Access to Justice and Legal Aid

Comparative Perspectives on Unmet Legal Need

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Access to Justice and Legal Aid Cuts: A Mismatch of Concepts in the Contemporary Australian and British Legal Landscapes

ASHER FLYNN AND JACQUELINE HODGSON

Significant reductions in spending and changes to the eligibility requirements of government-funded welfare services in Australia and the United Kingdom (UK) have impacted considerably on the provision of support in the areas of housing, employment, disability, health, education and the law. In the context of legal aid, there have been extensive cuts in the overall amounts of funding available to the users and providers of legal services, changes to the types of legal assistance, programmes and services that remain eligible for government funding; and alterations to the ways in which providers can access or apply for funding. These cuts have been felt across all legal sectors—criminal, civil and family.

In England and Wales, de-investment in legal aid has been rising since the mid-2000s. This has been fuelled partly by concerns voiced in the 1980s and 1990s (McConville and Hodgson 1993; McConville et al 1994)—particularly in the context of the criminal law—that defence lawyers were manipulating aspects of a poorly regulated system. In response, there was a marked increase in regulation and compliance requirements, without any commensurate increase in remuneration. Between 2006 and 2009, legal aid was subjected to a new fixed-fee regime by the government. This was followed in 2011 by a 10 per cent cut in fee rates across all legal aid services (Flynn et al 2015).

The most devastating cuts to legal aid in England and Wales began in 2013 following the introduction of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (LASPO), which sought to reduce the legal aid budget by £350 million (AU$615 million), mainly in the areas of family law, immigration, welfare benefits, employment and clinical negligence. According to the figures of the Ministry of Justice (MoJ), after introducing LASPO, 62 per cent of those entitled to access legal aid in 2012 were no longer entitled to access that same assistance in 2013 (Howard 2014). Shortly after its introduction, further reforms were announced

by the Justice Secretary in a consultation document entitled *Transforming Legal Aid: Next Steps* (MoJ 2013b). This chapter outlined a series of proposals, which, in addition to affecting the remaining areas of law funded through civil legal aid, focused on reducing criminal legal aid funding and services. To date, this has resulted in cuts of approximately £120 million (AU$211 million) to criminal legal aid—around 8.75 per cent of the total 17 per cent forecast—and in just one year (2013–14), there was a 5 per cent fall in the criminal workload of the magistrates' courts (MoJ 2014).

In January 2016, after 99 separate legal challenges to the proposals, the MoJ announced that it would suspend the remaining 8.75 per cent of legal aid cuts, which would have reduced the number of firms awarded duty contracts to provide criminal legal aid work by two-thirds, from 1600 to 527. The position will be reviewed again in April 2017 (MoJ 2016). While aimed at consolidation and economies of scale, this degree of centralisation in the provision of legal services would have left large areas of the country without access to adequate representation. In contrast to many European countries where lawyers typically work across a range of areas, criminal defence work is highly specialised in England and Wales, encouraged by the regulation requirements governing legal aid contracts. The proposed reduction in legal aid firms would not, therefore, be simply a matter of shifting the focus of lawyers' work to other areas such as family or commercial law. It would require firms either to merge—a lengthy, costly and unappealing prospect for many—or to close down altogether.

Reporting on the impact of cuts in civil legal aid, the House of Commons Justice Committee (2015) found that, while the government had succeeded in making substantial cuts to the civil legal aid budget, it had failed to target the remaining legal aid budget to those who need it most (resulting in a significant underspend) and could not demonstrate that it was delivering better overall value for money for the taxpayer. The Report noted that those eligible for legal aid were unable to access it due to a lack of public information about the services available, such as the Civil Legal Advice telephone gateway for debt advice. Domestic violence victims continue to experience problems obtaining evidence from healthcare professionals, which is necessary in order to trigger their eligibility for legal aid. Some of these failings have been the result of the government's own short-sightedness and poor strategy, as it rushed through changes without any adequate underpinning evidence (National Audit Office [NAO] 2014). For example, it did not research the geographical spread of legal provision and so, as the capacity of the legal advice and assistance sectors has reduced, legal 'advice deserts' have been created.[1] The government also did not anticipate the knock-on costs of the reforms. Courts and

[1] This phenomenon is now widely recognised and the Law Society has produced an interactive map of England and Wales showing the number of providers with legal aid contracts for housing advice in each region, indicating the location of 'legal aid deserts'. Available at http://www.lawsociety.org.uk/policy-campaigns/campaigns/access-to-justice/end-legal-aid-deserts/

tribunals expend more resources on assisting litigants in person,[2] and many problems are no longer prevented by early intervention, resulting in the escalation of cases such that eligibility for legal aid is then triggered, or costs are simply shifted across to other public services (House of Commons Justice Committee 2015). In this respect, the Committee (2015: 61) found compelling the analogy of Lord Low that 'it makes more sense to put the fence at the top of the cliff than to call the expensive ambulance when the person has fallen to the bottom'.

In Australia, a mix of Commonwealth and State government funds are provided annually to State-based statutory bodies—legal aid commissions (LACs)—and to community legal centres (CLCs). While governments control the amount of funding received by each State-based LAC, traditionally, accessibility, eligibility and policy decisions around which legal services to fund have been made by the LACs and CLCs themselves. Since 1997, there have been consistent decreases in the Commonwealth level of funding for LACs, reducing annually from around 55 per cent of each LAC's budget to approximately one-third (33 per cent). This culminated in the 2014 federal budget, which cut AU$6 million (£3.4 million) from CLCs, AU$15 million (£8.5 million) from LACs and AU$43 million (£24.47 million) from advocacy services over a four-year period, including from the Indigenous Policy Reform Program which funds Aboriginal and Torres Strait Islander Legal Services across Australia.

The impacts of these proposed cuts were immediately felt, with staff redundancies, the creation of 'advice deserts', the merger of CLCs and the (forced) imposition of new, stringent eligibility policies which removed the capacity for vulnerable individuals who would previously have met the means and merit criteria of LACs to now apply for assistance. In Victoria and New South Wales (NSW), for example, individuals facing summary criminal charges where imprisonment or detention order outcomes were unlikely were no longer able to apply for legally aided representation. In addition, Victoria Legal Aid (VLA) limited funding of parents in family law matters to trial preparation, and to advice on how to conduct oneself in court. While the government 'asserted that the cuts would not impact frontline services—and were only focused on law reform, which shouldn't be funded when there is a budget "crisis"' (Farrell 2015), the pressures being felt by frontline agencies resulted in staff and service cuts. As Farrell (2015) explains, 'as these cuts were starting to bite, the Abbott [federal] government soon realised that its decision to cut funding conflicted with its commitment to services and strategies to stop

[2] For example, the NAO (2014: 15) reports 30 per cent year-on-year increases in family court cases where neither party is represented. Judges estimate that these cases take 50 per cent longer than those with representation, and that cases that would formerly have been filtered out by focused advice on the legal merits are now continuing through to court hearings (NAO 2014: 14). There has also been an increase in unrepresented parties in cases involving contact with children (NAO 2014: 15), and while 64 per cent of these were contested in 2012–13, this rose to 89 per cent in the corresponding quarter in 2013–14 (NAO 2014: 15). The NAO estimates that the reforms cost the HM Courts and Tribunals Service an additional £3 million (AU$5.27 million) each year (NAO 2014: 17).

family violence'. Following strong lobbying from legal stakeholders and also to support its own focus on addressing family violence in Australia, the Commonwealth Government reversed some aspects of its 2014 budget. This included restoring AU$25.5 million (£14.5 million) to the sector over the next two-year period, of which AU$15 million (£8.8 million) was specifically to be used for women's legal services. This restoration of funding, however, was conditional upon new government requirements stipulating how its funding could be spent, which included preventing CLCs from using government money for policy or campaign work.[3]

These significant shifts in government-funded provisions and legal services have fuelled a robust debate over the allocation of resources, with a specific focus on the priorities that should be accorded to government-funded serious criminal cases, pre-trial representation, criminal representation in the lower courts, and civil, administrative and family law matters. This debate has raised some important questions for practitioners, recipients of legal aid, courts, academics, society, governments and providers of legal aid funding and services, namely, who deserves legal aid? In the context of finite funding and expanding demands, on what criteria are priorities decided, and who decides those criteria? Who should determine the scope and policies of legally aided services—parliament (and so, government), or LACs, CLCs and/or the courts through judicial intervention? To what extent is the right to legal assistance dependent on the right to legal aid? And, perhaps most importantly, what are the consequences of leaving many of the most vulnerable in society without representation in the assertion of their rights? These questions are answered in part by the courts and international conventions, but in practice their scope is being determined by government policy and economic austerity.

To date, much of the excellent work examining access to justice in light of legal aid cuts, while paying some attention to the implications across criminal, civil and family law areas, has focused almost exclusively on one area of the law and the associated problems in that specific context. Likewise, existing work has considered these emerging issues within one jurisdiction, or only in relation to jurisdictions located within their immediate region. Through our own research collaborations, however (Byrom et al 2014; Flynn et al 2015; Flynn et al 2016), it became clear that the key questions outlined above were being asked simultaneously across Australian and British jurisdictions, where we were witnessing some common themes and concerns emerging, but also quite different approaches and responses. This current collection is thus situated in the context of a burgeoning interest in access to justice and legal aid, bringing together the perspectives of a range of interdisciplinary British and Australian socio-legal scholars, legal practitioners, cross-sector stakeholders and advocates, with recognised expertise in criminal, civil and family law, legal aid, and access to justice, to critically examine

[3] Similar restrictions were introduced in England and Wales in May 2016 which prevented UK charities from using government funding for activity intended to influence—or attempt to influence—parliament, government or political parties.

the diverse assemblage of experiences and consequences of legal aid cuts across Australia, and England and Wales.

As common law jurisdictions, our countries share similar ideals, policies and practices; yet, they also differ in aspects of their legal and political culture, in the nature of the communities they serve and in the approaches adopted by their respective judiciaries. Accordingly, they provide us with different perspectives on accessing justice and how we might seek to overcome the crisis in unmet legal need across civil, criminal and family law in relation to a broad range of individuals, including the profession, client advice workers, legal centres, legal aid clients, Indigenous Australians, refugees, women and other vulnerable groups.

This book engages with key debates regarding the false assumption that cutting funds to government-funded social and welfare services will equate with savings either in the long or short term, by demonstrating the many adverse consequences of the various policy and funding shifts across Australia, and England and Wales, not only for the most vulnerable, but also for the courts, the legal profession and more broadly in relation to other state-based services (health, unemployment, immigration, housing and so on). A clear message also emerges in relation to changes in the professionalisation of justice. In both the Australian and British contexts, it is stressed that volunteers cannot replace lawyers and the devaluing of legally aided work has the strong potential to alter the shape and future of the legal profession, with losses of experienced professionals at one end, and a reduction in law students entering the field at the other. This book also addresses the important role of efficiencies and new technologies within the current financial climate, but recognises the changes such advancements make in social understandings and expectations of the way we access justice, and the ways justice 'should' be done. In doing so, it considers how the successful neoliberal rhetoric of the anti-welfare state has combined with an absence of community to demonise those most in need, creating a new 'other' within the legal realm (Garland 1996, 2001).

This book details the stark outcomes of recent policy and funding changes in legal aid across Australia, and England and Wales, which can make for a depressing and confronting read. But within the discussions of injustice, vulnerability, marginalisation and disadvantage, the chapters contain considered recommendations to address the seemingly bleak future of legal services across and possibly beyond the focus jurisdictions. These recommendations involve highlighting the innovative responses of various advocates, practitioners and services to the changes; identifying suggestions for further innovation that seeks to compensate for a reduction in frontline services; prioritising a comprehensive response that avoids silo-ing the issues experienced in criminal and civil law sectors away from their broader social, environmental and structural contexts; and, as Mary Anne Noone (Chapter 2) discusses, recognising the vital need for the completion of 'legal aid impact statements' to accompany any proposed changes to legally aided services and funds. These statements would require detailed and comprehensive pre-planning of the

potential consequences of any shifts in legal policy for LACs, the courts and their clients, CLCs and so on, *before* changes are made.[4]

While it is likely that there will always be unmet legal need and some contention over legal aid funds, government restrictions to legal aid services, budgets and policies bring into sharp focus concerns about human rights, due process, the rule of law and the ability of vulnerable and marginalised groups to access justice; and it is these issues with which this collection is concerned.

In the first three sections of this chapter, we address key themes arising from the collection as a whole and provide a context for understanding how the various austerity measures have been introduced. We also highlight what the broader (perhaps more hidden) consequences of the changes have been. The second section provides an overview of each chapter.

I. Access to Justice

Within the legal setting, justice is traditionally equated with equality, fairness and respect for individual rights. It falls under the rule of law framework, which encompasses procedural justice ideals (measured by perceptions of fairness within the legal *processes* used) and substantive justice ideals (measured by perceptions of fairness in the *outcomes* of those legal processes) (Flynn and Fitz-Gibbon 2013; Henry et al 2015). In this sense, justice is the pinnacle of our legal system—it informs our social moral consensus, it keeps the legal process and related services operating in line with community expectations and values, and it is the essential link between 'the law' and society. When engaging with any form of law—criminal, civil or family—the definitive outcome may therefore be considered the attainment of justice. But what exactly does justice mean and what does 'accessing justice' look like?

As Robert Sackville (2002: 19) observed, 'like other catchphrases, such as "fairness" and "accountability" (if not "democracy" itself), the expression "access to justice" survives in political and legal discourse because it is capable of meaning different things to different people'. Justice is thus 'a slippery concept' (Easton and Piper 2012: 86). In his foreword to the *Access to Justice Taskforce Report*, then Australian Federal Attorney-General, Robert McClelland (2009: 1), equated an effective justice system with being accessible 'in all parts' for all members of the community. He further noted that access to justice extends beyond the provision of legal advice, to having a system that demonstrates 'an appreciation and understanding of the needs of those who require the assistance of the legal system'. Similar views were voiced by former English Justice Secretary, Chris Grayling,

[4] As noted above, the House of Commons Justice Committee (2015) criticised the government's failure to consider the broader impact of the legal aid cuts it so rapidly implemented.

when introducing LASPO: 'access to justice should not be determined by your ability to pay, and I am clear that legal aid is the hallmark of a fair, open justice system' (MoJ 2013a). Yet as the costs and expectations in relation to government-funded legal aid have grown, and unmet legal need has subsequently increased, such statements could not be further from the reality of the legal aid systems and legal landscapes currently operating in Australia, and England and Wales.

In the Australian context, this is evident in the comments of the Chief Justice of Western Australia, Wayne Martin (2012: 3), who notes:

> The hard reality is that the cost of legal representation is beyond the reach of many, probably most, ordinary Australians … In theory, access to that legal system is available to all. In practice, access is limited to substantial business enterprises, the very wealthy, and those who are provided with some form of assistance.

Australian Federal Senator, Penny Wright (2013), has similarly expressed her concerns that, 'increasingly, ordinary Australians are being priced out of the court system because they cannot afford legal representation and court fees'. Parallel sentiments echoed across England and Wales in the lead-up to and following the implementation of LASPO; as Jo Renshaw (2012) observed, LASPO means 'to all intents and purposes, the concept of equal access to justice will be dead'. Similarly, the President of the Supreme Court, Lord Neuberger, forewarned that 'if you start cutting legal aid, you start cutting people off from justice … and that's dangerous' (cited in Bowcott 2013a). These concerns were further evidenced in the successful passing of three motions of regret pertaining to LASPO in the House of Commons. In putting forward one of these motions, Lord Bach stated that LASPO would 'demean the reputation of our legal system', adding that 'the behaviour of the Government towards Parliament, towards this House in particular and towards its citizens is unacceptable' (HC Hansard 27 March 2013: Col 1088). Chantal-Aimée Doerries QC, Chair of the England and Wales Bar Council, similarly argued that, in previous times, the British justice system was the 'envy of the world. However … the reputation of our courts and their ability to serve the public is under threat … Justice is not a luxury, and everyone should be able to defend their rights through the legal system' (cited in Bowcott 2016). This is an outcome that is evidently becoming less and less possible—as the Lord Chief Justice (2015: 5) reported in 2015: 'our system of justice has become unaffordable to most'.

II. An Environment Susceptible to and Accepting of Legal Aid Cuts

As the chapters in this collection demonstrate, de-investment in legal services has and will continue to have serious implications for already vulnerable and disadvantaged individuals coming before the law. In its 2014–15 annual report, VLA (2015: 3–4) highlighted these tensions, claiming: 'We value a society that aspires

to fairness and opportunity, and we work towards reimagining injustice where it exists … [But] without further investment or changes to services, we will again be in deficit by 2018'.

Under a justification of austerity, we have witnessed an almost irreparable shift in priorities away from welfare, towards neoliberal forms of governance, which is reshaping the operation of justice and raising questions about the values and procedures once considered normative legal practice. Today, access to justice is problematically transforming in response to government funding cuts, to the point where accessing the law is becoming a contested privilege rather than a fundamental right. This is perhaps most evident in relation to the civil law, where there is an emerging social consensus that civil law matters are a private issue—presented as a 'wants', not a 'needs' matter. As examined by Simon Rice (Chapter 11), this argument draws strength from the (often misconceived) perception of voluntariness in civil law matters as compared to criminal law matters, where the accused is 'an involuntary participant … whose presence in court is mandatory and, if necessary, forced'. Further to this, Rice explores how the persistent use of the 'incarceration is more serious argument' allows for the criminal law to be considered the more serious legal issue and therefore a matter of greater priority, despite the fact that a person involved in a civil dispute may be at risk of losing 'their home, their livelihood, their children, their reputation, their earning capacity, their freedom of expression, their right to vote, and so on'.

As various chapters in this volume show (see Aliverti Chapter 16, Byrom Chapter 12, Mutha-Merennege Chapter 14, and Schwartz Chapter 15), this simplistic view of the civil law, and the idea of accessing civil law remedies or justice being a *want* rather than a *need*, is not reflective of the reality. According to the Law and Justice Foundation of NSW's most recent comprehensive survey of legal need (Coumarelos et al 2012), almost half of the 20,000 plus respondents had experienced one or more civil legal problems in the 12-month period leading up to the survey. This common occurrence of civil law problems is because civil law comprises 'a rag-bag of matters and participants'. As Genn (1997: 160) explains:

> There are disputes relating to the performance or non-performance of contracts involving businessmen [sic] suing each other, individuals suing businesses, and businesses suing individuals. There are claims for compensation resulting from accidental injury in which individuals sue institutions. There is the use of the courts by lenders who realise their security by evicting individual mortgage defaulters. Civil justice also involves attempts by citizens to challenge decisions of central and local government bureaucrats, a rapidly growing field that includes immigration, housing, mental health, child welfare, and the like … Finally, there are the acrimonious and often heartbreaking struggles between men and women following the breakdown of family relationships, as property and children become the subject of legal disputes.

As discussed below, the implications of not addressing civil law issues expand well beyond each individual matter, to also have significant ramifications for society, health, education, social services and the criminal law. Yet this simplistic view of

civil law as an individualised want of only some sections of the community allows for cuts to civil legal aid to be more readily accepted.

Further to promoting civil law as a wants not a needs issue, the governments of the focus jurisdictions have been quite clever in some regards in framing their cuts, drawing on populist perceptions of legal aid and social exclusion, and targeting the reforms at already demonised groups in society. For example, in England and Wales we have seen this in relation to policies focused on non-UK citizens, prisoners and welfare recipients. Attention has also been placed on the amount of money awarded to those working in the legal aid field, thus exploiting the idea that 'fat-cat lawyers' who abuse the system for profit are going to be the most effected, so we should have minimal sympathy for them and in turn support the cuts. As the then Justice Secretary of England and Wales stated in the Ministerial Foreword to the *Transforming Legal Aid* consultation paper:

> Taxpayers' money has been used to pay for frivolous claims, to foot the legal bills of wealthy criminals, and to cover cases which run on and on racking up large fees for … lawyers … Under these reforms, those with significantly higher than average incomes will no longer be eligible for financial support … those who have no strong connection with the UK will cease to have their … legal costs covered too. Prisoners … will have recourse to the prisoner complaints procedures rather than accessing a lawyer … Lawyers who bring weak cases [to judicial review] will no longer be reimbursed. (MoJ 2013a: 3)

Similar comments were voiced in November 2013 by Courts and Legal Aid Minister Shailesh Vara, who claimed:

> The Government is trying to make the legal aid system fairer for the taxpayers who pay for it … We will stop criminal legal aid being given to prisoners unnecessarily—such as those using legal aid to seek an easier ride elsewhere … To make the legal aid system fairer for the taxpayers who pay for it, we are also planning to introduce a residence test for civil legal aid next year. Why should those without a strong connection to the UK, such as those who have barely stepped over the border or are here illegally, be eligible for civil legal aid? (Vara 2013)

These comments play to the populist right-wing concerns of the British public—views reflected in a YouGov (2013) survey in April 2013, which found that 64 per cent of the almost 2000 people surveyed believed that legal aid should not be available for immigration claims.

A similar approach has been taken in Australia by some politicians and sections of the media who have focused on 'undeserving criminals', such as 'rapists, paedophiles [and] thugs … who use tax payer funds' (Crawford 2013), and 'drug king-pins' who allegedly hide their resources to make them eligible for legal aid.[5] Likewise, media outlets have highlighted the total annual monetary

[5] Media-driven outrage around legal aid funding was particularly strong in Victoria (Australia) in relation to the cases of Adrian Bayley, who was tried for the rape and murder of Jill Meagher in 2013, and Tony Mokbel, who was tried for drug trafficking offences in 2013.

figures awarded to private practitioners who act on behalf of legal aid, as if to suggest that they are unfairly profiting from representing disadvantaged people in legal matters (Johnston and Smethurst 2013). In response to VLA funding the appeal of a convicted murderer in 2013,[6] the Victorian State Government went so far as to publicly ask VLA to 'think about what they've done and … explain themselves' (cited in Johnston and Smethurst 2013). This view emerged despite the findings of the Australian Commonwealth Productivity Commission's (2014: 30) *Access to Justice Report*, which noted that the means tests of LACs were so restrictive, and in fact 'sat below those of other government benefits due to underfunding', that in contrast to populist perceptions 'it is not the case that people are "too wealthy" to be eligible for legal assistance, but rather that they are not sufficiently impoverished'.

With the use of such tools, the tightening of legal aid budgets and implementation of strict policy provisions can be more successfully accepted in the public realm through the creation of what Garland (1996) terms the 'criminology of other'. This means that, despite crime-cutting across class, ethnic and gendered boundaries, we seek to construct accused persons, welfare recipients and those who find themselves in civil and criminal disputes as 'not like us'. In this rhetoric, those accessing legal aid can be treated as 'a different species … for whom we can have no sympathy' (Garland 1996: 461). This approach reflects changes in crime control and social welfare policies more generally, where we have seen a clear shift away from social acceptance and recognition of injustice and support for governments to respond with a combination of welfare-enhancing measures of social reform, such as education, housing, job creation and welfare services, to instead viewing legal and social need as the fault of the individual. In this way, state responsibility to assist 'those who had been deprived of the economic, social, and psychological provision necessary for proper social adjustment and law-abiding conduct' (Garland 2001: 15) has been replaced by individual responsibility to 'fix' the problem themselves. This approach perpetuates a neoliberal society and anti-welfare attitudes, and fuels the creation of a social order based on class, race and gender. It also perpetuates ineffective solutions to complex crime and social problems, including changes in legal aid priorities and resourcing.

III. Bigger Picture Consequences

The types of state resource-driven decisions discussed within this collection are unlikely to result in the delivery of significant savings, because they fail to take into account the broader picture implications, such as higher levels of incarceration, fewer quality lawyers working in legal aid areas, increased numbers of

[6] This statement was made in relation to Adrian Bayley's appeal against sentence severity.

self-represented defendants and litigants, and issues that might have been prevented by recourse to legal assistance being instead escalated to major problems requiring public resources. There are also likely to be increases in the use of court resources and costs, and decreased services and access to justice for already vulnerable and marginalised groups:

> Cuts to legal aid have resulted in the courts being flooded with people representing themselves without legal advice or representation, including those in emotionally difficult circumstances such as losing access to their children, facing the loss of their home, or fighting deportation to a country where they might be persecuted. (Bowcott 2016)

As explored throughout this collection, the impact of these changes is being felt by the most vulnerable, with the funding cuts and policy changes meaning 'greater levels of injustice when you're already dealing with people who experience injustice in every facet of their lives' (Perkins and Lee 2015).

In 2013, prior to the introduction of LASPO, the Warwick University Centre for Human Rights in Practice evaluated the possible implications of the legislation, finding that in addition to impacting on the most vulnerable people—mainly those located in rural areas, women and those with a disability—almost one-third of the 674 legal practitioner respondents believed that they were at risk of redundancy (Byrom 2013). As the chapters in this collection show, there are a number of consequences arising from the cuts that extend well beyond 'fat-cat lawyers' and 'undeserving' legal aid clients. These include the creation of geographic gaps in the availability of advice; limited focus on early interventions, particularly in civil law matters; sharp increases in the number of unrepresented accused and litigants in person, alongside an increased burden on the already congested court system; difficulties for persons navigating increasingly complex systems of law; a risk that financial imperatives will push firms towards corporatisation of policies and practices, undermining the individual professional lawyer–client relationship; changes in the accessibility and existence of not-for-profit organisations; and an overall increase in unmet demand for services, placing further pressure on those services that remain and the individuals that provide them.

The broader social consequences include affecting the degree of diversity and the level of expertise within the legal profession. As Natalie Byrom explains in Chapter 12, these effects will perhaps be most felt in relation to lawyers from black and ethnic minority backgrounds, and women. Additionally, as Rosemary Hunter et al (Chapter 13), Pasanna Mutha-Merennege (Chapter 14) and Ana Aliverti (Chapter 16) discuss, new provisions requiring applicants for legal aid in family violence proceedings to provide documentary proof in support of their application (England and Wales), and changes to the funding policies of family law cases (Australia), have had a detrimental impact on victims of family violence. A survey carried out in 2013 by the Rights of Women, Women's Aid and Welsh Women's Aid (2013) showed that half of all women surveyed who had experienced or were experiencing family violence did not have the prescribed forms of evidence to access family law legal aid. Of these, 61 per cent took no action in relation to their

family law problem as a result of not being able to get legally aided assistance. In Chapter 14, Mutha-Merennege identifies similar concerns in the Australian context, examining how changes in legal aid funding policies may force women and children to stay in violent, volatile relationships, due to the lack of available assistance.

The changes implemented in England and Wales and the new restrictions enforced on CLCs in Australia to stop advocacy and campaigning work are also likely to result in significant miscarriages of justice going unnoticed. As Liana Buchanan argues in Chapter 8, the campaign work of CLCs across Australia has resulted in improvements to all Australians' access to justice and basic rights. But the new requirements 'deprive the Australian community of a force for change that has brought the experience of the disadvantaged, marginalised and vulnerable to light and improved our laws and justice system in a myriad of ways'. Similar concerns can be seen in England and Wales, where the exposure of significant miscarriages of justice such as the case of Stephen Lawrence would be unlikely to occur in the current LASPO climate:[7]

> If a grieving family in the same situation as the Lawrences were in 1993 called on [legal aid] now, [they] would turn them away … If the planned legal aid cuts were in place at the time, no one other than his family and friends would now even remember Stephen Lawrence. (Bawdon 2013)

As reported by the Australian Productivity Commission (2014: 6), there are 'good reasons for governments to seek to improve the functioning and accessibility' of the justice system, not simply to address individuals' interests, but also for the potential wider societal benefits. As the Commission explains (2014: 6), in the civil law context 'a well-functioning civil justice system … promotes social order, and communicates and reinforces civic values and norms … [which] contributes to Australia's economic performance'. Additionally, as Melanie Schwartz argues in Chapter 15, if left unaddressed: 'Civil law issues such as unpaid debts, housing problems or social security disputes can escalate to become full-blown legal matters … Unaddressed legal issues not related to the criminal law can also escalate to become criminal matters'.

This view is strengthened by the findings of the Law and Justice Foundation of NSW's legal need survey (Coumarelos et al 2012: xvi), which found that 55 per cent of respondents acknowledged that their legal problem had a 'severe' or 'moderate' impact on their lives, including income loss or financial strain (29 per cent), a stress-related illness (20 per cent), physical ill health (19 per cent), relationship breakdown (10 per cent) and moving home (5 per cent)—problems that ultimately create an increased economic burden for the community.

[7] Stephen Lawrence was killed in a racially motivated murder in England in 1996. There were a range of substantial injustices relating to the police investigation and the trial of those accused of the crime. In 2012, double jeopardy exceptions allowed for one of the alleged murderers, Gary Dobson, to be re-tried. He was found guilty (*R v Dobson* [2011] EWCA Crim 1255).

These broader monetary concerns are significant, as the key rationale underpinning the reforms to legal aid has been the potential financial savings. In England and Wales, the MoJ has argued that the LASPO reforms will result in a saving of £220 million (AU$386 million) annually by the 2018–19 financial year. However, Armstrong's (2013) financial analysis of the proposed cuts to prison law, the resident's test and judicial review indicated that the on-costs of the funding changes would actually cost the government around £30 million (AU$52.7 million) each year. In addition, he found that the changes proposed would not deliver significant savings, and would cost more in terms of court time, resources and taxpayer contributions (Armstrong 2013). Likewise, the analysis completed by the NAO in 2014 noted that, despite some potential short-term financial savings:

> In implementing the reforms, the Ministry did not think through the impact of the changes on the wider system early enough … The Ministry needs to improve its understanding of the impact of the reforms on the ability of providers to meet demand for services. Without this, implementation of the reforms to civil legal aid cannot be said to have delivered better overall value for money for the taxpayer. (NAO 2014: 8)

The potential costs to the taxpayer as a result of reduced court efficiency and standards are examined across numerous chapters in this collection. In particular, as Pauline Spencer (Chapter 5) and Rosemary Hunter et al (Chapter 13) argue, the costs of representing accused persons in criminal matters and providing representation and advice in civil and family law are simply transferring to other areas of the court, as a result of significant increases in self-representation. The implications of this have been identified by the Judicial Executive Board in England and Wales, which claims that such cases will 'occupy more court time and take longer to come to a conclusion, while simultaneously increasing the risk of mistakes and miscarriages of justice' (cited in Bowcott 2013b). Such concerns were likewise summarised in a letter to *The Times* signed by nine professors working in universities across England:

> The long-term effects [of the legal aid reforms] will be devastating and once the damage has been done it will be extremely hard to put right. The legal profession will be decimated, and defendants, the police and the courts—and ultimately the taxpayer—will pay the price. (Law Society 2013)

IV. Structure of the Book

In this final section, we summarise briefly the themes of each of the contributions in chronological order, in order to enable the reader to navigate the collection more easily.

In Chapter 2, Mary Anne Noone outlines the background and context to legal aid funding in Australia before examining the sometimes competing objectives of increased demand for legal services, with a desire to improve both the quality

and efficiency of legal assistance, and the need for a more joined-up approach to the provision of legal services. She focuses in particular on the impact of legal aid changes and reforms, including for the legal profession itself. Running through her analysis is an awareness of the need to take a more systemic approach to understanding and improving access to justice, taking account of the intertwined nature of public services. In her chapter, Noone clearly demonstrates that access to justice depends on health and welfare services, as well as those providing legal assistance.

In Chapter 3, Jeff Giddings takes an historical look at the development of legal aid and access to justice in Australia, examining the range of providers, their interrelationships and their sources of funding—be it State and Territories, or Commonwealth (federal) funds. He discusses the establishment of the Australian Legal Aid Office (ALAO), which, although extending the provision of legal services, was challenged by the legal profession, who feared that a model of salaried lawyers might compromise the independence of legal assistance. LACs replaced the ALAO, operating as part of a mixed model of legal provision, together with CLCs and the private profession. However, LACs have been unable to resist funding cuts and they continue to face conflict-of-interest concerns, especially in duty lawyer services.

Moving to England and Wales, in Chapter 4, Tom Smith and Ed Cape document the growth in criminal legal aid and the roots of its decline, which can be located within the removal of real terms fee increases from 1994 onwards. They also chart the various challenges faced by the profession, such as the establishment of the Public Defender Service (PDS) and the quality assurance and accreditation measures that were adopted in response to research demonstrating that lawyers were failing to ensure the provision of high-quality legal assistance (McConville and Hodgson 1993; McConville et al 1994). In addition to financial cuts, there has been a shift from hourly rates to fixed fees and systems of competitive tendering designed to reform the market of legal providers. The authors argue that the reduction in the criminal legal aid budget reflects a broader antipathy to state welfare provision and a lack of concern for procedural justice and the right to a fair trial. They have little room for optimism, despite international measures recognising the importance of the right to legal aid as a measure of a fair trial.

In Chapter 5, Pauline Spencer provides a view from the bench of a busy magistrates' court in Melbourne (Victoria, Australia). Using a hypothetical case scenario based on the many cases she hears each day, Spencer focuses on the ways in which legal representation can improve the efficiency and effectiveness of the court and help to guide the client through a legal process that is often difficult to comprehend. She argues that lawyers can provide the missing social information that the court needs to ensure that interventions are timely and appropriate, enabling them to draw on therapeutic justice approaches and saving money by avoiding unnecessary adjournments. Spencer also highlights the challenges defendants face, as they are often unaware of the consequences of their choices and so can inadvertently make their situation worse. In this regard, she argues that lawyers can help to prevent the escalation of problems by translating the requirements of

legal decisions to align with the personal situation of the client's case. This better understanding of the process gives the client a greater sense of agency and thus a belief in the legitimacy of the process.

In Chapter 6, Carolyn McKay discusses the growing use of video-link technology in prisons and courtrooms in Australia and the impact that this reduction in face-to-face contact has on the nature of the lawyer–client relationship from the perspective of those held on remand and serving time in prison custody. McKay draws on empirical data gathered through 31 prisoner interviews in NSW with individuals who had experienced court hearings through video link. While McKay argues that there are clear advantages in avoiding prisoners and lawyers having to travel between courts and prisons, and that videoconferencing sometimes provides a better experience than telephone consultation, she identifies a range of concerns, in particular around maintaining the confidentiality of the lawyer–client relationship. McKay notes that there has been significant financial investment in videoconferencing facilities, as this is seen as a way of saving money without compromising quality, but she questions the extent to which prisoners, especially those most disadvantaged, enjoy 'access to justice' when their needs are complex and the camera represents a barrier to establishing emotional empathy.

In Chapter 7, Kathy Laster and Ryan Kornhauser argue that, arising out of the television and online culture in which everyone can refashion themselves as an expert, the institution and provision of legal aid is being undermined by 'DIY law'. They discuss the shift from the consumer movement of the 1970s, which emphasised the value of access to justice, provided in practice by a professional elite, and where legal aid ensured the protection of the most vulnerable and marginalised in society, to the current climate where direct access to legal information and self-help resources, together with a dominant ideology of public sector managerialism and a focus on reducing costs, now encourages consumers to take responsibility for addressing and resolving their own problems. In examining this shift, Laster and Kornhauser argue that it has de-skilled the law in some respects, but it has also deprived those without the technological know-how of the opportunity to access legal assistance or to assist themselves.

In Chapter 8, Liana Buchanan examines the history of CLCs in Australia, their social ethos and the important legal changes that they have helped initiate. Often working in areas of law that affect those who are most marginalised in society, CLCs, Buchanan demonstrates, aspire to use the law as an agent of social change, focusing on substantive as well as procedural justice. She explains that the wider social ethos of CLCs includes providing not only legal advice and representation, but also community legal education, and law and policy reform. In discussing the multifaceted role of CLCs, Buchanan shows that their innovative approach to improving access to justice includes developing integrated multi-agency responses to identifying and resolving legal needs and that they are committed to forms of 'systemic' advocacy, focusing on broader underlying problems that affect groups of people beyond the immediate litigant, such as family violence and police racial

profiling. In doing so, Buchanan reflects on the responses of CLCs as their funding is cut and their legal activism curtailed.

In Chapter 9, James Organ and Jennifer Sigafoos assess the impact of recent funding cuts and policy changes to third-sector advice agencies in the English city of Liverpool—an area of high social and economic deprivation. They describe the perfect storm that is created by cuts to welfare benefits and to the funding of non-profit legal advice agencies (the largest providers of welfare benefits advice) following LASPO. This includes demonstrating how advice agencies have lost specialist advice services and so have to rely on volunteers, telephone advice services, and client self-help and online information. Unsurprisingly, respondents in Organ and Sigafoos' empirical research reported that the quality of their service provision has fallen, as has the number of clients they are able to assist, resulting in growing unmet legal need. Additionally, their findings show that some agencies have sought to ameliorate the impact of these changes by merging with other organisations, but even larger bodies are not immune to funding reductions. Organ and Sigafoos conclude that these short-term savings are unlikely to deliver long-term gains, as the preventive benefits of legal assistance are lost, and increases in anxiety and mental health problems create costs elsewhere in the public sector.

In Chapter 10, Samuel Kirwan considers the changing funding for the organisation and provision of advice by Citizens' Advice Bureaux (CABx) in England and Wales, with a particular focus on the experience of advisers. Drawing on the author's own qualitative empirical data, he considers two principal areas of concern. The first is the voluntary nature of this work and the emotional connection with advice provision as practice—a connection which is under threat as a result of funding cuts that place pressure on advisers' time and responsibility. Second is the complex nature of 'advising' clients, a process which—more than the simple conveying of information—also encompasses practices that enable CAB clients to understand, process and act upon the information and advice provided. This analysis is used to critique funding cuts, which Kirwan argues ignore the human and emotional context of CAB workers, treating volunteer 'advice' as practical and non-legal, and therefore as something that can simply be made more productive when required.

In Chapter 11, Simon Rice examines the nature of the relationship between human rights and legal aid in non-criminal matters, posing the question of whether legal aid is a necessary part of our understanding and enjoyment of some substantive human rights. After a detailed analysis of the nature of human rights and the international and European human rights jurisprudence around legal aid, he notes that the right to legal aid is less well established in non-criminal matters (where it centres on access to the courts), than in criminal matters (where it is more closely tied to the right to a fair trial). In conclusion, he casts doubt on the idea of legal aid as a right in itself, arguing that a more fruitful approach is to identify the right to legal aid as an aspect of pre-existing substantive human rights.

In Chapter 12, Natalie Byrom considers the extent and impact of cuts to civil legal aid in England and Wales, and the context within which such drastic funding

reductions have been possible. Drawing on a range of official reports as well as her own research, Byrom notes the resulting uneven geographic distribution of civil law advice now available (resulting in what have been termed 'advice deserts') and the loss of expertise, as firms and agencies are unable to retain experienced advisers. She highlights the fact that black, Asian and minority ethnic lawyers are more likely to work in legal aid practices and so have been disproportionately affected by the cuts, reducing diversity within the profession. She goes on to examine the low visibility of civil legal aid and poor public perceptions of lawyers, both of which formed part of the context in which these cuts were possible. Byrom concludes by proposing more creative ways of thinking about the role of lawyers in society in the post-LASPO funding landscape, and how lawyers should best approach protecting what remains of public funding for civil legal aid.

In Chapter 13, Rosemary Hunter, Anne Barlow, Janet Smithson and Jan Ewing argue that LASPO's removal of legal aid funding for the majority of private family law disputes in England and Wales, and the expectation that all such matters will now be resolved through mediation, reflects a moral as well as an economic ideology. Mediation is cheaper than legal advice and representation, but it is also promoted by a government rhetoric that deems parties responsible for resolving their own 'private' disputes concerning separation, divorce and child custody. Drawing on their extensive qualitative empirical research, Hunter et al conclude that mediation—the only option available to those with limited means—does not represent justice; it is not appropriate for all cases; and in the one-third of cases where it is unsuccessful, there is no alternative procedure available to the parties. This privatisation of family disputes reduces access to justice, and allows the state to abdicate responsibility for child welfare.

In Chapter 14, Pasanna Mutha Merennege examines the impact of cuts to family law legal aid for the women of the Australian State of Victoria, bringing insights from her time working at the Women's Legal Service Victoria. Mutha-Merennege discusses how domestic violence and separation are growing areas of unmet legal need (recorded family violence increased by more than 80 per cent between 2010 and 2014 in Victoria), and as women are most likely to be the victims of domestic abuse, often leading to separation and child custody disputes, they are disproportionately affected by the cuts. In line with the arguments presented in several other chapters in this volume, Mutha-Merennege argues that removing access to legal advice and representation can lead to wider social and economic harms, as well as health consequences, as related problems are not dealt with and so escalate. She demonstrates how self-representation is not a realistic alternative for women with long histories of family violence, as they find it difficult to cross-examine violent ex-partners and prepare technical affidavits under pressure of time. Mutha-Merennege concludes that, without adequate legal aid funding, women experiencing family violence risk losing their children, their homes and even their lives.

In Chapter 15, Melanie Schwartz examines civil law access to justice issues for Aboriginal and Torres Strait Islanders, drawing on government inquiries and

qualitative data from her large-scale empirical project conducted across five jurisdictions, which included 800 Indigenous focus group participants and nearly 3500 interviews with organisations and agencies providing legal and welfare services. She notes that geographical remoteness is a major disadvantage for Indigenous people, often leading to negative socioeconomic consequences, as well as difficulties in accessing legal assistance, which is most often located in urban areas. Schwartz argues that a lack of knowledge of how civil and family law might provide solutions for Aboriginal and Torres Strait Islander people is a key obstacle to overcome, along with how to ensure effective communication (by both clients and lawyers) that takes into account the complex and culturally sensitive needs of Indigenous clients. Schwartz discusses how Indigenous women in particular have low levels of trust and confidence in the legal system, and concludes by warning of the necessity for wide-ranging reforms in order to address the structural disadvantages facing Aboriginal and Torres Strait Islanders. She also highlights the need to see civil and family law funding as essential in preventing the criminal offending that often results when these problems are not addressed.

The collection closes with Chapter 16, in which Ana Aliverti considers legal aid in the context of migration control, played out through a proposed UK Government policy to restrict legal aid eligibility to those who have resided in England and Wales for more than 12 months, which she critiques as part of a wider reconstituting of social citizenship. While the High Court ruled that, in assessing on the basis of residence rather than need, the proposed test was unlawful, Aliverti is critical of the court's failure to tackle the underlying broader questions of fairness and inequality in the immigration sphere, and so the less overt sources of discrimination that reduce the ability of lower-class foreign nationals to access justice. Although the test relates to residence and so might equally apply to non-resident British nationals, she argues that in practice this fulfils the less palatable objective of targeting foreigners. Aliverti also argues that legal aid reform reflects social hierarchies of who is deserving of state assistance and who is not, concluding that, while on the face of it, the High Court ruling was favourable, it also left unquestioned the state's presumed right to treat people differently on the grounds of 'foreignness'.

V. Conclusion

In this book, each chapter drives home the need for a new narrative around access to justice to counter the current dominant view that legal advice is unnecessary, and that legal aid cuts are unavoidable. This collection seeks to rebuild belief in the value and necessity of accessing and understanding law; and in the value of the quality of justice through legal assistance—civil, family and criminal. Without this, we run the risk of irreversibly damaging the legal system, and hiding the true extent of unmet legal need.

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