

The following is a revised version of a speech given by Emmanuel Kerkyasharian in the Bar Association Common Room at a seminar titled 'Crisis in Legal Aid' on 18 April 2018.

Crisis in Legal Aid

Not long ago, a four-week trial was conducted before the Supreme Court. The charge was murder. It involved complex issues of law. The two co-accused on indictment were sentenced to non-parole periods in excess of twenty years.

One of them was represented by a public defender. That public defender cost the State of NSW about \$2,800 per day of preparation time. In the weeks leading up to the trial, that public defender spent 12 days preparing to run it. The director of public prosecutions was represented by a salaried Crown. While I have not conducted the analysis, Crowns and public defenders have the same yearly salary, and hence it is likely that that Crown cost the state about the same as a public defender. That Crown prosecutor also spent 12 days or so preparing to run the trial.

The other co-accused was given a grant of Legal Aid with which to engage counsel. Legal aid granted only six days' preparation at \$1,150 per day. That is, the accused was granted \$6,900 in order to pay counsel for the 12 days' work necessary for the preparation of a murder trial. That barrister calculates his overheads for the period at about \$6,000. This means, in effect, that for those 12 days' work, counsel made \$900 profit. Assuming an eight-hour day (and which barristers work only eight-hour days preparing a serious trial?), that amounts to \$9.37 per hour: about half the minimum wage.

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There is a crisis in Legal Aid.

The last decade

2007 was the last time Legal Aid raised the amount it provides accused to pay for counsel in ordinary District Court criminal trials. Notionally, they provided about \$987 per day. I say notionally because even back then there was an expectation that a practitioner engaged by the accused would work for more hours than those for which he or she was paid.

For all but the most complex matters, the rates provided to accused people to engage private practitioners in criminal matters have not increased in 11 years.

The *Legal Aid Commission Act 1979* (NSW) prescribes that rates to engage private practitioners must be less than the commercial rate. This is, perhaps, as it should be. The



difference between what one might charge as a private rate and Legal Aid rates can be considered, reasonably, as a contribution of the legal profession to the community. However, that 'contribution' has reached the point where it is becoming increasingly difficult for accused to secure experienced and skilled

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practitioners to act for them.

In 2007 the minimum wage was \$13.74 per hour. In 2018 it is \$18.29 per hour. The minimum wage has increased by about 25 per cent. The salary of a backbencher in the New South Wales Parliament has increased by more than 20 per cent over that time. The salary of the director of public prosecutions has gone from \$309,000 to \$435,000 – an increase of about 36 per cent. The salary of most, if not all, government lawyers has increased by 20 per cent or more over that time.

In 2007 Legal Aid's budget was about \$190 million. In 2016–17 the budget was about \$308 million. That amounts to a 62.3 per cent increase over that 10-year period. It is true that Legal Aid is now granted for certain matters previously excluded from its purview, for example, applications in the Supreme Court to detain high risk offenders, but these are a fraction of Legal Aid's total expenditure. It is also true that it has been

cut for some things, like many summary hearings before magistrates.

The wages of in-house Legal Aid lawyers have kept pace with the wage rise of all government funded law jobs. So have the wages of the administrators who work there.

Conservatively, there has been at least a 20 per cent reduction – and one has only anecdote on which to base that figure – in the amount that Legal Aid will provide for an accused to pay for their lawyers' preparation. In addition to the 'contribution' by way of a discounted rate, lawyers are expected to provide a further 'contribution' by working additional hours for free.

Successive governments over that same 10-year period have established various programs directed at extracting from a defendant in a criminal matter an earlier guilty plea. These, and other measures, have been put into place ostensibly to improve the efficiency of courts. All of those measures, however, require more preparatory work from counsel prior to trial. And yet, historically at least, no additional funding has been provided for them. On the contrary, as noted above, there has been a reduction in funding for preparation.

Moreover, the administrative rigmarole that one must go through in order to get a grant of Legal Aid, and in particular to acquire a reasonable amount of preparation funding, has increased, hitting solicitors particularly harshly.

It is becoming increasingly common that accused do not get a grant until either a few days before, the day of, or a few days *after*, their trial. This means that accused must rely on the good will of counsel and solicitors to prepare their matter. It also means unnecessary delays in court.

Worse, where a matter, despite days of preparation, resolves in a plea of guilty, Legal Aid on occasion will not provide the funding for preparation that it would have otherwise provided had the matter run for trial. An example: having initially been advised in writing that four days' funding for preparation was available for a particular matter, that figure was nevertheless halved when the matter settled on the first day of trial, despite the preparatory work (and a lot more) having already been done by counsel.

Perhaps most troubling is the policy introduced a few years ago for Local Court matters, whereby for a large number of criminal matters, those that are not likely to result in gaol sentences, if you plead guilty, qualify for legal aid. But if you dare avail yourself of a



Legal professionals from across Victoria at a Rally For Legal Aid fundraiser outside the County Court of Victoria on 17 May 2016 in Melbourne. Photo: Vince Caligiuri / Fairfax Media

hearing, you are on your own. The pressure placed on an accused to plead guilty is perverse.

Outside of criminal law

The situation outside of criminal law is even worse. Funding for citizens with civil matters is so paltry that one cannot make sensible comment about it, beyond noting that it is barely existent. Family law and care and protection funding has been stripped bare.

It is no exaggeration to say that the funding provided for Care and Protection, including, for example, lawyers to represent children who are being sexually abused, is abominable. The following hypothetical will suffice to illustrate that:

A barrister of ten years' experience is briefed to appear for the Independent Legal Representative for a child in a Care and Protection matter. The matter involves sexual abuse allegations. There are competing experts involved and complex issues of fact

and law. As the matter is an appeal from the President's Children's Court the appeal is held in the Supreme Court, where it is listed for a five-day *de novo* hearing.

As the brief is to appear for a child, no preparation time has been allocated. Despite this, counsel spends considerable time preparing the matter. It settles by way of consent orders in the first hour of the first day of the hearing due, in part, to the hard work of counsel. The presiding justice of the Supreme Court congratulates the parties and their legal representatives on their good sense and diligence. Under the current funding scheme, counsel might only be entitled to charge \$150 for the entirety of their involvement in the matter. By way of comparison, if you drive from Castle Hill to the CBD down the toll roads and back for a few days it will cost you about \$145.

The role of lawyers

It is tempting to see this solely as a funding

issue and blame the executive government. However, it is important to acknowledge that lawyers too have a role to play. Barristers, be they prosecutors or defence counsel, are at least some part of a system that is burning through public funds. Judges also bear some responsibility.

It took an appearance at a country District Court to open my eyes to the problem. Four defence counsel, their solicitors, a Crown, a District Court Judge, her associate, and then all the non-lawyers – the accused, witnesses, and most importantly the alleged victims of serious crime – are all present at 10am to get the trial started. Despite the matter having been set down some months before, Counsel at the bar table said the five-day estimate was too short, and therefore the matter could not be heard in the sittings.

The trial date was vacated on the spot. There was no inquisition by the presiding judge as to why the error was made and if the matter could run. \$4,400 in Legal Aid barrister's fees were thrown away on that day

alone, not to mention the cost of our travel and accommodation.

A barrister from the UK, here on a sabbatical, who was assisting me was appalled. In the UK, time limits would be set on things like cross examination and speeches. Counsel would be required to justify how long they were going to spend with each witness and why they wanted that witness called. The matter would be forced into the allocated time.

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It got worse. As often happens on trial days, a deal was cut by the experienced practitioners on the ground. It was agreed to by the complainant. So, hopeful of a solution, we adjourned to the next day.

Crown prosecutors cost the state in excess of one quarter of a million dollars each year. They are statutory appointees with (albeit limited) tenure. They are skilled and experienced advocates. They are also not permitted by the director of public prosecutions to make decisions about whether matters should run or settle in a particular way. Instead, their advice is subjected to a complicated process of review.

My understanding of the process is that the advice of the Crown prosecutor goes to a solicitor in the 'Director Chambers' (in effect the executive suite of the director and deputy directors of public prosecutions). There, that solicitor reviews the advice provided by the statutory appointee Crown and may issue a further advice. A decision is then made, usually by a deputy director of public prosecutions.

Whatever the merits of the decision made in this case, it is far from clear why a statutory appointee, trusted to find indictments and run trials for the Crown, experienced and deeply involved in a matter, should have his or her independent advice reviewed by a solicitor who has limited knowledge of the brief and then overturned by a deputy DPP relying in part on that advice. It is an abject

waste of money both for the prosecution and relevantly, Legal Aid.

The net result is that we arrived on Wednesday morning – having spent another \$4,400 of Legal Aid money – to be told that a deputy director had said no. Three days wasted, \$13,200 of Legal Aid fees thrown away.

What's worse, this is not unusual. It happens Mondays through Thursdays (since nobody sets a trial down for a Friday) in tens if not scores of trials each week. It is reasonably common around the state to find 30 counsel, sitting around, with no judges, waiting to be not reached or adjourned because of late service of material or some other reason. Scores of victims of serious crimes, witnesses, police, sitting around wasting time, and burning money.

EAGP

We are told that the Early 'Appropriate' Guilty Plea Scheme will fix at least some of this. The basic idea of the scheme is to push parties to arrive at a plea arrangement in the Local Court so as to avoid occurrences like the one described above. It is important to note that it is not designed nor expected to increase the number of guilty pleas, but just to shift them forward in time, so it's not going to fix everything.

\$200 million dollars has been set aside by the government for a suite of changes to the criminal justice system, \$92 million of which is for the Early Appropriate Guilty Plea Scheme. Less than 10 per cent of that – some \$9 million – has been allowed for Legal Aid.

The attorney general in his second reading speech introducing the reforms said:

In addition to the five elements of legislative reform, additional funding is being provided to the Office of the Director of Public Prosecutions and Legal Aid to ensure the continuity of senior lawyers for both the prosecution and the defence from start to finish...

...

These measures are designed to remove the perverse incentives that currently operate ...

At first blush, this seemed like great news: And then Legal Aid sent us the proposed fees. The scales are completely unrealistic. They highlight the danger of fixed fees. For three thousand dollars, regardless of the brief size (except in exceptional circumstances), an accused is expected to find counsel who will:

- conference with them;
- read their brief (we were told orally that there would be extra preparation, but have not been told that in writing);

- provide an advice on evidence, i.e.: what evidence is missing, what should be asked for, what should not be ask for;
- talk to the Crown about getting that evidence;
- advise on subpoenas;
- advise on whether they can/should call witness in the Local Court prior to committal;
- write submissions to call for witnesses;
- appear on the hearing about calling witnesses;
- appear at the arraignment in the District Court;
- spend two hours travelling to and from a gaol on at least one occasion, if not more.

When the trial finally comes, counsel won't get any preparation funding, on the basis that it has already been provided in the Local Court. At least that is what the first proposal said. We have been told orally that there will be more, but again, we are yet to see that in writing.

So with a bit of back and forward, we put together a revised task list and a reasonable rate of \$180/hour. Legal Aid tells us that that this, for barristers alone, will cost an additional \$16.8m per annum.

Since the whole scheme relies on senior barristers having the matters, we've asked the government for that amount. We await their response.

I am not hopeful. [Since the time of writing, the government has made \$10m more available for all lawyers, not just barristers. While this step is both significant and to be commended, in my view the EAGP scheme remains gravely underfunded].

Other negotiations

Parallel to the discussion about Guilty Plea scheme funding, Legal Aid is putting together a proposal for greater funding overall. It has been predicted by BOCSAR that District Court trial work will increase by five per cent per annum for at least the next few years, meaning significant extra costs for Legal Aid, which are not funded.

So Legal Aid needs more money for itself, and to fund private practitioners. That process is ongoing. But the squish is on: there is a push for fixed fees. And fixed fees, like the one proposed for the EAGP scheme, are the beginning of the end. Once they have barristers on fixed fees, then the screws really start turning, which is what has been happening in the UK.

Fixed fees mean a transfer of risk from



Barristers in London protest at cuts to the legal aid budget. Photo: Andrew Cowie / Alamy Stock Photo

the state (the court, the prosecutors and the police) to the barrister and the client. From this, the freedom and clarity of decision-making becomes dangerously compromised: if, for example, you're not going to get another \$150 for the next hearing day, should you adjourn because the police just threw 500 pages of telephone intercept material at you at the door of the court? Perhaps you should encourage your client to plead today, because, as the bench makes clear, 'I can deal with your client's matter today Mr Kerkyasharian but only if she pleads...'

Fixed fees mean a diminution in the quality of justice. Studies conducted after the imposition of a fixed fee regime in Scotland showed that lawyers dramatically increased the number of cases they undertook, and correspondingly significantly reduced the time they spent preparing each one.

UK barristers report that Legal Aid matters involving 100 hours of pre-trial preparation and a full week in the Crown Court sometimes pay only £1000. Instructing solicitors do not appear in court in legally aided mat-

ters – counsel are almost invariably on their own. The same is happening here: caps and a ridiculous funding arrangement, where solicitors only receive five hours a day, and only for time physically in court, means barristers are increasingly appearing uninstructed, or instructed by clerks.

Around Australia

The above illustration shows just where we are headed. In Australia, the Law Council's 'Justice Project Interim Report' published in March 2018 reports:

- 14 per cent of people live below the poverty line, yet legal aid representation is only available to eight per cent of Australians.
- Most people charged with crimes or requiring representation in family law matters do not qualify for legal aid grants.
- People who are cash poor but have some assets can expect not to receive help.

Legal Aid is not a funding priority anywhere.

Should it be?

A question with which we ought to grapple is should there be Legal Aid at all?

It is important to remember that Legal Aid has not existed since time immemorial; the access to justice it provides is a relatively new privilege that, for many years, those accused of crimes, and the poor, did not enjoy.

It seems to me though, a system worth protecting. It is the presence of highly trained, skilled, well-armed advocates on both sides that ensures justice. Sadly, we have already given up so much of it. Committals are gone. Jury trials in all but the most serious criminal matters are gone. All of it sacrificed on the altar of efficiency.

Like all repositories of power, the justice system's legitimacy comes from competence. No matter how efficient, if the outcomes are unfair, then it is illegitimate. Every reduction in legal aid funding diminishes the justice

system.

Poorly paid barristers cannot afford chambers, or where they can, cannot afford to participate in the life of chambers. They cannot give to the Bar. They are unlikely to take silk. They are never going to get a junior brief and learn all that one does from such encounters. They are too often self-excluded from the hallowed basement that is the bar common room, and, despite often being the best of us, they are excluded from the bench. Poorly paid barristers have to go home having been chastised by a judge for being unprepared; embarrassed, distraught, and unable to pay their mortgage.

It means that the talent is running away. It means abhorrent mental health. Worst of

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all, it means that innocent people may go to gaol, and the guilty may roam free. And in the Care and Protection jurisdiction, it means that children who are getting raped by their parents might not be able to escape their clutches.

What we have been doing

We are late to the fight. Legal Aid is required by its constituent Act to consult with the Bar Association whenever it changes its fee scales. For more than a decade the Bar Association has worked with Legal Aid on fees and refrained from demanding increases that were clearly justified. We continue to try and work with Legal Aid, however there is a desperate need to push for more funding both from Legal Aid and from the state and federal governments, and we are now in the fight.

Part of the problem is that barristers have utterly failed in communicating to the community why we are necessary. Outdated and out of touch with the *zeitgeist*, we are the apparently pompous men and women in wigs.

It is ironic that professional communicators have communicated so miserably. Whatever the reason, we have failed to deal with the enormous changes to the cognitive environment in the last 20 years.

Our media skills are childlike compared to those of our colleagues in other countries. Our social media skills are non-existent: our

Twitter accounts are dull at best, and full of puerile virtue-signalling at worst. More likely for criminal barristers, they are non-existent. We have failed completely to engage in the very media that guides modern policy processes.

And where we have engaged, our message has been wrong.

Barristers are, to use the words of Angela Rafferty QC, head of the English Criminal Bar Association:

...the people who fairly prosecute and fearlessly defend. Without us, innocent people would now be locked up. Without us, the guilty would have walked free. Without us and our good will, the system would have broken a long time ago.

It is our fault that the community does not know that.

Study after study shows the ways in which Legal Aid funding cuts affect the disadvantaged in society. Few, if any, focus on the effect on the justice system as a whole. We have to get across to the great majority of society – the failing middle class – that we are not servants of particular privileged sections of society (the super rich, those with a lobby, and, of course, the crooks) but rather servants of all.

It is our job to make sure that everybody else – the government, the police, the bureaucrats who come into your house and take your kids away – are getting it right and held to account. We are the guardians of the guardians themselves. To my mind, that's the message that we should be broadcasting.

What can we do?

In Northern Ireland, fees were successfully raised when a campaign by barristers to refuse to take new legal aid work was put into effect. This is not so much a strike as it is a refusal to be engaged as a private contractor at the rates offered. Just as a banking interest would not build a toll road unless the fees were 'reasonable,' each of us can refuse the briefs.

More generally, barristers can apply for adjournments and temporary stays where funding has not been put in place or is inadequate.

Legal Aid obtains silks at greatly discounted rates and essentially never pays for a junior. This is a cause of great harm to the profession, and consequently to the community in the future, and the institutional knowledge and skill of the criminal bar will be much diminished.

It is also the case that we barristers subsidise the government in all kinds of matters. It is not clear to me why, say, counsel appearing for the Crown in an asset forfeiture matter should get paid less than counsel for Joe

Bloggs.

These are all matters that barristers in their own practices might reflect on. We are under no duty to work for insufficient money, and certainly for not less than the minimum wage. We ought all communicate that to our government clients.

Whether or not the Bar Association can lawfully arrange collective action is beyond my expertise; but it seems likely, should we continue down the road of fixed fees, that such action will become necessary. Such action has had some, albeit limited, success in the UK.

This year marks 39 years since the Legal Services Commission Bill 1979 was presented to the NSW Parliament. That Bill laid the foundation of the Legal Aid framework that is in place today.

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Frank Walker QC, then attorney general, said in his second reading speech:

It is pointless to have Legal rights if one cannot afford to pursue them in the courts. Without extensive legal aid, justice becomes the prerogative of a privileged minority, and the processes of the law become a weapon that the rich can use against the poor with impunity. Both the judicial system and the legal profession suffer from the lack of public confidence that results.

He went on to say:

The objective of the government is simply to provide the means by which all citizens might have the same practical access to courts, and to achieve equality before the law. Reasonable limits must be imposed on what it will spend on this, but within those limits the government will, without apology, commit whatever resources it can fund to the removal of injustice against its helpless fellows.

That is how it ought be. And if we still believe that, then it is incumbent on us to get it back there.