

COMMENTS

REPRESENTATION BY SPECIAL ADVOCATES

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The Unmet Need for Legal Services

In recent years there has been a growing concern and increased effort to make legal services available to all sectors of the community. Nevertheless, there is still a great unmet need for legal advice and representation. This is particularly true in two areas of importance to large numbers of people, namely criminal defences in courts of petty sessions and social welfare claims. Both involve disputes between the government and individual citizens who are often disadvantaged in terms of status, wealth and education.

Figures prepared by the N.S.W. Bureau of Crime, Statistics and Research show that in 1972 defendants appearing in courts of petty sessions charged with offences (other than drunkenness and some traffic offences) were unrepresented in sixty-eight per cent of all cases.¹ The analysis does not indicate the socio-economic class of those who were represented, but it seems likely that they were the wealthier defendants. In 1972 there was practically no legal aid available in N.S.W. courts of petty sessions.² Unfortunately the statistics published so far do not adequately demonstrate the effects of representation,³ but the mere fact that wealthy defendants can and do use lawyers, while poorer people cannot, provides at least the appearance of injustice. Unless there is a dramatic increase in the number of criminal advocates, the present unsatisfactory situation is likely to deteriorate. Our cities are expected to continue expanding, while crime rates tend to grow faster than the population.

In the past, very few lawyers have been concerned with social security law.⁴ Since 10 February 1975 the Australian Social Security Appeals tribunals have been operating in each state and territory, and it is likely that Australia will see a growing use of tribunals in line with recent English and American experience. In an endeavour to reduce formal procedures and to avoid an antagonistic atmosphere, representation of applicants by lawyers is frequently prohibited before tribunals.⁵ Unfortunately, the lack of an appropriate non-lawyer representative places both the applicant and the tribunal in an invidious position; in addition, the tribunal may feel embarrassed when only the department's case is put by an articulate and experienced officer. A clear

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1. Vinson and Homel, "Legal Representation and Outcome" (1973) 47 A.L.J. 132.

2. Australian Commission of Enquiry into Poverty ("Poverty Commission"), *Legal Aid in Australia*, Discussion paper (Nov. 1974) para 344.

3. Vinson and Hornel, *supra* note 1, 134.

4. Sackville, "Social Welfare for Fatherless Families in Australia: Some Legal Issues" (1972) 46 A.L.J. 607 and Sackville "Lawyers and the Welfare State" (1974) Aust. J. of Soc. Issues 11.

5. See, e.g., Consumer Claims Tribunal Act, 1974 (N.S.W.) s. 30; and *Social Security Appeals System: Principles and Procedures* (Dept. of Soc. Sec., Dec. 1974) para. 43.

presentation of facts and arguments by a trained advocate will benefit both the applicant and the tribunal.

Of course, lawyers are not excluded from lower criminal courts, but they are not active in that jurisdiction, principally because the work is unremunerative. Most potential clients are unable to meet fees considered reasonable by lawyers. A conservative estimate of the level of fees acceptable to the profession is indicated by the standard payments made to private practitioners by the Australian Legal Aid Office. In June 1975 the Leichhardt office in Sydney was paying solicitors forty to fifty dollars for a straightforward guilty plea and about one hundred dollars for a defended matter lasting one day in petty sessions.

Meeting increased demand for the services of lawyers will depend upon massive injections of legal aid, which will in turn involve a substantial drain on state resources. Because of lawyers' long unremunerative years of education, their expectations of financial reward, their high social status and the strength of their "professional unions" lawyers' salaries are high and are likely to remain so. Furthermore, the cost of training lawyers is not low. Most practising lawyers in Australia are graduates who have spent four or five years engaged in full-time study in a university. The cost of training each student in a five year course (excluding capital costs) is approximately \$7,500, a figure which does not take into account the cost of tertiary allowances that are paid to a majority of full-time students.

Politicians who support provision of legal services by a "welfare state" have on occasion expressed the fear of being devoured by their own creation; legal aid provides the spectre of a financial "bottomless pit".⁶ No-one has attempted to calculate the amount spent annually on legal advice and representation by governments, corporations and the relatively small sector of society which presently uses our legal machinery to settle disputes. Some people would consider it safer to nail the lid down firmly on legal aid now, despite the fact that such action would entail limiting access to legal services. However, even if such pragmatism overwhelmed a philosophy of equal access to the law, it would not be politically acceptable. Legal expenses in the U.S.A. have already risen above the reach of the mass of middle-class citizens.⁷ The trend is probably occurring here too, and it is a trend politicians cannot ignore. Middle-class pressure for legal aid is politically significant.

Members of the legal profession assume that where representation is required before judicial bodies, lawyers are best qualified to provide it. They believe sufficient lawyers should be trained to meet the needs of litigants, and if clients cannot afford to pay their lawyers' fees, a government subsidy called "legal aid" should be provided. While we agree that society should aim to provide the best possible legal service to all its members, we question the conclusion that this requires further broadly-trained legal practitioners. Lawyers do not have an exclusive right of appearance in all courts. Despite various statutory provisions relating to the legal profession and to procedure, the courts have retained as part of their inherent jurisdiction the power of regulating who will appear before them.⁸ Furthermore, a large number of statutory provisions

6. See references to Lord Widgery's comments in a speech in Perth quoted by the Attorney-General Senator Murphy, in his ministerial statement on Legal Aid: Sen. Deb., 13 December 1973, 2800-2802.

7. In damages claims, the problem is mitigated in the U.S.A. by charging on a contingent fee basis.

8. In *R. v. O'Neill* (1885) 6 N.S.W.L.R. 43, a crown prosecutor was not allowed to appear at Quarter Sessions for a defendant even with the Attorney-General's consent. *Hubbard Association of Scientologists International v. Anderson and Just* (1972) V.R. 340, 342.

explicitly provide for non-legal representation.⁹ Nevertheless, courts have been very reluctant to allow anyone to appear before them unless that person is a qualified lawyer or is the actual litigant.¹⁰

Use of Special Advocates

We are faced, then, with a dilemma. Large sections of the community cannot afford to use lawyers, even in criminal cases, and yet the cost of providing freely available legal services will involve a vast expenditure of government funds. Furthermore, even those defendants who do have lawyers appearing for them may not be adequately represented. Many solicitors have neither training nor experience in criminal advocacy. The establishment of a scheme to provide assistance through specially trained "criminal advocates", rather than through lawyers who have undergone the present general and protracted training, would be a major step towards solving both problems.

There is no novelty in suggesting that non-lawyers should be allowed to act as advocates. In practice there are a number of bodies which regularly hear non-lawyers as advocates. For example, police prosecutors in lower criminal courts¹¹ and prosecutors in children's courts are not qualified practitioners, nor are many advocates appearing before industrial courts and tribunals. Accountants and tax agents commonly argue cases before taxation boards of review, while in South Australia officers from the Department of Community Welfare, who are not trained lawyers, appear in affiliation proceedings and in the children's courts.¹² Similar instances may be found in England, the U.S. and Canada. In all these countries non-lawyers appear regularly before specialized tribunals.¹³ In some American states, they may appear in minor criminal matters.¹⁴ In Ontario trained "professional agents" appear in small claims courts and family courts. In many jurisdictions law students also are allowed to appear.¹⁵ These examples indicate that non-lawyers can and do act as advocates where their services are needed.

People suitable for training as criminal advocates need not have achieved top grades in their school years, nor need they have had any prior tertiary education. An American programme for legal para-professionals run by the Dixwell Legal Rights

9. For examples of N.S.W. provisions allowing representation by lay agents, see Land and Valuation Court Act, 1921, s. 11; Landlord and Tenant (Amendment) Act, 1948, s. 54; Consumer Claims Tribunals Act, 1974, s. 30; District Court Act, 1973, s. 43; Courts of Petty Sessions (Civil Claims) Act, 1970, s. 11; Industrial Arbitration Act, 1940, s. 80.

For examples of Commonwealth provisions, see Willheim, "Legal Representation Before Administrative Tribunals" (1969) 43 A.L.J. 64.

10. A recent expression of disapproval is reported in The Law Soc. Bull. (S.A.) p. 5 (June 1975).

11. Police prosecutors in N.S.W. receive 45 lectures and on-the-job training extending over a period of 4-5 years.

12. See Sackville, "Affiliation Proceedings in Victoria" (1972) 8 M.U.L.R. 351, 360; and Community Welfare Act, 1972 (S.A.) s. 239 (2), (4).

13: There is a wealth of U.S. material on this point: e.g. see Robinson, "Appearances by Laymen in a Representative Capacity Before Administrative Bodies" (1938) 5 Law & Contemp. Probs.; Sparer, Thorkelson and Weiss, "The Lay Advocate" (1965-1966) 43 U. Detroit L.J. 493, 498.

14. See Avila, "Legal Paraprofessionals and Unauthorized Practice" (1973) 8 H. Civ. Rights - Civ. Libs. L. Rev. 104, 116.

15. Including in nearly all states of the U.S.A. - see Pincus, *Clinical Legal Education in the United States, 1968-1975*, Workshop Papers for the 18th Australian Legal Convention, p. 111, 117.

Association selected from applicants on the basis of individual and group interviews,¹⁶ and did not emphasize high educational achievements.

Entry requirements for applicants should be as flexible as possible in order to attract mature age applicants, especially from migrant, black and other disadvantaged communities. Active recruitment of advocates from such communities should be encouraged as it will help to alleviate the communication difficulties which stem not only from language problems, but also from cultural differences and the reticence of clients who identify their lawyer with the system of authority from which they feel alienated. The second field report on a Legal Service Assistants programme run by Columbia Law School noted that the assistant

has added a 'new dimension' to the office in that his ghetto background equips him to sympathize with the clients more than the white middle-class lawyer and to go beyond narrow legal problems to be aware of and to resolve related 'social problems'.¹⁷

Breaking down such social barriers is likely to lead to wider benefits in two ways. On the one hand, the active participation of advocates from a disadvantaged community in the judicial process will tend to decrease the sense of social alienation of that community. Respect for the law and the courts is therefore likely to increase. On the other hand, sympathetic presentation of properly prepared cases in court will lead to a better understanding of the problems of minority groups by magistrates. This in turn will result in better administration of the law and pressure for reform. It is unlikely that these wider social benefits will flow from increased use of the traditional legal practitioner.

Training Programme

Implementation of this proposal will require a short but intensive training course for advocates, possibly comprising a full-time one year course at an institute of technology or a college of advanced education. (No doubt a part-time course could be provided for those people who must work as well as study.) The theoretical training would include an introduction to the legal system and a comprehensive study of criminal law and procedure and evidence. Combined with the theoretical studies would be a clinical course in interviewing, negotiating and advocacy. Finally there would be a brief period of apprenticeship or "articles", spent primarily in court working with a trained lawyer or qualified criminal advocate. This work would provide the core of the training. However, trainee advocates could also receive instruction in basic principles of social work and penology.

Even allowing for the expense incurred in well-run clinical courses (such as the purchase of moderately high-priced videotaping equipment) the educational expense would hardly compare with that of a university law degree. The primary difference is, of course, that the proposed "criminal advocate" is being given very specialized instruction. Yet there is no reason why someone representing solely criminal defendants should have detailed knowledge of such subjects as the law of trusts, property, contracts, torts, taxation, or estate planning. On the other hand, not many law students at present receive such detailed training in criminal law and procedure, let alone advocacy. The vast majority of young criminal barristers have had no such essential training before they are thrown in "to learn on the job".

16. Brickman, "Expansion of the Lawyering Process Through a New Delivery System: The Emergence and State of Legal Paraprofessionalism" (1971) 71 Col. 1. Rev. 1153, 1226.

17. Quoted in Statsky, "Paraprofessionals: Expanding the Legal Service Delivery Team" (1972) 24 J. Leg. Ed. 397, 419.

Upon completing their training the proposed advocates could set up offices in private practice, or be employed by government or independent agencies, such as the local legal centres recommended by the Poverty Commission Report on Legal Aid.¹⁸ Alternatively, advocates could be attached to the courts in which they will work. This might allow them to satisfy the present demands for a "duty solicitor" scheme. Furthermore, the Poverty Commission has suggested significant reforms to bail procedures, which, if implemented, will require the collection of information from each applicant for bail and the making of submissions to the magistrate on a number of matters.¹⁹ It would seem logical to attach to each court criminal advocates who could perform these functions. Of course, there is a danger that working and interviewing only in the court building will lead to the advocate being quickly identified with the court,²⁰ and the appearance of independence should be preserved as much as possible.

A similar training scheme could be devised for advocates who could appear before the new Australian Social Security Appeals Tribunals. Social security entitlement is a field with which very few Australian lawyers are familiar and in any event they are not permitted to appear before the tribunal. The Department's statement of *Principles and Procedures* allows representation at hearings, but not by a legal practitioner.²¹ The statement also advises that the tribunal will attempt to ensure that a 'court room' atmosphere does not exist at hearings. At least in Sydney, the tribunal is ensuring a highly informal relaxed atmosphere.²²

The Department obviously considers that the presence of legal representation will lead to undesirable formality. However, the need for some representation is accepted, and in so far as it will help both the tribunal and the claimant to have someone familiar with the tribunal and its area of operation to marshal facts and state arguments concisely, we believe that special advocates will be welcomed. An English commentator discussing the possible contribution of lawyers to the workings of the U.K. Supplementary Benefits Appeals tribunals has stated:

Let it be said straight away that most of the functions which could be performed by lawyers could equally well be performed by trained lay advocates . . .²³

The English tribunal has a similar role to that of the new Australian appeals tribunals. Lay advocates are commonly heard in other English tribunals, such as the National Insurance Tribunal where trade union officials frequently represent their members with regard to industrial injury compensation claims. Again, the Australian experience is closely analogous.

Criticisms

A number of attacks may be made on the proposals outlined above. In an address to a conference of Australian magistrates, Susan Armstrong criticized the use of special

18. Poverty Commission, *supra* note 2, paras 6.37a - 6.43.

19. *Bail in Australia*, a report prepared by Susan Armstrong for the Poverty Commission (unpub. 1975).

20. For a similar problem, see McGee, "Lay Advocacy and 'Legal Services to Youth': Summaries of the Use of Para-Legal Aides" (1969) 47 J. Urban L. 127, 137.

21. *Supra* note 5.

22. Personal communication from Mary Jane Mossman, who is currently undertaking a project funded by the Poverty Commission on "Social Security and the Law".

23. White, "Lawyers and the Enforcement of Rights" in P. Morris, R. White and P. Lewis, *Social Needs and Legal Action* (1973) 28. For a debate on the desirability of lay or legal representation before English tribunals, see (1974) 124 N. L. J. 398-420.

advocates in criminal courts on two grounds.²⁴ First, she alleged that such a scheme would appear to be providing second class representation for poor people. For the reasons set out above we believe that the trained advocate will in fact often do a better job than a lawyer. It could be argued that the mere appearance of a double standard would be sufficient to condemn the proposal, but at least a pilot scheme seems justified to determine whether there will be widespread hostility from the users of the service, for it is they who must believe they are receiving competent assistance. Even if we are wrong and the criminal advocates do not fully measure up to lawyers' standards, it is still arguable that second class representation is better than none at all. People who cannot afford a Cadillac need not be condemned to walk. As Justice Douglas stated in *Hackin v. Arizona*,²⁵ a case involving an indigent defendant to whom a court had refused representation by an unadmitted law graduate,

for the majority of indigents, who are not so fortunate to be served by neighbourhood legal offices, lay assistance may be the only hope for achieving equal justice at this time.

It should also be noted that because criminal advocates will be trained specialists they will not be merely second-class lawyers, in the way that managing clerks in English (and Australian) solicitors' offices tend to be. We envisage that they will have their own professional organization and scales of remuneration. By reason of their limited field of expertise, the limited scope for advancement up a professional hierarchy and the fewer unremunerative years spent obtaining the necessary qualifications, these scales will be below those demanded by barristers or solicitors. This in itself is a benefit to society resulting from provision of a specialized, but not inferior, service.

Susan Armstrong's second criticism of the proposed special advocates is that they form a stop-gap solution which could "frustrate more important reforms". What are these reforms?

The first is the provision of sufficient lawyers to advise and represent all defendants. This remedy has already been rejected as undesirable and impracticable. It ignores the positive advantages of the proposed advocates over lawyers, and it would impose on the taxpayer an unwarranted burden in terms of salaries and the cost of training sufficient lawyers.

The second suggested reform requires the simplification of procedures so that people can adequately represent themselves. Undoubtedly there is a great and urgent need for such simplification, but it can only provide a partial solution to the problem. Litigants will always vary in their levels of education, experience, articulateness and ability to present their case in court. There will always be a large number of people who will need representation.

Furthermore, assistance should be made available to persons who wish to represent themselves before the court or tribunal, but still need assistance and advice. In *McKenzie v. McKenzie*²⁶ the English Court of Appeal affirmed a litigant's right to have someone present in court to assist the litigant by taking notes, suggesting questions and quietly giving advice. Most lawyers feel frustrated not to have control of a case and will not act in such a limited role; they believe that by acting as counsel they could do a better job in a shorter time. However, litigants should be able to

24. Susan Armstrong, *The Expansion of Legal Aid Services - The Effect on Courts of Summary Jurisdiction* (unpub. 1975) (A paper delivered at a conference, "The Magistrates' Court: 1975 and beyond", organized by the Australian Institute of Criminology in May 1975).

25. 389 U.S. 143, 152 (1967).

26. [1970] 3 W.L.R. 472.

represent themselves with assistance, and the special advocate could perform this advisory function better and more cheaply than a lawyer. The advocate would have a better understanding and be less impatient of the wishes of the accused than would a lawyer.

A third criticism, heard from some lawyers, is that advocates who are not legal practitioners will not be subject to the ethical restraints imposed on lawyers, yet such restraints are essential to the proper working of our judicial system. In reply to a similar argument addressed to the undesirability of allowing lay advocates in administrative proceedings, Professor Gellhorn of Columbia University Law School replied:

Lawyers have not yet established monopolistic control over the moral virtues. . . . the profession's code of ethics . . . is not so esoteric that it cannot be adapted to the conditions of administrative practice, and there made applicable to non-lawyer as well as the legal practitioner.²⁷

While malpractice should not prove a substantial problem, there could be a certifying board which would concern itself with both educational requirements and unethical practice. Certificates issued by that board could be made renewable annually, and the board could investigate complaints from magistrates, opposing prosecutors or clients alleging incompetence or unethical practice. Proven malpractice could lead to suspension or non-renewal of a practising certificate, as with solicitors.

Conclusion

These proposals will not solve the formidable social problem of how to provide legal services to the community at a politically acceptable price. They are not offered as an attempt to provide a total solution, but rather to indicate a path which leads in a hopeful direction. The arguments have concentrated on the courts of minor criminal jurisdiction. This was done deliberately as it is a field demanding urgent attention, although an easier case can be made for using special advocates in tribunals. Tribunals have more narrowly defined jurisdictions, lending themselves readily to specialized training of the kind envisaged.

It is not suggested that lawyers should be excluded from magistrates' courts, but where they do not provide services, they cannot rationally justify a monopolistic position. Furthermore, they cannot expect the public to provide an unnecessary subsidy to enable them to establish a monopoly. We believe there is an urgent need to set up training courses for special advocates to provide advice and representation to defendants in courts of petty sessions and claimants before the Social Security Appeals Tribunal. Appropriate courses could also be designed for lay advocates already operating in other jurisdictions.

27. "Law and Lawyers in the Modern World", (1941) 15 U. Cinn. L. Rev. 123, 203.