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**International Legal Aid Group**

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‘Informed Litigants  
with Nowhere to Go’:  
Unbundling Legal Aid  
Services in Australia

**Melbourne  
Australia  
13-16 July**

# 'INFORMED LITIGANTS WITH NOWHERE TO GO' UNBUNDLING LEGAL AID SERVICES IN AUSTRALIA\*

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## ***Introduction***

This paper considers the role of legal aid agencies in the delivery of self-help legal services in Australia. The paper reviews the development of these services and suggests that the increasing reliance on self-help mechanisms may involve a significant and unacknowledged shift in the relationship between legal aid commissions (LACs) and community legal centres (CLCs). We are seeing a shift in the focus of service delivery by both CLCs and LACs. In particular, LACs are moving towards a stronger focus on the provision of generic legal information and advice to larger numbers of people.

Political and practical factors have led to CLCs being major providers of legal information and initial one-off advice. CLCs have been politically committed to delivering community legal education, designed to empower people and to enable them to make effective choices regarding legal issues. Practical constraints have seen many CLCs, with their heavy reliance on the use of volunteers, focus on the delivery of advice rather than on-going casework.

Technological advances have led to development of new mechanisms for the provision of legal information and advice. From videotapes in the 1980s to video-conferencing and on-line services in the 1990s, these mechanisms have been used by CLCs and LACs to provide community legal education, initial information and advice. Such technology has had less of an impact on representation services which continue to rely heavily on face-to-face delivery.

This paper also questions the usefulness of the distinction frequently drawn by service providers between the provision of legal information and legal advice. Legal information is described as generic, not addressing the particular circumstances of the individual. Legal advice is more tailored and specific to the needs of the consumer. While the information–advice distinction provides a convenient means for legal aid service providers to limit the extent of the services they provide, it is unlikely to be well understood by the people receiving the information. The information-advice distinction relies on the ready availability of advice and other services. Without the availability of services more tailored to meeting individual needs, the provision of information may result in the creation of an 'angry army of informed litigants who have no where to go'.<sup>1</sup>

The trend towards greater reliance on the provision of information rather than more substantial services raises the concern that information services are most effectively used by educated people with experience of legal processes. Means testing has seen the services of LACs targetted towards the disadvantaged. The move to provision of information through call centres and via the Internet sees LACs providing a limited service to anyone who chooses

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\* A Griffith University Research Grant supported the research used in the writing of this paper. Thanks to Merran Lawler and Francis Regan for their suggestions regarding the writing of this paper.

<sup>1</sup> Merran Lawler, interview, 20/3/00

to access such services. If this happens at the expense of service delivery to disadvantaged members of the community, this involves a significant priority shift for LACs. Several people we interviewed expressed strong concerns that self-help legal services are really suited only to articulate, middle class people. 'If the fit is fine, these services are good but not if you don't fit the mould'.

Material for this paper has been obtained through a series of interviews with providers of self-help legal services. Semi-structured interviews were conducted with a diverse range of providers; from LAC and CLC staff, private service providers and staff in government departments.

### **Terminology**

Various terms are used to describe non-traditional legal services. These include self-help, do-it-yourself, community legal education, unbundled legal services, discrete task representation and alternatives to full-time representation. We will use the term self-help legal services to cover those services that allow or encourage the legal consumer to take personal responsibility for some or all of the activities that are necessary to complete a legal transaction. Various service providers, including government departments<sup>2</sup>, commercial organisations<sup>3</sup>, self-help groups<sup>4</sup>, courts, CLCs and LACs have promoted self-help legal services as an alternative to or a modification of traditional legal services.

In health-related literature, the term 'self-help' has a different meaning, referring to mutual support provided by people with a similar problem. Reismann and Carroll note that 'it has always seemed peculiar to call this activity self-help when much of what happens is group behaviour'.<sup>5</sup>

The notion of 'unbundling' of legal services is prominent in the USA but has not been articulated in Australia. Other terms for unbundling include discrete task representation and alternatives to full-time representation. Forrest Mosten describes unbundling of legal services as lawyers providing a range of services which allow 'clients to do as much of their own work as they are prepared to do and provide only the advice and support they require to handle their own cases as [litigants in person]'.<sup>6</sup> It is not the purpose of this paper to outline the unbundling process. This is done well elsewhere.<sup>7</sup>

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<sup>2</sup> For example, the Australian Taxation Office's 'Tax Pack' is an example of a self-help legal service.

<sup>3</sup> Kits enabling individuals to draft wills and other legal documents are readily available in some Australian jurisdictions.

<sup>4</sup> Fathers' rights groups throughout Australia provide assistance to their members in family law matters. While this assistance may involve referral to a lawyer, they also provide advice and assistance in matters such as child support and the preparation of legal arguments for litigants in person.

<sup>5</sup> F. Reismann & D. Carroll, *Redefining Self-Help: Policy and Practice*, 1995, Jossey-Bass, San Francisco, 1

<sup>6</sup> State Bar of California's Legal Services Section's Standing Committee on Legal Services to Middle Income Persons, *The Pro-se Counselling Handbook*, 1994 cited by F. Mosten, 'The Unbundling of Legal Services: Increasing Legal Access' in R. Smith (ed.) *Shaping the Future: New Directions in Legal Services*, 1995, Legal Action Group, London, 47.

<sup>7</sup> See F. Mosten, above note 6, & F. Mosten, 'Unbundling Legal Services' (1997) January, *Oregon State Bar Bulletin*, 9.

### ***The development of self-help legal services in Australia***<sup>8</sup>

Improving community understanding of the law has been an important aspect of the philosophy of Australian CLCs since their establishment in the 1970s. This community legal education focus continues to be emphasised by CLCs.<sup>9</sup> Sam Biondo refers to community legal education as comprising the provision of both legal information and legal education. He considers the provision of information about the law to be community legal education 'at its most basic level'.<sup>10</sup> Biondo states that the education aspect of community legal education 'is about developing a deeper understanding of legal rights and responsibilities'. Further, he endorses the view of Allan Nicoll that the vital and essential ingredient of relevant and successful community legal education is 'empowerment' which 'gives individuals and groups an ability to have a say in decisions that are likely to affect them'.<sup>11</sup>

Community legal education was not seen by CLCs as a stand-alone service but rather as a service designed to assist people to make informed choices about what further law-related actions they would take. For example, how to negotiate with someone, what not to say if interviewed by police, what paperwork to get when buying something. They were designed to raise the profile of legal issues rather than seeking to resolve specific issues.

The following are examples of self-help and CLE materials developed by CLCs and LACs.<sup>12</sup>

#### *Law Handbooks*

An excellent example of the community legal education work done by the early CLCs is the publication by Fitzroy Legal Service (FLS) of the *Legal Resources Book* in 1977. The *Legal Resources Book* was Australia's first book on the law written for an audience including non-lawyers.<sup>13</sup> The book was designed as a do-it-yourself guide to legal issues accessible to non-legal professionals such as social workers, teachers, youth workers, clergy and citizens advice workers as well as to members of the general public.<sup>14</sup> FLS took the financial risk of getting this unknown quantity on to bookstore shelves and all concerned were obviously delighted when it took only 8 days to sell the 4000 copies required for the project to break even.

The *Legal Resources Book* became the *Law Handbook* in 1987. There is now a family of these types of 'Law Handbooks' produced by CLCs and LACs across Australia. FLS distributes some 3,000 handbooks each year and as of last year also offers a CD-ROM version. The book now has a user market divided into three or four segments. 'The legal fraternity use it substantially;

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<sup>8</sup> The outline of examples of Australian self-help legal services is not meant to be exhaustive but rather to provide a (hopefully representative) sample of such initiatives. Jeff's CLC and Victorian heritage as well as our current location in Queensland will no doubt be obvious.

<sup>9</sup> S. Biondo, 'Community Legal Education' in J. Giddings (ed.) *Legal Aid in Victoria: At the Crossroads Again*, 1998, Fitzroy Legal Service, Melbourne, 169.

<sup>10</sup> Biondo, above, note 9, 170.

<sup>11</sup> Biondo, above, note 9

<sup>12</sup> Various community legal education projects are discussed by Biondo above note 9, 176-179

<sup>13</sup> The following year (1978) saw Readers Digest Australia publish a *Family Guide to Australian Law*, edited by Reader's Digest Services Pty Ltd, 1978, Sydney.

<sup>14</sup> J. Chesterman, *Poverty Law and Social Change: the Story of the Fitzroy Legal Service*, (1996) Melbourne University Press, 100-102.

the school market, including secondary and tertiary establishments, is a heavy user; the welfare sector and the general mums and dads market, in that order.<sup>15</sup>

#### *Books and Kits on Specific Areas of Law*

LACs, CLCs and CLC 'spin-offs' such as Redfern Legal Centre Publishing have produced a wide range of self-help kits and books focussed on particular areas of law. Nunawading and Eastern Suburbs Legal Service produced a Motor Vehicle Accident Crash Kit which was distributed by other Melbourne-based CLCs. Redfern Legal Centre Publishing (RLCP) produced a more elaborate kit which was sold at service stations. Another RLCP production was a book, *Rest Assured*, dealing with estate planning issues.<sup>16</sup>

In the mid-1980s, the Western Suburbs Legal Service in the Melbourne suburb of Newport produced a *Going to Court* kit with the assistance of the Victoria Law Foundation. This kit has been used by other agencies such as Legal Aid Queensland as the basis for similar publications. The Welfare Rights and Legal Centre in the Australian Capital Territory produced the *Annotated Social Security Act*<sup>17</sup>, the first comprehensive outline of Australian social security law.

CLCs were also central to the establishment and publication of a significant Australian law journal. In May 1974, Fitzroy Legal Service began publishing a newsletter which quickly became the *Legal Service Bulletin*, a leading Australian journal addressing an often eclectic range of law-related issues. In its early years, the *Legal Service Bulletin* published many articles by CLC and LAC workers. The *Legal Service Bulletin*, which in 1992 became the *Alternative Law Journal*, celebrated its 25<sup>th</sup> anniversary in 1999. The journal 'provided a publishing start for many lively legal minds, without large amounts of publishing experience, excited by analysis of public interest issues'.<sup>18</sup>

#### *Videos – Movement and Music*

In a 1990 review of a video dealing with domestic violence and the law, Trish Luker wrote of the increasing accessibility of video production in recent years making it a more viable option for community legal educators.<sup>19</sup> Production of this video was coordinated by a group of CLC and LAC workers. Luker noted increasing awareness of the limitations of traditional means of presenting information, particularly print. Video offered 'opportunities not previously available: narrative becomes possible, visual representations are more vividly conceptualised and there is dialogue and sound. It also has restrictions: less scope for providing detailed information and limited viewing time'.<sup>20</sup>

In December 1987, Fitzroy Legal Service launched a rock song, 'No Comment', and accompanying video with support from the Victoria Law

<sup>15</sup> Sam Biondo, interview, 6/4/00

<sup>16</sup> L. Spender (ed.), *Rest Assured A Legal Guide to Wills, Estates & Funerals*, (1988) Redfern Legal Centre Publishing with the assistance of the Law Foundation of N.S.W. A revised edition was published in 1995.

<sup>17</sup> T. Brennan *et al*, *The Annotated Social Security Act*, (1984) Welfare Rights Centre (Canberra).

<sup>18</sup> C. Field & I. Freckleton, *Opinion* (1999) 24 (3) *Alternative Law Journal* 110.

<sup>19</sup> T. Luker, 'Review of Putting out the Garbage: A Guide to Domestic Violence and the Law' (1990) 15 (6) *Legal Service Bulletin*, 285

<sup>20</sup> Luker, above, note 19,

Foundation and the Legal Aid Commission of Victoria. The song told the story of a young man walking along a street and being detained by police. Police strongly criticised both the song and video, calling for their withdrawal because of the negative portrayal of police in their dealings with young people. Unfortunately, mainstream radio chose not to play the song due to concerns that the content was both too state-specific and too educational.<sup>21</sup>

Other examples of videos produced by CLCs include:

- *I Thought it was Only Shoplifting*, an education kit for secondary school students produced by Northcote Legal Service which used video to explain the workings of courts,
- *Highway Robbery*, produced by Job Watch as a means of educating young people regarding employment rights, and
- *Your Rights*, produced by the Mental Health Legal Service. This video tells the story of 2 people researching the rights of people who are admitted to psychiatric care and is designed to provide information for people living with mental illness as well as being a useful educational tool for mental health workers.<sup>22</sup>

#### *Workshops for self-represented litigants*

Both LACs and CLCs have made extensive use of workshops aimed to assist people in their dealings with courts and tribunals in relation to matters for which legal aid is unavailable (traffic offences, straightforward divorce applications) or which are determined by bodies before which lawyers cannot appear (for example child support issues pursuant to Stage 2 of the *Child Support (Assessment) Act 1989*).

From when it commenced operations in 1981, the Legal Aid Commission of Victoria (LACV) ran divorce classes designed 'to guide applicants who wish to handle their own proceedings'.<sup>23</sup> A means test for these classes was introduced in early-1988 which halved the number of classes offered.<sup>24</sup> A review in 1994 saw the English language divorce classes suspended following the introduction by the Family Court of plain English application forms which were easier for people to complete themselves.<sup>25</sup> From 1985, the LACV also offered Traffic Summons Workshops. These were attended by almost 2,000 people in their first 3½ years of operation<sup>26</sup> and have since been supported with further written materials and instructional videos.<sup>27</sup>

#### *Other self-help providers*

While the early CLCs emphasised community legal education and self-help, there were also other groups involved in developing self-help resources in the form of kits. In the mid-1970s, the Divorce Law Reform Association of Queensland (DLRAQ) published a Divorce Kit. Trevor Cook, a member of the DLRAQ with knowledge of the Divorce Kit, became involved in the Australia

<sup>21</sup> Chesterman, above, note 13, 148-150

<sup>22</sup> Biondo, above, note 9, 178

<sup>23</sup> Legal Aid Commission of Victoria, 9<sup>th</sup> *Statutory Report 1987-1988*, 35.

<sup>24</sup> *Ibid.*

<sup>25</sup> Legal Aid Commission of Victoria, 16<sup>th</sup> *Statutory Annual Report 1994-1995*, 17.

<sup>26</sup> Legal Aid Commission of Victoria, 9<sup>th</sup> *Statutory Report 1987-1988*, 26. which were attended by almost 2,000 people in the first 3 ½ years of operation.

<sup>27</sup> Legal Aid Commission of Victoria, 16<sup>th</sup> *Statutory Annual Report 1994-1995*, 17.

Party<sup>28</sup> in Melbourne in 1976.<sup>29</sup> It was agreed that the Australia Party would develop a Conveyancing Kit to assist homebuyers to handle their own conveyancing. Dale Sedgman, Publicity Officer for the Australia Party was the person to whom the task of developing the kit. The Conveyancing Kit continues to be published by Sedgman and his wife, Helen along with a Will Kit, a Probate Kit and a Power of Attorney Kit. A typing service is provided for the Probate Kit while a telephone support service is available for the Conveyancing and Probate Kits.

#### *Technology-based self-help*

LACs, in particular Legal Aid Queensland, have been at the forefront of developments in the electronic delivery of legal services. All Australian LACs have quite comprehensive websites designed to increase the accessibility of legal aid services. Web-based information and material is no doubt a welcome first port of call for some people concerned with a legal problem. The Legal Aid Queensland website also provides access to a comparable sentence database for use by criminal law preferred suppliers.

Government departments are also providing increasing amounts of material on-line for the use of consumers. The Australian Taxation Office (ATO) is moving away from a heavy reliance on publications towards more electronic delivery of information. The ATO developed the 'Tax Pack' in an effort to assist people to complete their own tax return. This Tax Pack is now available on the web. We spoke to staff from the ATO who explained that their office makes use of a number of self-help services provided through the Internet, fax and telephone call centres to move people away from making face-to-face contact with ATO staff.<sup>30</sup>

There have also been private sector moves into web-based legal services. Services such as Law4U provide legal content for Internet service providers.<sup>31</sup> Law4You has been operating for some 4 years and involves several former CLC workers from Victoria. Even though their information is provided free, they derive revenue through the licensing of that content, through a directory service and referral service. They also sell kits and online legal services.<sup>32</sup>

Rob Phillips describes the rationale for Law4U as coming from experience in legal centres 'where we found that when people deal with the law, they have different needs. Some people want information, some people want to fill in the forms themselves, some people want to look at the legislation, some people want the lawyers to handle it and they don't want to know about it. And there didn't really seem to be much rationale, I suppose, as to which way they wanted to go. But the beauty of the internet was that, in fact, you could,

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<sup>28</sup> The Australia Party was founded as the Liberal Reform Group in 1966 by Gordon Barton, a Sydney businessman called Gordon Barton in 1966. It comprised disaffected Liberal Party members protesting against the party's Vietnam and other policies. It changed its name to the Australian Reform Movement then the Australia Party. The Australia Party had little electoral impact, never winning a parliamentary seat although a sitting Independent Tasmanian senator named Turnbull joined the party at one point. The Australia Party was absorbed into the Australian Democrats in 1977, along with the South Australian New Liberal Movement.

<sup>29</sup> Dale Sedgman, interview, 6/4/00

<sup>30</sup> Kevin Stone & Elizabeth Van der Hor, interview, 12/5/00

<sup>31</sup> Internet service providers which carry LAW4U legal content include Telstra Bigpond, Nine MSN, Choice Magazine

<sup>32</sup> Rob Phillips, interview, 9/1/01.

to a degree, meet most of those needs, whereas you couldn't, without the internet.<sup>33</sup>

Other web-based legal service providers, such as Legalmart, focus on the delivery of tailored on-line legal products. Legalmart remains one of only a handful of legal services in the world which create on-line legal documents tailored to the needs and circumstances of their clients.<sup>34</sup> Legalmart now also provides a lawyer support service. 'That was really provided to stop people from being afraid of getting into something they may not be able to fully understand. It is extremely simple to put a standardised pro forma kit together that's simply downloadable. It's extremely difficult technology-wise to actually create something that's hand-crafted based on people's responses, and the distinction is not always grasped, not even by consumers.'<sup>35</sup>

### ***How effective are self-help services?***

Some CLCs are increasingly sceptical about self-help services, in particular the ability of people to represent themselves in court proceedings. Sam Biondo describes a difficulty with self-help services being that the law is becoming increasingly complex and the reach of legal regulation is expanding, so that increasingly complex laws are having a greater impact on the day-to-day lives of people. 'You keep on adding more and more layers to very basic messages, and that gets complex.'<sup>36</sup> Francis Regan expresses a similar concern that 'self-reliance easily degenerates into neglect if, for example, legal problems are of such complexity that people are unable to deal with them on their own.'<sup>37</sup>

CLC workers we spoke to referred to clients presenting with increasingly complex problems. Part of the reason for Caxton Legal Centre no longer offering child support forums<sup>38</sup> is that the legal issues facing the people attending have become much more complex in the past 5 years.<sup>39</sup>

Courts are also increasingly expressing concerns about how they should best deal with unrepresented litigants. The increase in litigants in person is a cause of judicial concern from the High Court of Australia to local courts. Chief Justice Gleeson of the High Court has expressed strong concerns regarding the 28% of litigants appearing unrepresented before single High Court judges.<sup>40</sup> As well as taking steps to promote *pro bono* schemes to provide representation in serious cases<sup>41</sup>, courts are involved in providing material in

<sup>33</sup> Rob Phillips, interview, 9/1/01.

<sup>34</sup> Anne Janssen, interview, 19/12/00.

<sup>35</sup> Anne Janssen, interview, 19/12/00.

<sup>36</sup> Sam Biondo, interview, 6/4/00.

<sup>37</sup> F. Regan, 'Why Do Legal Aid Services Vary Between Societies?' in F. Regan, A. Paterson, T. Goriely & D. Fleming (eds.), *The Transformation of Legal Aid: Comparative and Historical Studies*, 1999, Oxford University Press, 181

<sup>38</sup> Where people needing to either make or defend a child support application could attend a forum where, with up to a dozen other people facing similar issues, they could obtain instruction and advice from a solicitor.

<sup>39</sup> Merran Lawler, interview, 20 March 2000.

<sup>40</sup> High Court of Australia, Annual Report 1998/99, Accessed 27/5/00 at <http://www.hcourt.gov.au/99report/99ar.htm>

<sup>41</sup> In 2000, the Queensland Court of Appeal established a *pro bono* scheme involving senior barristers in assisting people who are appealing against a conviction for murder or manslaughter and who have been refused Legal Aid for their appeal. See 'Court of Appeal Pro Bono Scheme' (2000) 25 (2) *Alternative Law Journal* 93.

the form of kits to potential court users. The Family Court of Australia in particular has developed web-based materials to assist unrepresented litigants.

Women's Legal Service (WLS) in Queensland has long been concerned with the disadvantage women suffer if they attempt to 'help themselves' through the family law system. WLS has serious concerns with the effectiveness of self-help, considering it unrealistic to believe that unrepresented women will be able to make effective use of the family law 'system'.<sup>42</sup> The self-help services provided by WLS are viewed by staff as being of benefit to clients but not of sufficient benefit to effectively overcome the difficulties facing such women.

Despite reluctance to provide self-help services, WLS client demand for such services has increased significantly as a result of legislative and legal aid changes.<sup>43</sup> Zoe Rathus, WLS Coordinator suggests that the debate surrounding self-help is an important one which CLCs have not as yet satisfactorily come to grips with.<sup>44</sup>

In 1997-98, Hazel Genn was responsible for an English survey of legal problems faced by 4,125 randomly selected adults.<sup>45</sup> The survey considered the range of justiciable problems people had faced in the past 5 years and sought information on the type of advice and assistance (if any) people had received and whether a resolution of some sort had been achieved. The results revealed 'a very widespread feeling of ignorance about legal rights that exists across most social groups. Different levels of competence will affect what can be done with information and advice, but the need for easily accessible free or low cost advice is profound.'<sup>46</sup>

The results of a multivariate analysis indicated that 'when controlling for a wide range of factors, the type of advice and assistance obtained is significantly correlated with outcome'.<sup>47</sup> Cases in which advice was obtained from a source other than a lawyer or a CLC and 'where the help given was limited to the provision of information and advice were 30% less likely to be resolved' than those where advice was received from a lawyer.<sup>48</sup> These findings raise concerns regarding the outcomes achieved by those people who have little choice other than to rely on self-help.

### ***The advice-information distinction***

The availability of self-help legal services also raises the distinction between legal information and legal advice. References to legal information usually relate to generic information which does not address individual circumstances.

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<sup>42</sup> Pam Godsell, Angela Lynch & Zoe Rathus, interview, 3/5/00

<sup>43</sup> Changes in 1996 to the *Family Law Act* significantly increased the likelihood of women becoming respondents to applications relating to contact and breaches of contact orders. Reductions in Commonwealth legal aid funding, starting in 1997, also increased the demand for self-help services.

<sup>44</sup> Zoe Rathus, interview, 3/5/00

<sup>45</sup> H. Genn, *Paths to Justice: What People Do and Think About Going to Law*, 1999, Hart Publishing, Oxford.

<sup>46</sup> Genn, above, note 45, 102

<sup>47</sup> Genn, above, note 45, 172

<sup>48</sup> *Ibid*

Legal advice is taken as being tailored to the individual circumstances of the 'client'.

Many legal service providers make use of the information-advice distinction but we want to question its usefulness in practical terms. Does it make sense to the self-helper? The distinction seems to be used by many LACs and CLCs to justify the provision of what might be described as 'low-level legal services' without other, more intensive and tailored legal services.

The advice-information distinction is also important in relation to the operation of call centres and other services which provide material by telephone. Legal Aid Queensland describe their Call Centre as having 'the most up-to-date database of legal information and referral services throughout Queensland. Our Call Centre operators can help people to work out if their problem is legal, discuss their options and refer them to an appropriate agency if necessary.'<sup>49</sup> The focus is clearly on information but CLC workers we have spoken to question the ability of Call Centre staff to ensure that the person receiving the information appreciates that they will need to obtain supplementary information and elsewhere.

Interestingly, judges also rely on the information-advice distinction between advice and information to justify the limited assistance they provide to unrepresented litigants. Attempts by judges to assist unrepresented defendants were described by Murphy J in *Mclnnis* (1979) 143 CLR 575 as generally serving 'only to gloss over procedural injustice'.<sup>50</sup>

CLCs have had a strong history of providing advice-only type services. In part, this has come from their nature as small organisations, needing to ration their services. It has also been because of their ability to attract volunteers who are not in a position to do the follow-up work necessary for on-going casework delivery. Volunteers are perhaps best able to play a screening role, identifying issues, referring matters to appropriate services elsewhere, bringing important matters to the attention of the day staff who are likely to have a greater opportunity to conduct on-going work in key cases. Whilst making the provision of limited advice to substantial numbers of people a service priority, CLCs have always retained the ability to provide additional services in appropriate cases.

Reviews have seen amalgamations of CLCs in South Australia and concerns have been expressed about similar moves elsewhere. Some CLCs have expanded their catchment areas and this may promote a focus on providing more advice-only services to the wider community. The moves by the Howard Government to develop regional CLCs may have reinforced this focus on limited advice services. All eleven new community-based legal services funded in recent Federal budgets are regional CLCs, 6 funded in the 1998/1999 Federal Budget<sup>51</sup> and a further 5 in the 1999/2000 Federal

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<sup>49</sup> <http://www.legalaid.qld.gov.au/>

<sup>50</sup> at 592.

<sup>51</sup> Kimberley and South West regions of Western Australia, the Iron Triangle region of South Australia, the Centre-West region of Queensland, the New South Wales South Coast and the cross-border region of New South Wales and Victoria.

Budget.<sup>52</sup> The very large geographic areas covered by each of these services must make it difficult to provide services beyond initial advice.

The Self-Help Kits published by Legal Aid Queensland, covering areas of law such as domestic violence and responsibility for children post-separation, include a disclaimer, 'The material displayed on this page is intended as information only. If you have a legal problem, you should seek legal advice from a lawyer.' The *Queensland Law Handbook* published by Caxton Legal Centre contains a disclaimer which states, 'This book should not be used as a substitute for legal advice.' The new legal issues program on ABC TV, *Law Matters*, also includes a similar disclaimer in the closing credits.

Many people will not take any notice of disclaimers and riders about the material they receive being no more than information and which recommend that legal advice be obtained. Such disclaimers are likely to be more effective in limiting the liability of the information provider than in encouraging the consumer to obtain further advice. After all, where are these people supposed to get such further advice from?

### ***Which areas of law best suit self help?***

We are concerned that the areas of law in which self-help services are being offered by LACs and CLCs may not be those in which such services would be most effective. Several private providers of self-help legal services told us that such services are best suited to areas involving substantial repetition and routine. Areas suggested included consumer disputes, probate applications, conveyancing, powers of attorney, wills, debt collection and personal injuries. One service provider told us 'They are all repetitive functions. They are so repetitive that even the lawyers approach them in a repetitive way.'

One area in which LACs have developed a strong focus on both self-help and primary dispute resolution is family law, an area involving the exercise of very substantial discretions by a range of decision-makers. We were told that the highly emotional nature of family disputes attachments and the aggression, depression and anger that is associated with some such disputes means that it 'doesn't matter how hard you work with the clients skilling them up, they are not capable of doing a whole lot of things'. For people in such emotional states, getting out of bed and putting one foot in front of the other is as much as they can do.

Women's Legal Service staff consider that family law is not an area suited to self-help services, especially in relation to issues involving children. Children are an unusually powerful motivation for women continuing with such court proceedings rather than reach an agreement outside court. WLS staff told us of clients who are disbelieving when told that they will not be able to be represented in court. 'They have made the decision to leave their (often violent) partner and then, having done that, they find that the system does not include legal assistance and representation.'<sup>53</sup>

The suggestion that self-help is better suited to some areas of law than others appears to be supported by the findings of Genn's survey. With consumer

<sup>52</sup> Far West of New South Wales, Gippsland in Victoria, the Goldfields region of Western Australia and the South East and Riverland regions of South Australia.

<sup>53</sup> Godsell, Lynch & Rathus, interview, 3/5/00

problems, an area suggested as well suited to self-help, the survey revealed that an agreement was reached without the need for a decision from a court or ombudsman in 56% of matters.<sup>54</sup> With divorce and separation matters, non-court agreements were reached in 21% of matters while 56% of matters required a court decision or order. With money problems, the major outcome difference between those who obtained advice and those who did not related to the proportion of matters in which agreement was reached. Where people obtained advice, 60% of matters saw an agreement reached. The corresponding figure where people did not obtain advice was 39%.<sup>55</sup>

### ***Not just types of law but types of clients***

Various people we interviewed emphasised the difficulties which some groups of people face using self-help services. In particular, people with limited literacy skills are not suited to self-help legal services. Further, there can be cultural issues and expectations regarding the use of lawyers which can reinforce education-based limitations on the usefulness of self-help. Older people tend not to make use of self-help options. Merran Lawler from Caxton Legal Centre told us that the attitude of many older clients is 'I am not a lawyer. If I've got a legal problem I will go and see a lawyer.'<sup>56</sup> Lawler noted that older people frequently attend at Caxton Legal Centre with a self-help kit for the purposes of having a lawyer assist them to complete the relevant paperwork.

We were also told that people with mental health or intellectual disability issues are clearly not suited to using self-help law materials. Caxton Legal Centre staff state that there are many variations on mental health problems which confront a significant proportion of the centre's clients. For such people, self-help options can be absolutely pointless. We are concerned that these people are amongst the very people LACs and CLCs should be targetting their services towards.

### ***The unbundling of legal aid services?***

In this paper we have argued that, in order to be effective, self-help services should not be the only service available to people with the particular legal need in question. They are best as part of a range of services rather than as a stand-alone product. Perhaps in this regard, they are similar to the PDR services now provided by LACs. The value of PDR services is greatly enhanced by mechanisms which direct matters not suited to mediation to other processes such as litigation. The value of self-help services is enhanced when people not suited to self-help or seeking assistance in a legal area not suited to self-help can obtain other sorts of services.

Community legal education is often concerned with giving people the information they need to be able to take further action on law-related issues. It is not necessarily an end in itself. The notion of unbundling requires a bundle of services. The provision of limited information or a kit to a person facing a legal problem hardly constitutes a bundle. Legal Kits of Victoria offer an optional phone support service with their conveyancing and probate kits. They describe the service as being designed to assist people to effectively use the kit they have purchased. Such a service provides users with an important

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<sup>54</sup> Genn, above, note 45, 156-7

<sup>55</sup> Genn, above, note 45, 161

<sup>56</sup> Merran Lawler, interview, 20/3/00

sense of security that they have somewhere to obtain advice if things become difficult.

Some Australian courts are increasingly advocating the unbundling of the 'services' they provide. The Family Court, facing large and increasing numbers of unrepresented litigants, is taking a lead in this regard. If courts move to unbundle their services, this is likely to place pressure on LACs to do likewise. Justice Faulks of the Family Court has referred to that court seeking to persuade LACs to consider unbundling their services to the extent that they would give grants for individual phases of litigation, rather than the whole of the litigation with a cap.

Justice Faulks referred to LACs 'perhaps providing a grant of aid to assist in drawing up documents or for a barrister to provide an advice on evidence or as to how the matter should proceed, or to provide assistance in some of the conciliation processes without necessarily looking at providing aid that's going to run out when it reaches a fixed cap.'<sup>57</sup> This suggestion appears similar to the Stage of Matter Limit arrangements which the Legal Aid Commission of Victoria introduced in the late-1980s which limited the expenditure on certain stages of cases, requiring approval to be obtained if the stage limit was to be exceeded.

### ***Ethics and self-help services***

Legal aid agencies will need to consider the ethical issues raised by self-help services. As officers of the court owing an important duty to the administration of justice, there are questions regarding how lawyers can justify providing only a partial service to a client. A private practitioner might answer such questions by stating that the full service can be provided if the client cares to pay for it but this answer is not available in a legal aid context.

The literature from the USA on unbundling raises a range of concerns regarding the relationship between lawyer and 'client' in such situations, focussing on liability for malpractice. Mosten highlights the potential liability of 'lawyers who ghostwrite correspondence and court documents for clients to improve the quality of the written work at a fraction of the cost'.<sup>58</sup> This type of assistance, whether described as 'ghostwriting' or 'coaching' is currently provided by CLCs in particular.

Legal service providers engaged in unbundling also face issues regarding the provision of incorrect advice where the time available does not permit the research, analysis and reflection warranted given the complexity of the legal problem.<sup>59</sup> Service providers also need to take account of the need to provide advice on related legal matters rather than only on the specific matter raised by the client. For example, the criminal law client seeking advice from a legal aid agency may also need information regarding civil liability. Further, there are likely to be certain tasks which, in any particular case, cannot be divided into separate components capable of being unbundled. These factors are likely to reduce the difference between a traditional legal service and an effective unbundled service.

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<sup>57</sup> Justice Faulks, interview, 21/3/01

<sup>58</sup> F. Mosten, above, note 7, 14.

<sup>59</sup> Mosten, above, note 6, 52

Ann Janssen from Legalmart considers that there will be a rise in litigation as self-help legal services become more prevalent 'because you have to be extremely careful about just what you propose to cover, and what is outside of your ambit to cover. A simple will may not be appropriate and can result in enormous litigation. There's a barrister here in Brisbane who just litigates do-it-yourself wills.'<sup>60</sup>

### **Conclusion**

This paper has considered changes in the types of services provided by LACs and CLCs in Australia. LACs have moved towards a stronger focus on the provision of self-help kits, web-based information and telephone services. Such services are notionally available to anyone who wants them. They are not targetted towards those most in need of legal aid services. If self-help services and the provision of information are to be offered without effective access to advice or casework services, this represents a significant shift in legal aid.

In 1985, Richard Abel referred to the image of legal aid 'as equal access to law (embodied in courts)' as probably 'the dominant conception today'.<sup>61</sup> We wonder whether the move of LACs away from targetting their services to those most in need illustrates a shift in the image of legal aid towards a notion of equal access to information about the law. There is a significant need for further research regarding the circumstances in which self-help legal aid services are most effective and as to how self-help options can best be combined with other services.

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<sup>60</sup> Ann Janssen, interview, 19/12/00

<sup>61</sup> R. Abel, 'Law Without Politics: Legal Aid Under Advanced Capitalism' [1985] *UCLA Law Review* 474, 487.