able to seek legal assistance from legal aid commissions if they wish.

The right to legal aid in Australia

Australia is a signatory to many international instruments, including the International Covenant on Civil and Political Rights, which states in article 14 the right of everyone charged with a criminal offence to be legally assisted when defending him or herself. However the provisions of ratified treaties like the ICCPR do not form part of Australia's domestic law unless incorporated into our law by legislation.

Unlike many countries, Australia also does not have a bill of rights. However our national constitution does protect some rights such as the right to vote and a limited protection of freedom of religion.

Sometimes human rights in Australia are contained in legislation as enacted by our national parliament or one of our state or territory parliaments. For example, our national parliament and most state parliaments have enacted legislation prohibiting discrimination on the basis of sex or race.

At other times, our rights are to be found in our common law, particularly in the decisions of our High Court of Australia. For example the High Court has confirmed that the right of an accused to receive a fair trial according to law is a fundamental element of our criminal justice system.

There is no national legislation creating a right to legal aid in Australia. Nor do the states and territories, in the main, create such a right.

An exception is s.25 of the *Victorian Charter of Human Rights and Responsibilities Act 2006*, an Act of the state of Victoria, which provides that a person charged with a criminal offence is entitled without discrimination to defend himself or herself personally or through legal assistance chosen by him or her or, if eligible, through legal aid provided by Victoria Legal Aid under the *Legal Aid Act 1978*; and also to have legal aid provided if the interests of justice require it, without any costs payable by him or her if he or she meets the eligibility criteria set out in the *Legal Aid Act 1978*. As you can see the right to legal aid in section 25 is a qualified one as the person must "be eligible" and the "interests of justice" must "require it."

While there is little in the way of legislation creating a right to legal aid, there is a 1992 High Court decision in the matter of *Dietrich v The Queen*, in which it was held

that only exceptionally will a trial for a serious criminal offence be fair where the accused has been forced to go unrepresented because she was without the financial means to fund legal representation.

The *Dietrich* decision has had the practical effect of requiring legal aid commissions in Australia to provide legal aid for all persons who satisfy the means test for the defense of serious criminal offences – regardless of the merits of their application.

The provision of legal aid in the Australian criminal justice system

Legal aid commissions received \$618M in income in 2013-14, of which \$213.7 million was provided by the Commonwealth government, \$291 million was provided by the State and Territory governments, \$85.6 million was provided by State governments from interest on solicitors trust accounts, and the remainder was from other sources (such as self-generated income through client contributions).

The manner in which legal aid commission utilise this funding is determined by the legal aid commissions within the priorities set by Commonwealth and State government service delivery agreements.

A lot of the funding provided by State governments is directed to funding legal assistance for criminal matters. This is because in Australia the criminal justice systems – being essentially the police, courts, prisons and community corrections services – are the responsibility of the States. However some Commonwealth funding is also used for this purpose as there are specific offences created by Commonwealth legislation.

Assistance is provided in a number of ways including legal advice, duty lawyer services and legal representation in some court matters.

Legal assistance is not generally available for a lawyer to attend police interviews with persons being investigated in relation to a criminal offence. However, a person who is accused of an offence can ring legal aid for advice prior to participating in the police interview, as often occurs in Queensland.

Duty lawyer services are available to provide advice and represent clients in the lower courts where less serious matters are heard. Duty lawyers also have access to persons who are detained in cells in police stations prior to appearing in court.

The lower courts experience very high volumes of work and clients may only have a small amount of time to talk to a duty lawyer prior to their matter being heard. The duty lawyer may enter a plea of guilty on behalf of the defendant, or seek an adjournment to enable an application for a grant of aid for legal representation for a complex plea or a trial to be made. Duty lawyers, in Queensland at least, do not conduct summary trials.

While grants of aid for legal representation in the lower court are available, access to them is a lot more restricted in the lower courts than in the higher courts, where more serious offences are heard. This is basically because the abovementioned principle in Dietrich is not considered to apply to matters being heard in the lower courts. For example, it is common amongst Australia's legal aid commission that a grant of aid is only available for a summary trial in the lower courts when the defendant not only satisfies the means test, but also is at risk of imprisonment and has a reasonable defence.

As already mentioned, in the higher courts, due to the Dietrich principle, poorer Australians have a right to a grant of aid for legal representation. Representation is available for pleas of guilty and trial, and, subject to a merit test, for appeals.

Legal aid for non-nationals in Australia

Importantly for the subject of this paper, legal aid commissions in Australia do not differentiate between nationals and non-nationals in providing advice or duty lawyer services or assessing applications for grants of aid for assistance in criminal matters. In essence, a non-national who is charged with a criminal offence in Australia has the same right to legal aid as an Australian national.

An illustrative recent example is the provision in recent years of legal aid by various legal aid commissions to a large number of Indonesian fishermen who were charged by the Commonwealth government with people smuggling of asylum seekers. The facts of the cases involved the fisherman transporting asylum seekers in small, wooden fishing boats from Indonesia down to Australia's northernmost seas. Here

they were picked up by Australian authorities, before being transported to Australian prisons and charged with offences such as people smuggling. The fishermen were very poor, of varying ages and varying levels of culpability for the crimes with which they were charged. Few spoke English, and in fact in many cases they spoke local dialects for which there were few interpreters in Australia. Legal aid commissions across Australia provided legal aid to the defendants in these matters not only for trial, but also for appeals to the High Court of Australia.

Some of those charged identified as being younger than 18 years of age. Legal Aid Queensland funded three private law firms to represent three such alleged people smugglers who were being detained in an adult prison in Queensland.

The three firms worked cooperatively to obtain documentary evidence from Indonesia to support the age claims of the detained youths. A report was also obtained to challenge the wrist x-ray technology that was relied upon by the Commonwealth to determine they were 18 years or older. On the basis of submissions provided by the firms, the charges were withdrawn.

Another common example in Queensland is of young tourists, whom we call backpackers, who come from all over the world but sometimes get into trouble with the law. They will be provided with the same access to Legal Aid Queensland's advice, duty lawyer, and grant of aid services as any Australian citizen or resident.

As far as I am aware, legal aid commissions have not experienced any problems providing legal aid services to non-nationals. Even in the above case of the Indonesian fishermen charged with people smuggling, where the number of defendants who required legal aid put some strain on the funding of the legal aid system, their fundamental right to legal aid for legal representation was not questioned.

In this context, the question of whether Australian jurisdictions should establish mutual assistance schemes is an interesting one. As Australia's legal aid commissions already provide legal aid in criminal justice system matters for non-nationals who are charged with offences in Australia, it has not been considered a priority, as far as I am aware, to seek to enter into any formal agreements with other countries in relation to such matters. This is certainly the case in Queensland. In fact, there is possibly a risk that seeking to enter into such schemes in Australia might

simply draw community and official attention to the issue and raise questions about the current practice.

I hope the above information has been helpful in providing you with some insights in to Australia's legal aid for criminal justice matters, both for nationals and non-nationals.