

DOES RECENT EMPIRICAL RESEARCH SHED NEW LIGHT ON AUSTRALIA'S LEGAL AID SCHEME?

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Introduction

Legal aid administrators and planners are faced with complex and difficult questions when it comes to guiding the development of legal aid schemes. While they often consult the vast international literature that describes legal aid schemes around the globe, they rarely have the time or opportunity to consult other important research that could facilitate their work.¹ Specifically, they rarely consider the empirical research that examines the types of legal problems and the legal help that people need in life. Consequently, they also do not consider the implications of that research when it comes to guiding the ongoing development of national legal aid schemes. Designing schemes from the 'top down', or without drawing on such research is, however, unwise. It is likely to result in legal aid that is ill-equipped to assist ordinary citizens in being considered genuinely equal before the law in the ways that *they* require. In other words, administrators' good intentions and hard work are not on their own sufficient. Ideally, legal aid schemes should also be shaped in part by 'bottom-up' research that informs administrators and planners about the needs of the citizens as they articulate them.

One of the clearest examples of the problem is that lawyers and administrators

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¹ The most recent example is Francis Regan *et al*, eds., *The Transformation of Legal Aid: Comparative and Historical Studies* (New York: Oxford University Press, 1999). Earlier volumes of studies of legal aid include Frederick H. Zemans, ed., *Perspectives on Legal Aid: An International Survey* (London: Frances Pinter, 1979) and Mauro Cappelletti, James Gordley, & Earl Johnson, eds., *Towards Equal Justice: A Comparative Study of Legal Aid in Modern Societies* (New York: Oceana, 1975). Also see the publications of the papers presented to the International Legal Aid Group Conferences including: D. Fleming & A. Paterson "International Legal Aid Group: The Challenge of the New Century" (Conference Proceedings, Melbourne, Australia, June 2001).

often think that offering legal representation services for court cases is the main and perhaps the only priority for legal aid schemes.² The empirical research, however, suggests otherwise. As I explain in the paper, the empirical research informs us that what people need most often is legal advice, education and information about how they might respond to common, everyday civil and family law problems.³ In essence, the research suggests quite a different story about what constitutes a successful and effective legal aid scheme compared to what some lawyers and administrators might think.

In the first section of this paper, therefore, I summarise the results of recent empirical research that examines the legal problems people experience and the types of assistance they need to respond to those problems. The second section identifies a number of implications of the research for the design of national legal aid schemes. I argue that an effective scheme needs to not only offer a combination of services that give a priority to assisting people when they are involved in litigation, or are 'inside litigation'; it also needs to give a priority to assisting people when their legal problems are 'outside litigation'. The paper draws on this material in the third and fourth sections to briefly sketch Australia's legal aid scheme and highlight the range of services for problems that are outside of litigation. I argue that this is one of the Australian scheme's often-overlooked strengths. Finally, I conclude that Australia's legal aid scheme is unusually successful in assisting people when their legal problems are outside litigation. Unfortunately, however, it is not nearly as successful when their problems are inside litigation.

Paths to Justice

Researchers in England and Scotland recently conducted empirical research that reminds us of the variety of legal problems ordinary citizens experience. It also reminds us of the often complex and multi-faceted steps that citizens take when they try to respond to their legal problems. The research, therefore, has important implications for the design of legal systems and particularly for legal aid schemes

² An historical illustration of this preoccupation was the emphasis given to litigation services in annual reports of Australian legal aid organisations. In general, little attention was paid to any services other than litigation and legal advice interviews despite the fact that larger numbers of people received assistance by other services including telephone advice and education about the law.

³ When people experience criminal law problems, by contrast, they generally are more likely to find their way to lawyers and other sources of help including court officials and police.

that try to assist low-income citizens in dealing with their legal problems.⁴

In brief, the research surveyed ordinary citizens about whether they had experienced any of a common range of problems that had a remedy in civil or family law, and their experiences if they had done anything about those problems.⁵ In other words, rather than examining the legal system from the 'top down' perspectives of judges, lawyers, and justice system administrators, the researchers adopted a 'bottom-up' approach and asked individuals about *their paths through the justice system*. Such research is rarely attempted despite the fact that justice systems are designed at least in part to serve the citizens as well as the officials who administer them. When such research was undertaken in the past it often focussed on low-income or other disadvantaged groups alone. While this 'legal needs of the poor' focus (as it is referred to) is undoubtedly important, it does not provide a comprehensive picture of all social groups in a society.⁶ By contrast, the comprehensive nature of the bottom-up research provides a detailed understanding of the legal problems people experience in that society, how they respond, the consequences of doing so, and what they think about the legal system.

The research proceeded in three stages.⁷ In the screening survey in England and Wales, a random sample of 4,125 people over the age of 18 were asked whether they had experienced any from a list of common legal problems. Intensive interviews

⁴ The England and Wales research is reported in Hazel Genn, *Paths to Justice: What People Do and Think About Going to Law* (Oxford: Hart Publishing, 1999); the Scottish research is reported in Hazel Genn & Alan Paterson, *Paths to Justice, Scotland: What People in Scotland Do and Think About Going to Law* (Oxford: Hart Publishing, 2001). The Legal Services Commission in England will conduct a similar study every five years in order to monitor changes in people's paths to justice. Researchers in a number of other societies including the Netherlands, Canada, and Australia are also considering or planning similar studies.

⁵ The researchers focussed solely on civil law problems and did not include criminal matters.

⁶ Examples of the legal needs of the poor research conducted in the 1960s and 1970s include: (for the UK) Brian Abel-Smith, Michael Zander & Rosalind Brooke, *Legal Problems and the Citizen* (London: Heineman, 1973); (for the USA) Barbara Curran, *The Legal Needs of the Public* (Chicago: The Foundation, 1977); (for Canada), Camille Messier, *Les Mains de la Loi* (Montreal: Commission de Service Juridiques, 1975); and (for Australia) Michael Cass & Ronald Sackville, *Legal Needs of the Poor* (Canberra: Australian Government Publishing Service, 1975).

⁷ The research method is described in detail in Genn, *supra* note 4 at 12-18 and the research instruments are also described in Appendix A of the book and reproduced in full in Appendix C. In view of the fact that the research method used in the two studies was similar the discussion here summarises the England and Wales research alone. The results are summarised rather than discussed in detail because the main purpose of the paper is to highlight their implications for legal aid schemes.

were then conducted with the 1,134 people who had reported experiencing problems in order to find out how they had responded and to identify the consequences. Finally, a small group of 40 respondents who pursued their cases to a decision were interviewed about their experiences with and attitudes towards the justice system.

There are a number of important findings in the research that are relevant to this paper. First, a surprisingly large proportion of people reported experiencing common civil or family legal problems. The researchers found in the initial screening survey that over a five-year period, many people had experienced one or more of a wide variety of civil and family law problems. Overall, 39% of the population had experienced one or more of the problems. The most commonly occurring problems related to faulty goods or services (11%) and money problems (9%). But in general, it is fair to say that the legal problems were reported as occurring in many areas of the respondents' lives. Table 1 summarises the percentage of respondents who experienced each type of problem.

Table 1
Incidence of Problems of Different Types⁸

| Type of Problem | Respondents (%) |
|--|-----------------|
| Faulty goods and services | 11 |
| Money problems | 9 |
| Owning residential property | 8 |
| Injury/work-related health problem | 7 |
| Living in rented accommodation | 6 |
| Relationships amid family matters | 6 |
| Employment problem | 4 |
| Divorce proceedings | 3 |
| Problems concerning children under 18 | 2 |
| Negligent medical treatment | 1 |
| Discrimination – race/sexuality/disability | 1 |
| Immigration | 0.2 |

The research also sheds light on the ways that citizens respond to problems when they are identified as potentially having a legal remedy. While lawyers and courts might think that they play an essential role in resolving civil law disputes, the survey results suggests otherwise. Nearly half the people did not seek advice – 5% of

⁸ Source: *supra* note 4 at 24.

respondents took no action to resolve the problem, 35% of people handled the problem themselves without seeking advice or assistance of any kind. However, 60% of people did seek advice from one source or more. They were also more likely to seek advice for problems that were seen as more serious such as divorce, and accidents and injuries, and were less likely to do so for consumer problems or landlord problems.⁹

Lawyers were not, however, an important source of advice. When citizens sought advice only a relatively small proportion went to a lawyer – about 24% went directly to a solicitor. Another 21% sought help from a Citizens Advice Bureau. Not surprisingly given the variety of problems, the remaining respondents went to a variety of service providers including Ombudsman offices, court staff, the local council, a member of parliament, or a social welfare office.¹⁰

While it might be apparently irrational behaviour not to seek out legal help of one form or another, there were a number of reasons people reported for not doing so. The reasons included a dislike of legal procedures, the inaccessibility of many organisations where there are long queues and waiting times, an aversion to lawyers, and a fear of the cost of lawyers.

It is also important to note that the respondents were rarely keen to use the law to resolve their problems. Indeed they were generally averse to using the legal system at all. Instead, they wanted a number of things from their advisers. Above all else, they wanted the problem solved, or to obtain compensation for harm and loss. They also wanted advice about their legal rights and the options available to them either from legal or other sources. But this does not mean that people were keen to use the law. On the contrary, they generally wanted to fix the problem and get on with their lives and if possible avoid using law. As Genn explains,

[t]he impulse for punishment, revenge, apologies, or altruistic solutions is far less important than the desire to be rid of the problem, free of the threat, or compensated for the loss. In finding pathways to solutions, members of the public want routes that are quick, cheap and relatively stress-free. That is true for all social groups. People want to get on with their lives as quickly as possible and few relish the thought of having to pay to obtain what they believe is their right or what is due to

⁹ Genn, *supra* note 4 at 68.

¹⁰ *Ibid.* at 83.

them.¹¹

Finally, the respondents reported that courts were relatively insignificant when it came to resolving the common civil problems. The respondents reported that a tiny proportion of disputes were resolved by decisions of courts and tribunals. By contrast, negotiated agreements between the disputing parties resolved nearly four times the proportion resolved by courts and tribunals. Perhaps even more importantly when considering the design of legal aid schemes, more than half the plaintiffs' problems were not resolved at all, as Table 2 demonstrates.

Table 2
Outcome of Problems¹²

| How Problem was Resolved | Respondents (%) |
|---------------------------------|------------------------|
| Court/tribunal decision | 9 |
| Resolved by agreement | 36 |
| No action/resolution | 55 |

Genn's research is therefore worth reading in order to better understand the legal problems that all social groups report having experienced, what they do about them, and what works from the citizens' point of view. This is important information for justice system administrators and other legal personnel to consider when they design legal reforms that are meant to improve access to justice. It might mean that access to the courts is in fact a low priority and that information that is designed to promote self-help with respect to resolving the common everyday legal problems is a higher priority.¹³ The research also has implications for the design of legal aid schemes as I explain in the next section.

Implications for Design of Legal Aid Schemes

The findings in this research, therefore, suggest a number of important implications

¹¹ *Ibid.* at 254.

¹² Source: *supra* note 4 at 153.

¹³ It is important to note, however, that Genn is doubtful about individuals' capacities to successfully apply self-help strategies. In particular, she argues that the illiterate, disabled and other disadvantaged groups are ill-equipped with the necessary verbal and written skills required to use self-help effectively.

for the design of legal aid schemes. First, many ordinary people need help when they experience common civil law problems in life. Many people know what to do about some of the problems including divorce and they seek appropriate assistance from a solicitor. Many people attempt to resolve many other common problems by negotiation or other forms of self-help and are quite often successful in doing so. However, there are many problems where people do not know what to do and do not seek advice from any source. That is, the research demonstrates that people need help with knowledge and information about how to respond to common legal problems. As Genn comments,

[a] clear message that emerges from the study is the profound need for knowledge and advice about obligations, rights, remedies, and procedures for resolving justiciable problems. This is a need that exists to varying degrees across all social, educational, and cultural boundaries and for all types of justiciable problem[s]. It is a trite observation that citizenship requires knowledge, but the pervasive lack of the most rudimentary knowledge about legal rights and procedures for enforcing or defending rights can lead to an unnecessary level of helplessness even among the more competent and resourceful.¹⁴

In other words, while lawyers, courts and tribunals are certainly important in resolving common legal problems, they are not the only resource the citizens require. There is also a large number of problems which people try to resolve by drawing on their own resources such as talking and negotiating with the other person. And they might be able to do this more effectively if further assistance is readily available. Finally, there is a large dark volume of problems that is currently left unresolved and where people could benefit from better and more forms of assistance. The design of legal aid schemes and particularly the purposes they are meant to fulfil, therefore, matters.

Instead of giving the sole, or even main, priority to assistance in court cases the recent empirical research suggests that legal aid schemes need to pursue two partly contradictory priorities. The first priority is to assist people with the common but nevertheless worrying, often relatively uncomplicated, civil and family law problems of everyday life. As Genn's research reminds us, in these types of matters litigation is unlikely to be involved. The purpose of legal aid in such problems is not necessarily to assist people to pursue or promote litigation. Instead, it is to assist them with information about the options and their consequences if they decide to

¹⁴ *Ibid.* at 255.

respond. Once they understand their options, this might mean that they decide to avoid, bypass, threaten, and sometimes even consider initiating litigation.¹⁵ Assistance of this kind is referred to in this paper as ‘outside litigation’ services because they are not designed to assist people who, although have a legal problem, do not necessarily want or need to pursue litigation. Such services include:

- Legal advice and information:
 - in face-to-face interviews
 - over the telephone;
- Minor assistance including explaining documents, writing letters, telephone calls, drafting simple wills, drafting other simple legal documents, etc.;
- Public education and training about legal rights and obligations including:
 - workshops, classes, seminars on specific legal issues,
 - publications about relevant, recurring and relatively simple legal issues including short pamphlets, booklets, and do-it-yourself kits,
 - material on the Internet including pamphlets, booklets, and general information about relevant laws.

The second and more familiar priority for legal aid schemes is to assist people with litigation in all areas of law.¹⁶ The capacity to effectively defend and assert legal rights inside litigation is fundamental to modern legal systems. The second main purpose of legal aid schemes is, therefore, to promote citizens’ capacities to successfully pursue litigation. Schemes therefore need to offer what are referred to in this paper as ‘inside litigation’ services. They include:

- legal advice in relation to all types of court cases including for criminal cases involving:
 - legal assistance to people in prisons and/or held in police stations,
 - duty solicitor services where lawyers assist unrepresented parties with bail applications, adjournments, mitigation and guilty pleas,
 - legal representation in court in all types of cases.

¹⁵ This discussion draws on the often overlooked important conceptual model of ‘legal mobilisation’ developed in F. Zemans, “Framework for Analysis of Legal Mobilization: A Decision-Making Model” (1982) 4 A.B.F. Research J. at 989. The model is applied to legal aid schemes in Francis Regan, “Why do Legal Aid Services Vary Between Societies? Re-examining the Impact of Welfare States and Legal Families,” in Regan, *supra* note 1.

¹⁶ The standard legal aid texts, including Cappelletti, *supra* note 1, and Zemans, *supra* note 1, highlight the importance of legal aid schemes offering litigation services but usually do not highlight other services.

If the combination of two types of services is not offered, the citizens are abandoned to their own devices when they have to deal with common everyday legal problems, or when they have to go court, or both. These possibilities represent a rejection of the ideal of equality for all before the law.

Having summarised the empirical research and highlighted the implications for legal aid, the question is how well does Australian legal aid compare to this model? In the next section I summarise Australia's legal aid scheme and assess its services.

An Introduction to Australian Legal Aid

Comparative evidence suggests that most legal aid schemes pursue either of these two priorities well. In societies where there are few public resources for legal aid, the priority is usually given to outside litigation services because they are cheap and relatively simple to organise. In other words, legal advice and education services tend to flourish because the inside litigation services are relatively expensive.¹⁷ Meanwhile the dominant pattern in the rich western societies is to give the main priority to inside litigation services, or assisting people in court cases.¹⁸ Furthermore, the main priority is usually criminal cases because lawyers tend to put a very high priority on defending individual liberty.¹⁹ As I explain below, however, the data demonstrates that Australia's legal aid scheme does not reflect the dominant pattern in western societies.

Prior to the 1970s, Australian legal aid consisted primarily of charity undertaken by the private legal profession and a number of small government schemes.²⁰ It was a hopelessly inadequate scheme, however, because too little assistance was offered

¹⁷ For example see the analysis of legal aid in Uganda in the early 1990s in Francis Regan, "Legal Resources Development in Uganda" (1994) 22 *International Journal of the Sociology of Law* 203.

¹⁸ See Cappelletti, *supra* note 1 and Zemans, *supra* note 1.

¹⁹ A recent example of this trend is the priority given to criminal defence in recent Swedish legal aid reforms. See Francis Regan, "The Swedish Legal Services Policy Remix: The Shift From Public Legal Aid to Private Legal Expense Insurance," in Richard Moorhead & Pascoe Pleasence, eds., *After Universalism: Re-engineering Access to Justice* (Oxford: Blackwell, 2003).

²⁰ The schemes are described in *Legal Aid in Australia* by R. Sackville (Canberra: Australian Government Publishing Service, 1975). A detailed analysis of some of the schemes is contained in Francis Regan, *Promoting Equality Before the Law: A Re-examination of Australian Legal Aid Policy in the Twentieth Century* (PhD Thesis, Flinders University, Adelaide, Australia 2001) [unpublished].

to too few people. Aid was restricted mainly to serious criminal and complex family law cases. The current national comprehensive scheme was established in the early 1970s when the national or commonwealth government accepted financial and policy responsibility for legal aid and established the Australian Legal Aid Office in 1973.²¹ This comprehensive legal aid scheme offered services for many types of cases in many courts and tribunals. While a publicly funded scheme replaced charitable legal aid, private lawyers had continued to deliver most of the services.²²

Today Australian legal aid comprises multiple programs: government Legal Aid Commissions, Community Legal Centres, and Aboriginal and Torres Strait Islander Legal Services (ATSILS).²³ These programs reflect the federal nature of Australian government—the commonwealth, state and territory governments all make laws and responsibility for legal aid policy and funding is shared between these governments. Finally, it is important to note that there is no constitutional or statutory right to legal aid in Australia. There is a common law, or judge made right to a ‘fair trial’ in serious criminal and administrative cases. But this does not include a right to state funded legal aid.²⁴

Together the three main Australian legal aid programs offer a combination of inside and outside litigation services as I explain below.

²¹ The origins of the Australian Legal Aid Office are examined in a number of studies including G. Hawker, “The Rise and Fall of the Australian Legal Aid Office”, in S. Encel, P. Wilenski & B. B. Schaffer, eds., *Decisions: Case Studies in Australian Public Policy* (Melbourne: Longman Cheshire, 1981); S. Armstrong “Labor’s Legal Aid Scheme: The Light That Failed”, in R. B. Scotton & Helen Ferber, eds., *Public Expenditure and Social Policy in Australia, Vol. IV* (Melbourne: Longman Cheshire, 1979). For an overview of the development of Australian legal aid in the twentieth century see Australia, National Legal Aid Advisory Committee (NLAAC) *Legal Aid for the Australian Community* (Canberra: Australian Government Publishing Service, 1990).

²² NLAAC, *ibid.*

²³ For an overview of the first two programs see NLAAC, *ibid.*; for a recent overview of the operation of the ATSILS, see Australia, Aboriginal and Torres Strait Islander Commission, *Annual Report 2001-2002* (Canberra: ATSIC, 2002). The report is available at <http://www.atsic.gov.au>. For a recent scholarly examination of developments in the programs in the late 1990s, see Don Fleming, “Australian Legal Aid Under the First Howard Government” (2000) 33 U.B.C. L. Rev. 343.

²⁴ The common law right to a fair trial was clarified in *Dietrich v. R* (1992) 177 CLR 292.

(1) Legal Aid Commissions

Legal Aid Commissions are the primary providers of legal aid services in Australia. Established as independent statutory authorities by parliaments in each state and territory, they are required by their legislation to offer inside and outside litigation services in all areas of law—family, civil and criminal.²⁵ The legislation specifies that they must offer advice and representation services but also education about the law. They are not government departments or agencies but are funded by government and managed by a board of commissioners made up of government appointments and nominees of the private legal profession. The Commonwealth government grants account for approximately 65% of funds, and state government grants and other sources the rest.

The Legal Aid Commissions employ salaried lawyers to provide services. In addition, a large proportion of cases are referred to members of the private legal profession. The Legal Aid Commission lawyers undertake approximately 40% of inside litigation cases and private lawyers approximately 60%.²⁶

Eligibility for legal aid services varies dramatically between the two types of services.²⁷ To be eligible for inside litigation services applicants must usually pass a threefold test. First, the client's income and assets are assessed including income, cash available, living expenses, debts, housing expenses and value for assets. Only those people with low incomes qualify. If they qualify, they are usually expected to pay fees, make a contribution to the cost of the case and take out a mortgage over their house if they have one, to pay back the cost of legal aid. Second, the Commission's merits test means staff decide if the client's case has a reasonable prospect of success and that a reasonably prudent litigant would proceed with such a case. Third, the case must fall within policy guidelines. Currently legal aid is not available for a wide range of civil, family and criminal cases including wills probate, first offence traffic and drunk driving offences, and minor crimes such as first offence shoplifting. Many family law cases are also excluded including divorce and

²⁵ For example, see *Legal Aid Act*, Victoria 1978 and *Legal Services Commission Act*, South Australia 1977.

²⁶ The data is provided in the annual reports of the Legal Aid Commissions and these are published on the Internet. For example, the recent annual reports of the Legal Services Commission of South Australia are available at <http://www.lsc.sa.gov.au>.

²⁷ The services and eligibility tests are described in the annual reports of the Legal Aid Commissions.

most child support cases. The range of exclusions is also increasing. That is, aid is being steadily restricted to fewer and fewer cases.

Legal aid is theoretically available for all types of court and tribunal cases unless lawyers are specifically excluded. However, in practice this is not the case. Aid is not usually available if assistance is offered in other ways. For example, consumer complaints are handled by the Department of Consumer Affairs and minor civil claims up to Aus \$5,000 can be dealt with in Small Claims Courts. Finally, over the last few years most Legal Aid Commissions have imposed expenditure caps on all types of cases. In criminal cases, the cap is Aus \$50,000 in South Australia. When that amount of money is spent, the Commission no longer funds the case. In sum, inside litigation services are increasingly targeted to the poor and restricted to a narrow range of cases.²⁸

Eligibility for outside litigation services is, by contrast, very generous. Most Legal Aid Commissions offer these services for no charge, no means test is applied and no fees or contributions are charged. While inside litigation services are targets to the poor, outside litigation services are for all Australians regardless of their wealth.

(2) Community Legal Centres

Community Legal Centres emerged in Australia in the 1970s when volunteer lawyers and law students attempted to make the law more accessible to poor and disadvantaged communities.²⁹ Today they are independent community-based, controlled and managed organisations providing free, accessible and easy to understand legal services. Currently 160 Centres specialise in outside litigation services and offer little assistance in court. Centres are not government agencies and not established under acts of parliament but are funded by governments. While independent of government, they are expected to report on activities and account for expenditure. There are two types of Centres: the Generalist centres serve specific suburbs or towns while Specialist centres work with particular types legal problems

²⁸ The funding caps are described in the annual reports of the Legal Aid Commissions.

²⁹ The most detailed study is Attorney-General's Department, Office of Legal Aid and Family Affairs, *Community Legal Centres: A Study of Four Centres in New South Wales and Victoria* (Canberra: Attorney General's Department, 1991). The Australian Centres are considered in a comparative perspective in F. Zemans & A. Thomas "Can Community Clinics Survive? A Comparative Study of Law Centres in Australia, Ontario and England" in Regan, *supra* note 1.

(consumer credit, immigration) or particular groups in society (women, people on social security, young people). Centres usually offer advice and minor assistance, a small amount of court representation, community legal education, and law reform activities. It is estimated that they assist approximately 300,000 people each year.³⁰

The total funding to all Centres is approximately Aus \$20 million, more than half is provided by the Commonwealth and most of the rest by state governments, local councils and other sources. Most Centres employ a small number of staff, usually one or two lawyers, a legal education or project worker, administrator and secretary and many also use volunteer private lawyers and law students to offer legal advice in evening sessions. In contrast to the Legal Aid Commissions, the Centres rarely use the formal eligibility tests such as income or merit tests. Instead, services are usually free of charge and non-means tested. Centres are generally reluctant to assist high income Australians. Low levels of resources mean Centres rarely undertake litigation in court, instead they focus on outside litigation services. Centres have always argued that they do not have sufficient money to do all the work required. This remains a pressing issue. In addition, many are located in low quality buildings and computers and other facilities are often inadequate. The pressure on Centres is also increasing and Legal Aid Commission eligibility criteria exclude more people and cases.

(3) Aboriginal and Torres Strait Islander Legal Services (ATSILS)

The ATSILS were established in the 1970s to ensure the law was more accessible to the Australian indigenous population. Today 23 ATSILS' offer services solely to indigenous Australians.³¹ ATSILS are not government agencies, are not established by statute, but are responsible to a Commonwealth statutory authority, the Aboriginal and Torres Strait Islander Commission. While this body funds indigenous policies, including legal aid, the ATSILS are community controlled and managed. Their priority has been to protect people in court facing criminal charges; consequently, services focus primarily on inside litigation for criminal cases. Outside litigation services have not been a priority due to a lack of resources. The ATSILS assist approximately 70,000 clients a year in 200,000 legal matters. Of these, 90% involve assistance for criminal law cases, 7% civil law and 3% family law cases.

³⁰ For a recent overview of the activities of the national network of CLCs see the website for the National Association of Community Legal Centres: <http://www.naclc.org.au>.

³¹ NLAAC, *supra* note 21.

Most cases, 97.4%, were dealt with by lawyers employed by ATSILS while 2.6% were referred to private lawyers.

In contrast to the Legal Aid Commissions, the ATSILS provide a universal and free service for indigenous people. The reason for this is the persistently high rates of poverty, ill-health, low level of education and literacy, and traditionally high rates of arrest and imprisonment. No means, asset, or other eligibility tests are applied. In addition, there are no fees, charges, contributions or expenditure caps. Legal aid is instead free for all indigenous people. Theoretically, it covers all cases in all courts and tribunals, but in practice, aid is targeted primarily to criminal court cases.

Having summarised the Australian scheme, the next section examines how well it meets the needs identified in Genn's recent empirical research. That is, how successfully does Australian legal aid assist people with the common, relatively uncomplicated but, nevertheless, important civil and family law problems of everyday life?

Assessing Australian Legal Aid

As the data in Table 3 demonstrates, Australian legal aid gives a high priority to outside litigation services and a relatively low priority to assisting people in court.

Table 3
Summary of Australian Legal Aid Services, 2000/2001³²

| Type of Service Provided | No. provided in 2000/2001 |
|--|---------------------------|
| Inside litigation | |
| Duty solicitor services | 318,000 |
| Advice and legal representation | 120,000 |
| Outside litigation | |
| Advice and minor assistance interviews | 204,000 |
| Advice over the telephone | 370,00 |
| Legal publications distributed | 1,000,000 |
| Legal education and training classes | 10,000 |

³² Derived from Legal Aid Commissions' Annual Reports on the Internet. See *supra* note 26. The totals are rounded because they are an estimate due to missing data or different recording methods.

Australian legal aid's hidden and often-overlooked strength is, therefore, the priority it gives to outside litigation services. Not only are advice, minor assistance and classes important, but a large number of publications are also distributed. It is also important to note that all of these services are offered free of charge to the public. Finally, as I explain in Appendix 1, these publications can be downloaded from the Internet as well as obtained in hardcopy. Inside litigation services are also an important priority, as we would expect from a scheme in a rich industrialised society.

The data also demonstrates that outside litigation services are offered in precisely the areas of law highlighted in Genn's empirical research referred to earlier in this paper. That is to say, people primarily require outside litigation services in relation to common civil and family law problems. By contrast, people primarily require inside litigation services in relation criminal law cases (see Table 4).

Table 4
Australian Legal Aid Services Offered, By Type of Law³³

| <i>Type of law</i> | <i>Inside litigation services</i> | <i>Outside litigation services</i> |
|--------------------|-----------------------------------|------------------------------------|
| | % | % |
| Family | 22 | 24 |
| Civil | 11 | 22 |
| Criminal | 67 | 16 |
| Unspecified | | 38 |
| Total | 100 | 100 |

Conclusion

There are three important points to highlight in this paper. First, the recent empirical research suggests that legal aid schemes need to offer two types of services—for problems that are outside as well as inside litigation. Without this combination of services, people are either abandoned to their own resources in court cases or in dealing with the common legal problems of everyday life. Equality before the law implies that people are able to get help with all types of legal problems rather than, for example, court cases alone.

³³ Derived from Legal Aid Commissions' Annual Reports available on the Internet. See *supra* note 26. The totals are rounded because they are an estimate due to missing data or different recording methods.

Second, the recent empirical research highlights Australian legal aid's often-overlooked strength. While inside litigation services are restricted to the low-income Australians and limited to a declining range of cases, the outside litigation services meet many of the needs identified in Genn's research. That is, Australian legal aid offers a range of outside litigation services that assist people with common civil and family law problems, they are offered in a variety of ways including advice, written publications, and on the Internet. Australia also has multiple providers of outside litigation services including Legal Aid Commission offices around the country as well as the network of Community Legal Centres. Together with the increasing use of the Internet, this means that most people will be able to use such services when they experience common legal problems.

Finally, the paper suggests that legal aid administrators need to learn from 'bottom up' research. That research will make them better informed about the legal problems that people experience, how they respond, the consequences of taking action and what people think of their experiences. Consequently, the research will allow them to design legal aid schemes to more accurately take account of the genuine needs of people as well as the wisdom and experience of administrators. If the research does not exist in a particular society, legal aid administrators would be wise to encourage researchers to undertake it and to assist them to find the necessary funding.

Appendix 1

This appendix includes a selection of the legal education materials available in hardcopy and on the Internet from the Legal Services Commission of South Australia, Adelaide. It is broadly representative of the material available from all Australian commissions.

Pamphlets

The pamphlets are written in lay persons' language and often use a question and answer format. They are provided free of charge to the public as hardcopy or can be downloaded from the Internet in Microsoft Word format and in Adobe Acrobat PDF format. They are available at <http://www.lsc.sa.gov.au/pamphlets.html>. The topics covered are:

| | |
|--|--------------------------------------|
| - Bankruptcy | - Career Parents and Child Support |
| - Debts | - De Facto Relationships |
| - Family Law and You | - Family Mediation |
| - Fences and the Law | - Going to Court |
| - The Law and your Dog | - Liable Parents and Child Support |
| - Mediation: Resolving Problems Without Going to Court | - Motor Vehicle Accidents |
| - Motor Vehicle Accident Kit | - Need Legal Help? |
| - Parenting Plans | - Power of Attorney |
| - Restraining Orders - For Persons Restrained | - Restraining Orders |
| - Statutory Charge | - Same Sex Relationships and the Law |
| - Trees and the Law | - Strata and Community Titles |
| - Wills | - Unfair Dismissal |
| - Workers' Rights | - Witnessing Documents |
| | - You and the Police |
| | - You and your Neighbours |

The Law Handbook

The Law Handbook is an 800 page book published tri-annually and can be viewed free of charge in an 'Online' edition at: <http://www.lawhandbook.sa.gov.au/>. It is promoted as "Your practical guide to the law in South Australia" because it:

- Answers the most common legal questions in a practical, easy to read way,
- Helps you understand and use your legal rights,

- Tells you when you need to see a lawyer,
- Is full of useful contact points for further help and information,
- Has been written by experts in the field.”

What is in the Law Handbook?

- Chapter 1 The Legal System
- Chapter 2 Legal Aid
- Chapter 3 Criminal Offences (Crimes, Common Offences, Sexual Offences, Drugs, Traffic Offences, Corporate Crime, Defences)
- Chapter 4 Arrest, Questioning and Bail (Arrest and Questioning, Bail, Complaints against Police)
- Chapter 5 Going to Court (Summary offences, Indictable offences, the Sentencing Process, Appeals, Evidence, Effects of Criminal Convictions, Civil Procedure)
- Chapter 6 Prisoners
- Chapter 7 Family Relationships (Marriage, Separation and Divorce, Property, Child Support, Children, De Facto Relationships, Adoption, Family Violence, Change of Name)
- Chapter 8 Children (Children's Rights, Children and Crime, Children at Risk of Abuse or Neglect)
- Chapter 9 Consumers (Contracts, Consumer Protection, Consumer Credit, Banking)
- Chapter 10 Debt
- Chapter 11 Bankruptcy
- Chapter 12 Neighbours
- Chapter 13 Business and Community Organisations (Community Organisations, Commercial Organisations)
- Chapter 14 Housing (Private Tenancies, Public Housing, Community Housing, Buying a Home, Housing Improvement, Strata titles, Community Titles, Retirement Villages)
- Chapter 15 Planning and Local Government (Local Government, Planning and Development)
- Chapter 16 Environment (Responsibility for the Environment, Development and the Environment, Pollution and Waste, Nature Conservation, Heritage Protection)
- Chapter 17 Accidents and Injuries (Accidents on Land, Accidents Involving Animals, Accidents at Work, Motor Vehicle Accidents, Criminal Injuries and Loss Compensation)
- Chapter 18 Employment

- Chapter 19 Insurance and Superannuation
- Chapter 20 Health
- Chapter 21 Guardianship and Mental Health (Guardianship and Administration, Mental Health)
- Chapter 22 Powers of Attorney and Guardianship (General and Enduring Powers of Attorney, Enduring Power of Guardianship)
- Chapter 23 Wills, Estates and Funerals (Wills, Estates, Funerals)
- Chapter 24 Pensions, Allowances and Payments (Centrelink, Veterans, State Government Assistance)
- Chapter 25 Taxation
- Chapter 26 Immigration
- Chapter 27 Discrimination (Equal Opportunity, Commonwealth Acts)
- Chapter 28 Defamation
- Chapter 29 Complaints against Government
- Chapter 30 Privacy and Freedom of Information (Freedom of Information, Privacy, Privately Held Information)
- Chapter 31 Copyright