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Liz Curran

Mary Anne Noone

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# THE CHALLENGE OF DEFINING UNMET LEGAL NEED

LIZ CURRAN AND MARY ANNE NOONE\*

## RÉSUMÉ

La recherche sur le besoin juridique non satisfait en Australie a subi un retard considérable et bon nombre d'organismes ont noté que les données relatives au « besoin non satisfait » en terme d'aide juridique sont insuffisantes. Le concept du « besoin juridique non satisfait » est problématique, et une grande partie des travaux antérieurs dans ce domaine a fait l'objet de vives critiques. Cet article contribue à une meilleure compréhension de ce domaine complexe. Se basant sur les publications australiennes et internationales, un bref survol historique de la recherche sur le besoin juridique est fourni ainsi qu'un résumé des diverses critiques ayant trait à cette recherche. Un exposé est ensuite fait sur des études plus récentes entreprises en Angleterre, en Nouvelle Zélande et aux Etats-Unis. Enfin, une nouvelle approche à la recherche dans ce domaine est proposée : une approche qui est fondée sur le cadre des droits de la personne. Cet article intègre aussi les opinions exprimées par des membres de la magistrature australienne, de la profession légale et des organismes de services communautaires ou d'organismes statutaires sur la question du besoin juridique.

## INTRODUCTION

Research on unmet legal need in Australia is long overdue and this delay has been articulated in many spheres. Although there was significant work done on defining and studying the problems of access to justice in the 1970s and early 1980s, there has been little academic work done since.<sup>1</sup> In June 1998, the Australian Senate Legal and Constitutional References Committee noted that there were inadequate data on the “unmet need” for legal aid.<sup>2</sup> The same committee reported in 2004 that there had been no progress and restated the urgent need for reliable data on which to base government decisions.<sup>3</sup> A number of other Australian organisations have acknowledged

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\* Liz Curran is a lecturer and clinical supervisor at LaTrobe University. Mary Anne Noone is a senior lecturer at La Trobe University. Both have worked in delivery and policy development of legal aid services.

1. A selection of work includes P. Hanks, *Social Indicators and the Delivery of Legal Services AGPS* (Canberra: Australian Government Publishing Service [AGPS], 1987); M. Cass & R. Sackville, *Legal Needs of the Poor* (Canberra: AGPS, 1975); M. Cass & J. Western, *Legal Aid and Legal Need* (Canberra: AGPS, 1980); Commonwealth Legal Aid Commission; and R. Sackville, *Law and Poverty in Australia: Second Main Report of the Australian Government Commission of Inquiry into Poverty* (Canberra: AGPS, 1975).
2. Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System: Third Report* (Canberra: Senate Printing Unit, June 1998) at 17.
3. Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (Canberra: Senate Printing Unit, June 2004) at 40.

that research into unmet legal need should be undertaken as a matter of urgency. They include the Victorian Parliamentary Law Reform Committee,<sup>4</sup> National Legal Aid,<sup>5</sup> and the Law Council of Australia.<sup>6</sup>

Legal-needs research has been undertaken in most comparable jurisdictions throughout the world to provide guidance to funders and policy-makers in the delivery of legal aid services. In New Zealand, the United Kingdom, and Wales, dedicated independent research funds have been made available on a recurring basis for research on legal need but no similar arrangement exists in Australia.

The development of an independent assessment and measure of the level of legal need, distanced from political considerations and based on empirical research, can better inform policy-making, improve the allocation of funding and innovations in legal aid services, and assist in ensuring that legal services are better coordinated and reach those in need.

However, the concepts of “unmet legal need” or “legal need” are problematic and much of the previous work in this area has been subject to critical comment. This article contributes to an improved understanding of this complex area. Drawing on both Australian and international literature we outline a brief history of legal need research. We summarize the critiques of this work. The focus then shifts to more recent studies in England, New Zealand, and the United States. Finally, we suggest a new approach to research in this area that relies upon a human rights framework that can be adapted and used in other overseas jurisdictions.

Throughout this article we have incorporated the views of stakeholders (who have experience of or deliver services involving the justice system) who were interviewed as part of our research on definitions of legal need and other issues. Members of the judiciary, the legal profession and various community service agencies or statutory bodies were interviewed during 2001–2002.<sup>7</sup> Six open-ended questions were put to

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4. Victorian Parliamentary Law Reform Committee, *Review of Legal Services in Rural and Regional Victoria* (Melbourne: Government Printer, May 2001) at 14.
  5. National Legal Aid, *The Undercapacity of Legal Aid in Australia* (Canberra: National Legal Aid, July 1996).
  6. Law Council of Australia, *Business Plan for the Law Council of Australia, 2001–2002*, Clause 2 (Canberra: Law Council of Australia, 2001).
  7. Interviews were conducted with Sam Biondo, Fitzroy Legal Service, 29 January 2002; Jennifer Coate, President, Children’s Court of Victoria, 18 February, 2002; Kate Colvin & Annie Pettit, both of Victorian Council of Social Services, 13 February 2002; Barney Cooney, former Senator and acting chair of the 1997–1999 Senate Legal and Constitutional References Committee Inquiry into Legal Aid, 1 February 2002; Janet Dukes & Paula Grogan, both of the Youth Affairs Council of Victoria, 23 January 2002; Ian Dunn, Executive Director, Law Institute of Victoria, 6 December 2001; Julian Gardner (also former director Legal Aid Commission of Victoria), and Louise Glanville, both of the Office of the Public Advocate, 17 January 2002; Ian Gray, Chief Magistrate, Magistrates Court Victoria, 24 January 2002; Ian Horricks, Federation of Community Legal Centres, 7 December 2002; Emma Hunt, Co-manager, the Public Interest Law Clearing House (PILCH), 23 January 2002; Robin Ingles, National

each of the stakeholders who were taped and their answers were transcribed. They will be referred to as the interviewees in this article.<sup>8</sup>

The article focuses on work that highlights starkly some pitfalls in approach or assists in defining or measuring unmet legal need. It is not intended to be a comprehensive literature review.

### UNMET LEGAL NEED—A CONTESTED CONCEPT

In Australia, discussion about legal needs gained momentum with the increasing concern about poverty and social justice in the 1960s and 1970s.<sup>9</sup> Specifically, the focus on law and poverty in the Australian Government Commission of Inquiry into Poverty generated research. Cass and Sackville surveyed three poorer suburbs of Sydney in 1973.<sup>10</sup> Their “modest aim” was “to examine the unmet need for legal services” in these three areas. The authors cautioned against drawing conclusions from the limited study and identified the limitations of the techniques employed to gather information.<sup>11</sup> The purpose of the survey was to examine: the extent to which the poor are exposed to a range of legal situations; which groups were most exposed amongst the poor; the uses made by different groups of legal machinery; and ways the poor attempted to solve their legal problems.<sup>12</sup>

This research attempted to not only identify what categories of legal need were unmet but also why people might not have sought legal advice. This research underpinned many of the recommendations contained in the Inquiry’s final *Law and Poverty* report.<sup>13</sup>

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Association of Community Legal Centre and the Victorian Aboriginal Legal Service, 29 January 2002; David Manne, Refugee and Immigration Legal Centre, 29 January 2002; Kris Papadopoulos, Finance and Consumer Rights Council, 26 February 2002; Tony Parsons, Managing Director, Victoria Legal Aid, 1 February 2002; Di Sisely, Chief Executive Officer, Equal Opportunity Commission, 11 February 2002; and Marcus Williams (Committee of Management of the Federation of Community Legal Centres) & Shelley Burchfield, both of Footscray Community Legal Service, 11 February 2002.

8. We have called those interviewed stakeholders but it is noted that members of the judiciary and magistracy should not be considered stakeholders, as they are required to administer the law according to statute and the common law without bias.
9. B. Abel-Smith, M. Zanderand, & R. Brooke, *Legal Problems and the Citizen: A Study in Three London Boroughs* (London: Heinemann, 1973); A. Byles & P. Morris, *Unmet Need: The Case of the Neighbourhood Law Centre* (London: Routledge and Kegan Paul, 1977); M. Cass & R. Sackville, *Legal Needs of the Poor: Research Report* (Canberra: AGPS, 1975); and P. Morris, R. White, & P. Lewis, *Social Needs and Legal Action* (London: Robertson, 1973).
10. Sackville & Cass, *ibid.*
11. *Ibid.* at 89.
12. *Ibid.* at 1.
13. R. Sackville, *Law and Poverty in Australia: Second Main Report* (Canberra: AGPS, 1975).

Discussion on the topic continued in the early 1980s, with the focus on finding a suitable definition for legal needs and an examination of approaches through the use of socio-economic data and demographic information.<sup>14</sup>

In Australia, the most significant contribution to the debate at this time was made by Hanks<sup>15</sup> who was engaged by the Commonwealth Legal Aid Council. Hanks's paper grappled with many of the problems associated with measuring legal need and suggested a number of possible methods of collecting data in human services, health, and education that could be utilized in targeting persons who may have high levels of unmet legal need. Many of the difficult issues raised by Hanks were not generally pursued within the legal aid bureaucracy probably as a result of the restructuring of legal aid services, which coincided with his report.<sup>16</sup>

Hanks looked at the issue of developing indicators in the delivery of legal services.<sup>17</sup> He identified the theoretical and practical problems in the formulation of indicators for the development of legal services. Hanks presented an analysis of indicators most useful for the identification of at-risk groups. Hanks cautioned that care must be taken in defining legal need and its measurement.<sup>18</sup> He noted that lawyers dominate legal aid policy-making and that governments are keen to control spending. Hanks,<sup>19</sup> like Duncanson,<sup>20</sup> observed that poverty is still the product of the organization of society but sees legal services and remedies as having a role to play in alleviating the effects of poverty. He argued<sup>21</sup> that the unstated aim of the legal aid system is to deliver litigation-oriented legal services in the context of limited resources for those who express demand and not necessarily for those who lack political and economic power to assert their interests.<sup>22</sup>

Hanks concluded that there was very little serious concentration on the difficult task of debating and setting goals and objectives that can guide program development of the delivery of legal aid services; often reactive development that reflected vulnerable political positions; and limitations on resources, resulting in efforts to try not to

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14. I. Duncanson, "Legal Need in England and Wales in the Sixties and Seventies: A Retrospect" (1981) 4 *University of New South Wales Law Journal* 113; W. James, J.D. Meeker, & J. Song, "Perceptions about the Poor, Their Legal Needs, and Legal Services" (1987) 9 *Law and Policy* 143; G. Lyons, "Defining Unmet Legal Need" (1983) *Legal Service Bulletin* 165.
  15. P. Hanks, *Social Indicators and the Delivery of Legal Services* (Canberra: AGPS, 1986).
  16. In December 1986 a new national legal aid administrative and advisory structure was announced. It consisted of a National Legal Aid Advisory Committee, a National Legal Aid representative Council, and an Office of Legal Aid Administration within the Attorney General's office.
  17. Hanks, *supra* note 15.
  18. *Ibid.* at 2.
  19. *Ibid.* at 48.
  20. Duncanson, *supra* note 14.
  21. Hanks, *supra* note 15 at 47.
  22. See the comments of Tony Parsons, Managing Director, Victoria Legal Aid, Annual Report 2001–2002.

be seen as extravagant.<sup>23</sup> He observed that often the resources go to those with the loudest voices. Hanks referred to the Senate Standing Committee on Social Welfare, which stated:

Often responses are to expressed need rather than measured need. To this extent they have ignored the inarticulate or powerless who have not known how to express their needs effectively. The response has been political rather than equitable ...<sup>24</sup>

In Australia, constructive academic discussion of the issues and approaches to measuring legal needs has received little academic attention since Hanks's report.

Many of the studies and discussions concerning the concept of need, in both the legal sphere and social sciences spheres more generally, have used a typology developed by Bradshaw in 1972. Bradshaw noted that there is illusiveness in concepts of need and that there are difficulties in defining it. He offered a taxonomy that has four categories:

- Normative Need—need as defined by the “expert.”
- Felt Need—need that is experienced. This approach is used mainly in community development. The problem is that those who are demanding it can inflate it but others may not be able to access it.
- Expressed Need—need that is turned into action. For example, there are health services and waiting lists for using those services.
- Comparative Need—the equivalent of a need, if people with similar characteristics are in need of a service that is not available to all. It can be described as the gap between services in one area but not in another.<sup>25</sup>

The Bradshaw taxonomy has been utilized, often unquestioningly, in a wide range of research on unmet legal need and other human service needs studies.

More than one of the interviewees in our study highlighted the difficulty with a notion such as Bradshaw's “expressed need”:

Access and the level of understanding [about] how the system works are linked. Need will always be subjective. Often if no service exists you won't know how much need there is and what the level of need is.<sup>26</sup>

Another interviewee demonstrated the difficulty with “expressed need”, in discussing a homeless persons legal clinic:

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23. Hanks, *supra* note 15 at 50.

24. Senate Standing Committee on Social Welfare, *Through a Glass Darkly* (Canberra: AGPS, 1979) at 57–58.

25. J. Bradshaw, *The Concept of Social Need* (London: New Society, 1972).

26. Burchfield, *supra* note 7.

Certainly the Public Interest Law Clearing House's (PILCH) experience most recently with the homeless legal clinic, which has just been started in October 2001, has shown that there was and still is probably an enormous need amongst homeless people for direct legal assistance. And it's surprising that they weren't accessing legal assistance from community legal centres which often were very near but by the fact that sending lawyers into homeless agencies where they slept the night has meant that they are much more likely to access legal services now than they were before because we have had 80 clients since October.<sup>27</sup>

This theme of adapting the services to fit client circumstances is taken up later in the context of setting benchmarks for justice. It is important to take account of capabilities and capacity to participate particularly in the area of legal need which is so interconnected with the enforcement of rights.

### CRITIQUES OF UNMET LEGAL NEED

After the 1970s there was much critical discussion about the definition of unmet legal need and related research. A good illustration is the work of Morris, White and Lewis.<sup>28</sup> These editors argued that debates and developments around the provision of legal services operated at a superficial and myopic level. Assumptions were not articulated and there were often contradictory aims and expectations. They argued these had never been reconciled and the "bandwagon" of legal aid rolled on.<sup>29</sup> They commented that evidence presented for policy-making was based on shaky foundations and without empirical basis. Much of their critique remains valid today.

Lewis looked at legal needs and examined the enforcement of rights. He argued that the ideal of equality before the law can be better advanced through proposals on law reform that can be made by people working in legal aid services and researchers.<sup>30</sup> Lewis saw legal advisers, who were proactive and involved in law reform, as a method for redressing the inequity for people in need in society.

White<sup>31</sup> noted that the poor can have the same problems as the rich but that there are other problems associated with being poor that others do not have.<sup>32</sup> He discussed notions of class and also observed that law individualizes problems. Similar to Lewis, White said that the main function of legal-services research should be to identify areas where rights are not being enforced.

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27. Hunt, *supra* note 7. PILCH is a public interest law clearing house that links free legal services to cases that involve a public interest.

28. Morris, White, & Lewis, *supra* note 9.

29. *Ibid.* at 10.

30. *Ibid.*

31. *Ibid.* at 15–47.

32. This conclusion was also made in the interviews with Biondo, *supra* note 7; Gray, *supra* note 7; Ian Horrocks, Federation of Community Legal Centres (Vic.) Inc 7 December 2001; Hunt, *supra* note 7; and Parsons, *supra* note 7.

Morris also argued that legal issues should not be discussed in isolation from social issues but should have reference to class structure and poverty. He argued that one of the most serious questions in legal-service policy is what contribution lawyers might make in assisting their clients when they are up against the administrative machinery of government.<sup>33</sup> He argued that, in determining the nature and extent of unmet legal need for legal assistance, what is critical is questioning why it is that those who need legal assistance do not get it.<sup>34</sup> He noted that people may not recognize a problem as legal,<sup>35</sup> and when they do, they may not know of a legal service or be able to access it. Finally, they may be deterred by barriers such as lack of knowledge, lack of confidence, lack of power, lack of resources and the inaccessibility of services in pursuing a remedy or assistance.<sup>36</sup> He argued that lawyers have a role in acting as the “buffer” between societies’ “social values” and those of their clients.

A common criticism of legal need research was addressed by Lewis<sup>37</sup> when he noted that determining legal need depends on the attitudes and perceptions of the person concerned. He stated that it is the function of a lawyer to repackage a client’s case in a way that does not threaten the norms of society. Whether a problem is a legal need will depend on the person making the assessment. For instance, the fact that a person is asked to pay more rent may not be a legal need as the person may be happy to pay more. Calling a problem “a legal problem” assumes the need for the law to resolve it when there may be other ways. Lewis raised the issue that the best course of action may depend upon the economic and social resources available to a person. He questioned whether the debate about legal needs is simply a way of justifying public expenditure when other alternative remedies could be explored.

Building on Lewis’s work, Lyons<sup>38</sup> argued that unmet legal need exists because some lawyer or researcher suggests it does. He, like Hanks,<sup>39</sup> argued that needs do not arise in a vacuum but rather because of the way society is structured. Lyons questioned whether legal solutions are more effective than non-legal solutions.

Lyons acknowledged that lawyers have a valid interest, as advocates for their client’s case, but often only suggest legal solutions to problems. He argued that research into legal need is not objective or neutral, but is a minefield and is deficient. He noted the limited range of traditional legal options presented to the poor in conventional responses to unmet legal need. Lyons argued that definitions of unmet legal need

33. Morris, White, & Lewis, *supra* note 9 at 23.

34. *Ibid.* at 35.

35. This observation was also made in a series of stakeholder interviews: Biondo, *supra* note 7; Gardner & Glanville, *supra* note 7; Gray, *supra* note 7; Papadopoulos, *supra* note 7; Parsons, *supra* note 7; and Williams, *supra* note 7.

36. Morris, White, & Lewis, *supra* note 9 at 36.

37. *Ibid.* at 73 & 79.

38. G. Lyons, “Defining Unmet Legal Need” (1983) *Legal Service Bulletin* 165.

39. Hanks, *supra* note 15.

postpone the possibility of political action by disguising the structural and economic causes of the “problem” and often skew responses towards those with power by maintaining the status quo.

Similarly, O’Malley examined the legal profession’s self-interest in defining legal need and noted that sociologists are inclined to ask questions not just about the delivery of legal services but about the type of lawyer, and mediums other than lawyers for resolving problems:<sup>40</sup>

The identification of a social problem as a legal need rather than as some other sort of problem altogether is dependant on the place that law occupies in the society concerned, and especially the extent to which legalism permeates social consciousness. To identify a problem as a legal need is to make a particular judgement about appropriate solutions to that problem and then to recast the conception of the problem to accord with the nature of the proposed solution.<sup>41</sup>

O’Malley saw law as maintaining social equilibrium and limiting the opportunities for groups to have values enforced or protected by the state. Laws, rules and definitions he argues are promulgated by the state. The state is a political institution with its own interests in maintenance of order and its own material existence.<sup>42</sup> In this context, legal change is seen as threatening.

In related research, Duncanson<sup>43</sup> critiqued unmet legal needs research as a cynical attempt by the United Kingdom’s legal profession to garner more work when faced with the loss of business, growth in the number of lawyers and the emergence of the “rediscovery” of poverty by social scientists. Duncanson noted that the types of problems poor people have are often unattractive to professionals who charge for services as they do not involve much money or they consist of unknown complex areas of law such as social security. This poses very real problems in meeting the needs of disadvantaged people.

Duncanson implicitly argued for law as a tool of social change not as a tool for the preservation of the status quo. He stated that the genesis of the move to examine legal need was from law schools when there was an increase in young professionals. He noted that law centres, although effective, did not extend or advocate extension to the challenging of inequities of the status quo as well as they should.

## DEFINITIONAL ISSUES

The stakeholders interviewed in our study all provide legal services or are in some way involved in the administration of the legal system. They had firm views on what

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40. P. O’Malley, *Law, Capitalism and Democracy: A Sociology of Australian Legal Order* (Sydney: Allen & Unwin, 1983).

41. *Ibid.* at 104.

42. *Ibid.* at 28.

43. Duncanson, *supra* note 14.

the definition of legal need should encompass.<sup>44</sup> Many saw legal need as a continuum. Assistance was needed at different times and in different ways at the various stages of the legal process or a legal problem:

From a court point of view it involves people coming to court to have a case heard and who are confronted with court processes—people believe they need legal help but they can't get it. They have a legal problem but they don't know that it is and need some assistance to find out. It is unmet if they don't get steered in toward information about the problem and then if they don't get assistance to resolve or deal with it. They may get initial advice but then not have capacity for representation and therefore they have a partial unmet legal need. Legal need is a continuum. There may be a series of stages along the continuum where legal help is needed and is unmet.<sup>45</sup>

The complexity of the concept was illustrated by two interviewees who began by stating that they felt that legal need had to be narrowed as otherwise the issue could become “a can of worms” and “too difficult”.<sup>46</sup> But during the course of the interviews, both conceded that it was important to define the concept more broadly than they had initially articulated. They recognized that this was required in order to fully understand the barriers and contributors to legal need that were requisite for any genuine measurement:

It is a life problem borne by someone in the community the resolution of which lies in access to the legal system in one form or another. You define legal need by looking at the elements of the solution for the life problem and if the resolution relies on access to legal assistance. At a primary level unmet legal need is linked to very basic human rights by access to the simplest things including—but not limited to—health, shelter, clothing, food.<sup>47</sup>

Another interviewee also identified the connection to human rights:

Access to justice and issues around gaps in appropriate service delivery, access to your human rights. Access to your rights may or may not have a legal dimension. It needs other support services as well. I think issues of access to equity which are meant to have been guaranteed by the conventions on human rights and under equal opportunity legislation are important in any definition.<sup>48</sup>

Several interviewees recognized the difficulties of defining unmet legal need, echoing the various criticisms of research:

Expressed need is problematical and not a correct definition. You have to get people to say they have a legal problem. A person cannot always classify the problem as legal. For example, a person who is evicted because they cannot pay rent and has been cut off Centrelink

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44. Biondo, *supra* note 7; Cooney, *supra* note 7; Gardner & Glanville, *supra* note 7; Ian Gray and Ian Dunn interview, 6 December 2002; Hunt, *supra* note 7; David Manne interview, 29 January 2002; Parsons, *supra* note 7; Sisely, *supra* note 7; and Williams, *supra* note 7.

45. Gray, *ibid.*

46. Gray, *ibid.*; Parsons, *supra* note 7.

47. Parsons, *ibid.*

48. Sisely, *supra* note 7.

[social security] has problems—to me that’s unmet legal need. He has a problem but he doesn’t know it’s legal. Unmet legal need is when you have a problem or you know something is an issue capable of being assisted by the legal system but which isn’t. It’s a “social need” perhaps, the average person might or would reasonably use legal process or avenues to assist them in resolving.<sup>49</sup>

Another interviewee added that

what is legal need in a particular community can differ. Legal need is also where the legal system doesn’t have the remedy—the existing legal system finds it difficult to respond or doesn’t respond to a legal issue. There is too much of this segmenting of things out and I think in so many legal problems you can’t differentiate them out from other sorts of problems ... multiple mobile phone contracts so he [meaning a person with an intellectual disability] can choose various contracts ... he doesn’t have the ability to contract ... he has a financial problem—he can’t pay the bill. He has a general support problem ... essentially it relates to a whole lot of issues.<sup>50</sup>

Another interviewee put the issue this way:

Just because you cannot identify the nature of the solution to the problem doesn’t mean that the problem doesn’t exist ... You may have a serious illness ... if you don’t have the skills to identify the malaise in your life as a medical problem because you never had the training or education and you stagger on with the problem never bothering to go and see a doctor ...<sup>51</sup>

## RECENT STUDIES IN LEGAL NEED

In the late 1990s, further attention was given to the measurement of legal need in Australia, but much of the discussion was generated by the goal of fiscal restraint and a turf debate between the Commonwealth and state Governments about whose responsibility it was to fund legal aid in Australia.<sup>52</sup>

One such attempt to examine legal needs in Australia was significantly constrained and flawed.<sup>53</sup> The consultancy’s terms of reference required it to work within

49. Gardner, *supra* note 7.

50. Glanville, *supra* note 7.

51. Parsons, *supra* note 7.

52. Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (Canberra: National Capital Printing, 1994); National Legal Aid, *Undercapacity of Legal Aid*; National Legal Aid Advisory Committee, *Legal Aid: The Australian Community* (Canberra: AGPS, 1990); Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System: First Report* (Canberra: Senate Printing Unit, March 1997); Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System: Second Report* (Canberra: Senate Printing Unit, June 1997); Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice* (Canberra: Senate Printing Unit, June 2004); Senate Standing Committee on Legal and Constitutional Affairs, *Cost of Legal Services and Litigation Discussion Papers No 1–7 and Final Reports 1 and 2* (Canberra: Senate Printing Unit, 1991–1994).

53. Rush Social Research, *Legal Assistance Needs Project (Unmet Demand for Legal Assistance): Summary of Findings—Phase II—Qualitative Research with a Range of Stakeholders Report* (Canberra: Attorney-

Commonwealth priorities. The study did not adequately develop a methodology to access those Australians likely to have legal needs. A main feature of the assessment was an examination of legal aid refusals. This is flawed, because it assumes that all people with unmet legal needs apply for legal aid. The consultant's report also tended to gloss over specific groups, such as lone parents, the homeless, and those on social security who were likely to have high levels of legal need.

In the last five years a range of other isolated research projects, both large and small, have been conducted into aspects of Australian legal aid services provision, access to justice, and assessment of needs.<sup>54</sup> Of this research, the most significant is the Access to Justice and Legal Needs Program of the Law and Justice Foundation, New South Wales. This extensive program of research has generated a set of useful publications.<sup>55</sup> A central aspect of the research is the largest quantitative legal needs survey conducted in Australia in over thirty years. This aspect of the program comprised legal-needs surveys in six local government areas selected on the basis of the Australian Bureau of Statistics indices for disadvantage and a series of in-depth studies of the particular needs of specific disadvantaged groups (older people, people experiencing homelessness, and people with mental illness) that were identified for further research during Stage One. More than 2,400 people were surveyed by telephone in three metropolitan areas in Sydney, one in a regional town and in two areas in rural/remote NSW. The report from this survey was released in March 2006.<sup>56</sup> The quantitative survey methodology used in this research was based on the Paths to Justice work in the United Kingdom.<sup>57</sup> The Foundation has also established an online search facility to enable searchers to rapidly locate all material from the program reports that are relevant to their area of interest.<sup>58</sup>

For reasons similar to those in Australia, there has been an increase in this form of research internationally. But as Pleasence points out, the focus is now on "comparative need." In these studies, the "most needy" are identified in preference the "less

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General's Department, 1998), Rush Social Research and John Walker Consulting Services, *Legal Assistance Needs Study Phases 1 & 2*, December 1999 <<http://www.law.gov.au>>.

54. M. Noone, "Access to Justice Research in Australia" (2006) 31:1 *Alternative Law Journal* 30.
55. C. Coumarelos, Z. Wei, & A. Zhou, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas* (Sydney: Law and Justice Foundation of New South Wales, 2006); S. Forell, E. McCarron, & L. Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW* (Sydney: Law and Justice Foundation of New South Wales, 2006); Law and Justice Foundation of New South Wales, *Access to Justice and Legal Needs: Stage 1; Data Digest* (Sydney: Law and Justice Foundation of New South Wales, 2003); Law and Justice Foundation of New South Wales, *Access to Justice and Legal Needs; Stage 2: Quantitative Legal Needs Survey Bega Valley (Pilot)* (Sydney: Law and Justice Foundation of New South Wales, 2003); Law and Justice Foundation of New South Wales, *The Legal Needs of Older People in NSW* (Sydney: Law and Justice Foundation of New South Wales, 2004).
56. For further details, see Law and Justice Foundation New South Wales website: <<http://www.lawfoundation.net.au/access>>.
57. L. Schetzer, "Measuring Legal Needs" (Paper given at National Community Legal Centre Conference, Hobart, Tasmania September 2003) at 1 <[http://www.naclc.org.au/docs/Assessing\\_Legal\\_Needs.pdf](http://www.naclc.org.au/docs/Assessing_Legal_Needs.pdf)>.
58. Just Search <<http://www.lawfoundation.net.au/justsearch>>.

needly”.<sup>59</sup> In this way, the limited resources available for the provision of legal services are efficiently distributed.

In the United States, the United Kingdom, Wales, and New Zealand, detailed endeavours to tackle the issues of discovering, measuring, and defining levels of legal need have emerged. Some of these efforts, including those in Australia, were initiated to improve service delivery responses and to better use financial resources. Nonetheless, much of the research and most of the studies confront the difficulties noted in previous critiques and seek to address issues of gaps in services and methodologies for the measurement of legal need.

Unlike Australia, in the United Kingdom, parts of the United States, and New Zealand money has also been set aside to ensure that the measurement of legal need is regularized. The United Kingdom has much of its research funded by the Nuffield Foundation and the Legal Services Research Centre (LSRC), working in partnerships with other key stakeholders. The body of work conducted in the United Kingdom, Wales,<sup>60</sup> and Scotland<sup>61</sup> is wide-ranging. The earlier report, *Local Legal Need*, also contained a comprehensive literature and historical review of approaches to legal need in various countries.<sup>62</sup> Genn broadened the issues from previous narrow studies, which tended to presume in survey questions that people knew what a legal problem or legal solution was, by using the concept of a “justiciable event”. A “justiciable event” was defined as

a matter experienced by a respondent which raised legal issues, whether or not it was recognized by the respondent as being ‘legal’ and whether or not any action taken by the respondent to deal with the event involved the use of any part of the civil justice system.<sup>63</sup>

There were some reservations about the notion of a “justiciable event” developed by Genn for the initial English studies, which have been addressed in subsequent work.

The Legal Services Research Centre has conducted studies on disadvantaged groups in recent years and, as indicated earlier, has moved away from legal needs approaches to examining people’s problem-solving behaviour.<sup>64</sup> Similarly, other bodies in the United Kingdom have produced research on vulnerable groups, including lone par-

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59. P. Pleasence, A. Buck, T. Goriely, J. Taylor, H. Perkins, & H. Quick, *Local Legal Need* (London: Legal Services Research Centre, 2001) at 17–18.

60. H. Genn, *Paths to Justice: What People Do and Think about Going to Law* (London: Hart, 1999); Pleasence, *ibid.*; P. Pleasence, *Causes of Action: Civil Law and Social Justice*, 2nd ed., LSRC Research Paper No. 14 (Norwich: Stationery Office, 2006); and P. Pleasence, A. Buck, N.J. Balmer, A. O’Grady, & H. Genn, *Causes of Action: Civil Law and Social Justice*, LSRC Research Paper No. 11 (Norwich: The Stationery Office, 2004).

61. P. Paterson, “Paths to Justice Scotland: Which Way Now?” (Paper presented at the Legal Services Research Centre, International Conference 2002, Jesus College, Oxford, United Kingdom, March 2002).

62. Pleasence, *supra* note 59.

63. Genn, *supra* note 60 at 12.

64. Pleasence (2006), *supra* note 60.

ents.<sup>65</sup> The New South Wales Law and Justice Foundation, as stated earlier, recently examined advice-seeking behaviour of homeless people and the elderly, adapting the Genn approach.<sup>66</sup>

In the authors' view, this research, although useful in setting up service delivery models, does not delve sufficiently into practical impediments for the marginalized, which can stem from systemic problems with administration, laws, and people's actual experiences with the system. In addition, it does not link issues of problem-solving behaviour to the notions of citizenship and human rights entitlements and the role of government and its social contract with the citizenry. Although some good qualitative work has been done to complement a largely quantitative analysis, the studies are expensive to conduct as they rely on large-scale surveys. As indicated earlier, money for research of this nature in Australia is much more limited than in the United Kingdom and, consequently, more innovative research approaches are necessary. Such approaches could also be explored in other overseas jurisdictions with similar impediments to undertaking research of this kind.

In New Zealand, there has been research<sup>67</sup> undertaken into the levels of legal need across the regions of New Zealand.<sup>68</sup> Not all the studies in New Zealand are substantive or methodologically sound, but at least an effort has been made to provide regularized measurement across the regions. The difficulty has been that different consultancies, research institutions, or market-research companies have been employed to undertake the studies of unmet legal need so that consistency of approach

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65. R. Moorhead, M. Sefton, & G. Douglas, *The Advice Needs of Lone Parents* (Cardiff: Cardiff Law School, Nuffield Foundation, 2004).
66. Law and Justice Foundation of New South Wales, *Legal Needs of Homeless People In New South Wales* (Sydney: Law and Justice Foundation, 2005); Law and Justice Foundation of New South Wales, *The Legal Needs of Older People in NSW* (Sydney: Law and Justice Foundation, 2004).
67. See research provisions of the *Legal Services Act (NZ) 2001* s. 90 and in relation to community law centre, local legal need s. 85 (2). At the time this article was going to print, the Legal Service Agency in New Zealand had just released a National Survey of Unmet Legal Needs. See Ignite Research, *National Survey of Unmet Legal Needs and Access to Services* (Wellington: Legal Services Agency, 2006), <<http://www.lsa.govt.nz/documents/2006NationalSurveyofUnmetLegalNeedsandAccesstoServices.pdf>>.
68. H. Mitchell & J.P. Mitchell Research, *Unmet Legal Need in Nelson Province* (Nelson: Nelson Legal Services Committee, 1999); Ohiwa Community Consultants, J G, & Alison Greenaway, *Unmet Legal Need in the Hauraki Bay of Plenty Region* (Wellington: Hawkes Bay District Legal Services Committee, 2000); M. Papuni, *An Assessment of the Legal Services Needs of Maori in the Hawkes Bay* (Wellington: Legal Services Board, 1998); *Indicators of Unmet Legal Need: A Map of New Zealand*, Report to the Legal Services Agency, New Zealand Institute of Economic Research, Wellington (November 2002).

is sometimes lacking, superficial,<sup>69</sup> or flawed,<sup>70</sup> but many of the studies are innovative<sup>71</sup> and useful<sup>72</sup> and have good methodologies.<sup>73</sup>

The examination of legal need in Ontario, Canada, seems to be positive.<sup>74</sup> Currie, in a paper discussing the approach that Canada might take, argued for multiple strategies and discussed approaches that involve hearing about client group problems, stating that a community-development function is an important process for identifying needs.<sup>75</sup>

In the United States, the American Bar Association (the “ABA”) has been active in examining issues around legal need and access to justice. After the ABA’s *National Conference on Access to Justice in the 1990s*, which was held in the United States in 1989, the association decided that a

sophisticated national survey—one that accurately reflects the complexity of legal needs and the levels of intervention necessary ... is essential to developing sound policies and resource allocation principles, as well as to planning and reevaluating the current delivery systems for low and moderate-income clients.<sup>76</sup>

This *Comprehensive Legal Needs Study* was undertaken and looked at low-income and middle-income households. It is noted that the survey’s focus was economic, not socially or culturally based. There were three descriptive reports. The first profiled the legal needs of households eligible for subsidized legal services. A parallel report focused on moderate-income households. It therefore looked at legal needs in

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69. CM Research (NZ), *Toward an Understanding of the Process of Granting and Refusing Criminal Legal Aid* (Wellington: Legal Services Board, 1999).
70. A. Pitman, *A Needs Analysis for Legal Services in the Tai Tokerau Legal Services District* (Wellington: Tai Tokerau District Legal Committee, 1999). The researchers raised definitional problems but these were not tackled or linked to unmet legal need. The report was more an evaluation of existing services than a look at legal need.
71. S. Dodds, *An Evaluation of the Availability of Legal Services in West Auckland* (Wellington: Legal Services Board, 2000); A. Opie & R. Wellington, *The “General Practitioner” in the Courts: Changing Organisational Environments and the Operation of the Duty Lawyers Scheme* (Wellington: Legal Services Board, 2000); Mitchell, *supra* note 68; Ohiwa Community Consultants, *supra* note 68; Papuni, *supra* note 68.
72. J. Burns, *An Assessment of the Legal Services Needs of Hawke’s Bay* (Wellington: Hawkes Bay District Legal Services Committee, 1998).
73. Mitchell, *supra* note 68; K. Sackville Smith *et al.*, *In the Interests of Justice: An Evaluation of Criminal Legal Aid in New Zealand* (Wellington: Legal Services Board, 1995).
74. M. Marrone, “The Evolution of Needs Assessments in Ontario” (Paper presented at the Legal Services Research Centre International Conference 2002, Jesus College, Oxford, March 2002).
75. A. Currie, “The Emergence of Unmet Needs as an Issue in Canadian Legal Aid Policy Research” (Department of Justice Canada, Paper presented at the International Legal Aid Group Conference, Melbourne, June 2001).
76. American Bar Association, *Agenda for Access: The American People and Civil Justice*, Final Report into the Implication of the Comprehensive Legal Needs Study, Foreword and Executive Summary (1996). See also American Bar Association, *Report on the Public Hearing on Access to Justice Standing Committee on the Delivery of Legal Services* (2003).

a broader context than our present article does. A third report drew on both low- and moderate-income reports. A two-year policy-development phase was to get underway after the Report “delving further into the rich data” from the survey. The study explored—quantitatively and qualitatively—situations with a legal dimension encountered by those in the United States, rather than looking at the number of times lawyers were used, as had past surveys. Other surveys have also been conducted in different parts of the United States on legal needs.<sup>77</sup>

### SHIFT IN FOCUS TOWARDS COMPETITION AND MARKET APPROACHES

In the 1990s, discussion amongst many academics about legal services and legal need shifted from the concerns of the 1960s and 1970s, with issues of poverty and class, to a focus on market-force economics or market rationalism and managerial or competitive model considerations.<sup>78</sup> Meeker, Dombrink, and Quinn were critical of this approach.<sup>79</sup> They highlighted the problems in statistical validity in the attempts to compare service-delivery models and pointed out flawed assumptions such as the one that all behaviour is based on competition and motivated by making money. Meeker, Dombrink, and Quinn noted the flaws in comparing models of legal service delivery in terms of cost and equality and the difficulty in comparing services, especially in view of different service-delivery models.<sup>80</sup> They observed problems with statistical validity, which could render conclusions based on data unusable for policy consideration. They argued that the flaw in the competitive model lay in the fact that the services that they were applied to were not truly or clearly competitive. For example, one attorney was a nun who was not charging fees for her legal services. Competitive models, they argued, made use of free-market assumptions, which were unworkable in this context. Factors such as volunteer work meant that bids or tenders were put in, which would be lower than they would be in the free market. Meeker, Dombrink, and Quinn highlighted problems in testing a competitive model where it had elements that were not truly free market and there were no controls for relevant independent variables such as client population, legal problems, costs issues, and motivations to work for the public interest.

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77. A. Cantrill, *Agenda for Access: The American People and Civil Justice—Executive Summary* (Chicago: American Bar Association, 1996); Consortium on Legal Services and the Public American Bar Association, KPC Research, *1999 Community Needs Survey*, 6 December 2001 <<http://www.co.mecklenburg.nc.us/codss/PlanEval/CommNeed.htm>>; James, Meeker, & Song, *supra* note 14 at 143.

78. J. Johnsen, “Studies of Legal Needs and Legal Aid in a Market Context” in F. Regan, A. Paterson, T. Goriely, & D. Fleming, eds. *The Transformation of Legal Aid: Comparative and Historical Studies* (Oxford: Oxford University Press, 1999).

79. J. Meeker & B. Quinn, “Competitive Bidding and Legal Services for the Poor: An Analysis of the Scientific Evidence” (1991) 18 *Western State University Law Rev.* at 611.

80. *Ibid.*

The influence of the new economic frameworks for the delivery of legal-aid services was made apparent in the report produced by the U.K. Social Market Foundation in 1994.<sup>81</sup> This report applied an economic analysis to the increase in legal-aid expenditure. It assumed that lawyers, like others, were paid as economically-rational individuals who seek to maximize their income. The only problem with such an approach is that it overlooks the legal profession's ethical motivations. The 1994 report noted a "moral hazard" whereby clients do not care that they are being oversupplied, because someone else is paying. In contrast, based on the present authors' experience in the direct delivery of legal services, many clients are very conscious of not overburdening lawyers and are often hesitant to keep using the service, as they feel they are undeserving because they are not paying. This illustrates the dangers of presuming behaviours in human beings without an empirical basis from which to draw these conclusions.

The U.K. report does not mention aspects such as pro bono work and volunteerism, which dominate sections of the legal community in Australia.<sup>82</sup> It also overlooks the reduced rates of pay for salaried legal aid lawyers and community legal centre lawyers. These lawyers often accept these reduced pay conditions from a personal commitment to social justice. Again, like the semantic debate about definitions of legal need that can hinder constructive responses to improving access to justice, the limited market analysis of legal services can place a further impediment to finding solutions and ways forward.

The authors of *Local Legal Need*<sup>83</sup> also commented about this report and noted that since 1994 much of the commentary involved a discussion of greedy lawyers and supplier-induced demand rather than solutions to clients' problems. They observed that economic theories do not adequately address the concept of need and lawyers have not been shown to be greedier than other members of society. Since 1986 the pre-eminent governmental concern has been to control the growth of legal-aid expenditure and not whether needs are being met. This can safely also be said of the situation in Australia,<sup>84</sup> the United States, the Netherlands, and Sweden in the decade between 1985 and 1995.<sup>85</sup>

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81. G. Bevan, A. Holland, & M. Partridge, *Organising Cost-effective Access to Justice* (London: The Social Market Foundation, 1994).

82. *Ibid.*

83. Pleasence, *supra* note 59 at 17, para. 2.1.31.

84. Parsons, *supra* note 7; Cooney, *supra* note 7.

85. T. Goriely & A. Patterson, Introduction, in A. Paterson & T. Goriely, eds., *A Reader on Resourcing Civil Justice* (Oxford: Oxford University Press, 1996) at 16.

## A RECONSIDERATION OF THE DEFINITIONAL ISSUES

Genn highlighted the struggles in finding effective definitions of legal need.<sup>86</sup> She noted that the work in the United States in the 1960s had a narrow legalistic approach and that the 1997 Royal Commission into Legal Services in the United Kingdom adopted a similar pattern of questioning to the United States studies. She noted the flaw in assuming that if people do not seek the assistance of lawyers, they do nothing at all. She recognized that non-legal approaches can be used by people to resolve disputes. She was also critical of approaches that try to focus on kinds of people rather than kinds of problems.

Paterson contributed to the debate:

The decision about what to do will be determined by a vast range of factors: Do people have any inkling of what their rights and remedies might be? Do they have knowledge or confidence to pursue those rights and remedies? Do they feel able to handle the matter alone? If not, do they know where to go for help? If they know where to go for help, can they access that help, when accessibility depends on the willingness or ability to pay (or be paid for), or the willingness or ability to join long queues during normal working hours?<sup>87</sup>

In 2001, Pleasence and others commented on the research undertaken in England and Wales highlighting some of the pitfalls encountered. They observed that what can bring about fairness is not always clearly connected to the law. They commented that the nature of the ends must be understood as well as what type or level of legal service is required. Pleasence and others commented that recent empirical studies identified persons who had experienced problems, legitimately involved the legal process, and characterized the problems and explored the reasons for people having accessed legal services or not. They stated that the need for community legal-service partnerships in the United Kingdom to undertake consumer surveys was necessary and was required to investigate local levels of legal need as they were more closely connected to their regions and had local knowledge and understanding in examining categories of problems, sources of advice sought, and resultant experiences.<sup>88</sup> The associated problems in the use of predictive legal-needs models by the Legal Aid Board and the Legal Services Commission were noted. Little reliable and nationally consistent small-area demographic and social data had been available and few computers had sufficient memory for processing and allowing the manipulation of large-scale data.

The *Local Need* study<sup>89</sup> noted that the small-area predictive needs models could never be the sole source for policy and funding decision-making. The authors reiter-

86. Genn, *supra* note 60 at 5.

87. P. Paterson, "Paths to Justice Scotland: Which Way Now?" (Paper presented at the Legal Services Research Centre, International Conference 2002, Jesus College, Oxford, United Kingdom, March 2002) at 28.

88. Pleasence (2001), *supra* note 59.

89. *Ibid.*

ated the need for local knowledge and understanding to feed into needs assessment, particularly in a country the size of Australia. Groups differ from region to region, ethnic group to ethnic group, and amongst different indigenous peoples. The authors of *Local Legal Need* commented that the best recent legal-needs studies do not necessarily provide policy-makers with a ready-made list of recommendations. Instead, they argued that the provision of essential background information to the many policy debates concerning civil justice was appropriate and that this was both qualitative and quantitative in form, providing both the “big picture” and the detailed insight that allows change, which can affect people’s lives.<sup>90</sup>

The need to acknowledge and reflect diversity among different communities and individuals in any examination of legal need has been highlighted in Australia:<sup>91</sup>

In particular, women’s experience of violence and their options for dealing with that violence appear to be quite different in remote, rural and regional areas than in the city for a number of reasons, including lack of anonymity in small communities, physical isolation, police known socially to the perpetrator (for example, they play sport together), delays in police response due to distance, different police response due to distance (for example, perpetrator more likely to get warning than to be arrested if it is a long way to the nearest lock-up), lack of other community supports such as domestic violence workers or shelters, prevalence of firearms and other weapons, community pressure to stay with the perpetrator and, for Aboriginal women, the additional difficulty of looking to non-Aboriginal police personnel for assistance.<sup>92</sup>

This view about different indigenous communities and new arrivals to Australia was also stressed in the stakeholder interviews:<sup>93</sup>

The issue of understanding the role of lawyer with the Afghan asylum seekers is that they burst out in laughter because they have no concept whatsoever that they can complain and no concept that they even have experienced something they could complain about. This is a typical example of misunderstanding about the role of the lawyer. I guess a lot of our clients have had the experience where lawyers are not necessarily people who they can trust . . . when you see your client for the first time, their experience of someone sitting at the other end of the desk is that they are government and their experience of government is Taliban, people that want to kill them. There is no way of getting around that that is what they will feel physically and emotionally, and psychologically think, when they first meet you . . .<sup>94</sup>

Pleasence and others consider that one of the most sophisticated analyses of how well legal services meet public needs was produced by the Royal Commission on legal services in Scotland (the Hughes Commission) in 1980.<sup>95</sup> The Hughes Commission placed major emphasis on legal information. It concluded that everyone had the right

90. *Ibid.* at 8.

91. K. Eaton, “One Size Does Not Fit All” (2001) 26 *Alternative Law Journal* 62.

92. *Ibid.* at 66.

93. Ingles, *supra* note 7; Manne, *supra* note 7.

94. Manne, *supra* note 7.

95. Discussed in Pleasence, *supra* note 59 at 14, paras. 2.1 .25.

to know about legal solutions and, without such information, people could not make fully informed choices. The authors agree with this finding but add that the ability to understand that information is equally important. Need was defined as the provision of services to alleviate problems. The Hughes Commission report states:

When we speak of “unmet need” we are concerned about instances where a citizen is unaware that he has a legal right, or where he would prefer to assert or defend the right but fails to do so for want of legal services of adequate quality or supply.<sup>96</sup>

Several interviewees revealed the same view of the term “unmet legal need” as the Commission.<sup>97</sup> A study of legal need should include people who are unaware they have a legal right. This was one of the omissions in the Australian Rush and Walker Report mentioned earlier.<sup>98</sup>

In the late 1990s legal aid administrators were looking for tools to enable rational planning. The concept of comparative needs, which allows the most needy to be targeted in preference over the less needy, is a concern, as it loses its focus on justice and access to legal rights. Many people do not have their case taken up, and too few people are prepared to pursue their disputes. Lawyers might be ambivalent about representing unstable or reactive clients, who have different perceptions of the problem, who may be confused by the difference between civil and criminal law, or may allocate blame in different ways.<sup>99</sup>

Pleasence and others observe,

As a consequence of the developing understanding of the complexities of the concept of a “legal need”, more recent empirical studies have sought only to identify those persons who have experienced problems, which could potentially legitimately involve legal process, and then characterise the problems. This is why Genn has introduced the language of “justiciable problems.”

They go on to argue that there is ambiguity in terms such as “deprivation” and “need” and that care must be taken in defining what is being predicted and measured, and what the outputs might be.<sup>100</sup> They recommend that national tools be developed, against which to plan, monitor, and evaluate the United Kingdom’s legal-service

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96. *Ibid.*

97. Coate, *supra* note 7; Julian Gardiner interview on 17 January 2002; David Manne interview on 23 January 2002; and Hunt, *supra* note 7.

98. Rush, *supra* note 53; Rush & Walker, *supra* note 53; Rush Social Research and John Walker Consulting Services (Rush) 1996, *Legal Assistance Needs Phase I: Estimation of a Basic Needs-Based Planning Model*, Legal Aid and Family Services Division, Australian Government Attorney-General’s Department, Canberra. *Legal Assistance Needs Project Phase II: Quantitative Research with Australians from Low Income Households*, Legal Aid and Family Services Division, Australian Government Attorney-General’s Department, Canberra. <[http://law.gov.au/aghome/commaff/flad/legal\\_aid/stage1.doc](http://law.gov.au/aghome/commaff/flad/legal_aid/stage1.doc)>. Rush Social Research Agency (Rush) 1999

99. Pleasence, *supra* note 59 at 18–19.

100. *Ibid.* at 77, para. 4.1.21.

partnerships. They also suggest the development of local tools to allow local law centres to do the same. At a national level, they suggest the development of predictive models; however, they note the weaknesses in such models.<sup>101</sup> Where there are real local differences in a particular area, and these are mixed into a national study, then the national findings can be distorted in terms of their resonance in that same local community.

A concern about the notion of “justiciability” developed by Genn for the English studies is that the concept of “justiciability” has implicit in it the right and capacity to sue as a key measure of legal need. This can be seen as taking a narrow view of what constitutes legal need.<sup>102</sup> Although Genn tried to broaden the issues from previous narrow studies, which tended to presume in survey questions that people knew what a legal problem was, or that a legal solution was the only avenue of redress, Genn’s approach was still narrow. From a broader perspective, the right to sue may not, in and of itself, be a remedy. People under international law hold certain rights that are considered inalienable, universal, and indivisible. When a right is breached, then the availability of a remedy to correct the wrong may not be limited to having to sue. In fact, a remedy may exist in improved processes, as in occupational health and safety, or in acknowledgment or monetary recompense. In fact, the harm that can be caused by the adversarial process, including an aggressive opponent or the expense of the process, is no guarantee that a legal wrong will be corrected as it can, in some instances, exacerbate the wrong.

### A DIFFERENT APPROACH

Legal need can be defined more broadly than the Bradshaw taxonomy and Genn’s “justiciability”. The concept can have sufficient clarity and reference points to have meaning in a civil society, to be pragmatic and realistic, but also to have a broader informational base to take into account the effects of gender, age, culture, colour, location, and income.

A needs-based approach based on the Bradshaw taxonomy can have a tendency to examine need from a “we know best” paternalistic or bureaucratic view, based on

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101. *Ibid.* at 78.

102. Rosemary Hunter, “Commentary on Hazel Genn, Paths to Justice: What People Do and Think about Going to Law” (Paper presented at Managing Justice Conference, Sydney, 18–20 May 2000) 8–9, notes, “Professor Genn argues that we should be thinking about legal and other forms of advice needs in terms of what certain kinds of ‘people’ do or want but rather we should focus on what people do or want in relation to particular problems. The difficulty with this conclusion, however, is that the dismissal of differences between people is not based on evidence from the study, but seems to have been made *a priori*.” Hunter notes that Genn refers to individuals and an “undifferentiated “public”, derived not from statistical analysis but from a failure to gather information about differences between groups. She observes and these authors agree that supplementary studies of minority groups may be costly and time-consuming but they should be undertaken, otherwise they are rendered “invisible and their experience ignored”.

someone else's determination of what is a need, fiscal constraints, decisions removed from the practical realities of people's experiences, and tight targeting or "bottom lines" so prevalent in market analyses.

A study of legal needs should have a universal yardstick against which needs can be measured. One of the problems of limiting an examination to needs is that it ends up determining need on the lowest common denominator or level of subsistence of services required.<sup>103</sup> The idea of benchmarking based on a broader base than mere subsistence was advocated by several interviewees, noting, however, that need "will always be subjective".<sup>104</sup>

For example, in relation to the measurement of poverty, Jonathan Bradshaw argued that many measures tend to be too narrow. In 2000,<sup>105</sup> he suggested moving away from using a fixed typology, instead calling for more than one measure of poverty:

We should acknowledge that the empirical representation of each of these concepts is flawed—partly by the fact that they inevitably involve a judgement about the threshold that should be applied.<sup>106</sup>

He argued that basic human need cannot be understood in purely physical terms. The essence of humanity is the capacity to make choices and any (absolute) measure of poverty has to take into account capabilities, including the capacity to participate.<sup>107</sup>

In his approach to the notion of development, Sen argued in this context that attention should be shifted from an exclusive concentration on income poverty to the more inclusive idea of capability deprivation.<sup>108</sup> He proposed that attention should be paid to the expansion of "capabilities of persons": "We can better understand the poverty of human lives and freedoms in terms of a different informational base."<sup>109</sup>

For example, he noted that low incomes tell us little about the phenomenon of gender inequality. Also, unemployment is not merely about deficient income, which can be resolved by state transfers but can have far-reaching and debilitating effects on freedom, initiative, and skill, and result in loss of self-confidence and social exclusion.

103. Cooney, *supra* note 7.

104. *Ibid.*; Williams, *supra* note 7; Sisely, *supra* note 7; Colvin & Pettit, *supra* note 7; Coate, *supra* note 7; Dukes & Grogan, *supra* note 7.

105. See J. Bradshaw, *The Measurement of Absolute Poverty*, Final Report for Eurostat, Social Policy Research Unit, University of York, Heslington, York, at 63–4.

106. J. Bradshaw, "Methodologies to Measure Poverty: More than One is Best!" (Paper for the International Symposium on Poverty: Concepts and Methodologies, Mexico City, 28–29 March 2001) at 8–9; see <<http://www-users.york.ac/~jrbc1/home.htm>>.

107. *Ibid.* at 4, when referring to L. Doyal & I. Gough, *A Theory of Human Needs*, (Basingstoke: Macmillan, 1991).

108. A. Sen, *Development as Freedom* (New York: Anchor, 1999) at 20.

109. *Ibid.* at 18.

Several interviewees expressed concerns about the compounding impact of poverty and other forms of disadvantage on legal need, such as coming from a different culture or having a disability:<sup>110</sup>

One of the areas of unmet legal need is, in fact, that someone who may have a remedy who doesn't get the remedy as a result of sort of getting, if you like, a second-class justice system because they are poor or whatever, or disadvantaged, or have a disability, or because of their intellectual disability for instance. It's very hard to have the time to go through the process with them. It becomes an unmet legal need because they actually have a remedy that they have not been able to access. Clients are being affected by systemic issues, and that leads to the conclusion that they should also be working on law reform and policy situation so that people's legal need is less likely to be unmet. I mean it is an effectual thing I think that it is really important that policy and law reform be tied very closely to practice.<sup>111</sup>

Sen observed how decision-makers concentrate on tighter targeting and means testing in an effort to reduce the fiscal burden where public funds must stretch further.<sup>112</sup> Sen was concerned about the difficulty in ensuring that the measures used to justify or not justify spending means are effectively tested with acceptable validity, without leading to adverse effects.

Sen noted that the beneficiaries of targeted social support are often quite weak politically and may lack the clout to sustain the programs in political jostling or to maintain the quality of services offered. These observations accord with those of Hanks, which were discussed earlier. Sen noted that policy-makers utilize strategies such as using fine-tuned targeting for "ideal delivery" to a supposed inert population, and that these processes often result in disassociation of the running of governments from democratic scrutiny and participation in the exercise of political and civil rights.<sup>113</sup> This is commonly referred to as the phenomenon of governments "steering and not rowing" in policy setting and program funding. The problem is that the less government is informed of the impacts of policies and services, the more removed, disconnected, and lacking in relevance the policy responses of governments become to the communities they are elected to serve. This is certainly the case with legal services, which are continuously seen by political forces as less important than areas such as defence or health. However, if one takes a holistic view, as Sen did and as the recent findings of the LSRC have revealed,<sup>114</sup> legal services are interconnected with the enhancement of other factors of well-being and, if not realized, democracy itself. Access to legal services is critical to the notion of democracy. If people cannot access legal help and assistance to seek remedies or enforce their rights, then their

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110. Manne, Biondo, *supra* note 7; Colvin & Petit, *supra* note 7; Sisely, *supra* note 7; Parsons, *supra* note 7.

111. Hunt, *supra* note 7.

112. Sen, *supra* note 108 at 134.

113. *Ibid.* at 19.

114. Pleasence (2006), *supra* note 60.

participation in society is diminished and the rule of law undermined. Both of these principles are important if participatory democracy is to be realized.

Another approach to targeting services and social support might be to determine standards and then use indicators to measure the practical reality of people's lived experiences, to see if the experience accords with these standards. A danger of studies of unmet legal need is that they suit a variety of agendas or public policy constraints and operate in an information vacuum. Instead they should be based on the real considerations of the people who are trying to access the legal system. Such a new approach could result in improved targeting of services to overcome barriers and impediments to accessing the legal system.

### HUMAN RIGHTS FRAMEWORK

One solution is the establishment of benchmarks, using internationally recognized minimum human rights standards as the yardstick. Human rights at international law may not be enforceable, but they can still be used as universally agreed upon standards. The task is to examine legal need from the vantage point of key underpinnings of the justice system in civil society. Universally accepted standards for human rights are used as the measure for a society seeking to achieve equality of access to the law and under the law.<sup>115</sup> Benchmarks and practical indicators can be developed so that adherence to these standards can be measured. Field studies already reveal what groups are likely to have the most substantial levels of legal need<sup>116</sup> as measured against these standards. Sen argued for evaluations that focus directly on freedom, seen in the form of individual capabilities to do the things that a person has reason to value.<sup>117</sup> Other methods would then be used to identify the extent to which these standards were met.

To move the measurement of legal need into the broader realm of the level of adherence to universally recognized human rights standards may move the debate from one of vested interests into the more systemic considerations that Duncanson was concerned about. As one interviewee commented,

Don't define it on the basis of what "lesser beings" in society might get; otherwise you are accepting a lesser level of services is OK. Define it by "what we want in a free society" and an "equitable" society. Has a person got a reasonable cause and can they pursue it? This is a better standard than using the most desperate cases. A definition should talk about society and equality of opportunity—what sort of society ought to be proclaimed to the sort of people we say we are and look at people who are turned away.<sup>118</sup>

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115. M. Salvaris *et al.*, *Human Rights Benchmarks: Benchmarks and Indicators for Economics and Social Rights in Development Assistance Programs* (Melbourne: Swinburne Institute for Social Research and Deakin University, 1996).

116. Pleasence, (2006) *supra* note 60.

117. Sen, *supra* note 108 at 56.

118. Cooney, *supra* note 7.

If one were to depart from Bradshaw's typology, the question is what other benchmarks might aid in the measurement of legal needs so as to inform development of public policy.

The work undertaken by Salvaris in constitutional reform and citizenship research provides some insights. He discussed the need to develop a national system of benchmarks and indicators capable of regularly measuring the extent to which legal, economic, social, and cultural rights and responsibilities of Australian citizens are implemented. Salvaris saw Gross Domestic Product measures of development as extremely narrow and often misleading and noted that a range of aspects of human life were not considered. He stated that economic indicators were "often unreliable and poorly understood" and earned the inappropriate place as "surrogate measurements of well-being".<sup>119</sup> Here Salvaris found an ally in the critiques of Meeker and Quinn<sup>120</sup> and Sen<sup>121</sup> discussed earlier.

If the barriers to people accessing the legal system are not better understood, then as Hanks and Duncanson have pointed out, real advances in making access to justice more attainable are less likely, as the understanding can only be superficial. If the methodologies to measure legal need take into account only narrow rather than broad considerations, then only narrow solutions are possible.

Salvaris argued that benchmarking should involve comparing Australia's levels with international best practices and provide a framework for defining and meeting desirable standards. He observed that citizenship involves full membership and active participation; a just, democratic, and mutually supportive political community; individual and collective rights and responsibilities—legal, social, economic, cultural and environmental; and public and private policies and resources that are needed to sustain them.<sup>122</sup>

Salvaris observed "some worrying changes in the common values and institutions that underpin citizenship: greater social inequality, a diminished sense of community and a loss of confidence in public institutions".<sup>123</sup> He called for public discourse or shared language on the issues and principles of citizenship, democracy, and social

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119. M. Salvaris, *Citizenship and Constitutional Reform: A Just Republic or Just a Republic?* (1995) <[http://www.gu.edu.au/centre/cmp/Salvaris\\_2.html](http://www.gu.edu.au/centre/cmp/Salvaris_2.html)> at 21.

120. J. Meeker & B. Quinn, "Competitive Bidding and Legal Services for the Poor: An Analysis of the Scientific Evidence" (1991) *Western State University Law Rev* at 611.

121. Sen, *supra* note 108 at 68.

122. Salvaris, *supra* note 119.

123. *Ibid.* at <[http://www.gu.edu.au/centre/cmp/Salvaris\\_2.html](http://www.gu.edu.au/centre/cmp/Salvaris_2.html)> p. 4. This comment was reflected in research by students at La Trobe University in a project that found that self-represented litigants increasingly appear to be losing confidence in the legal system as a mode of resolving their disputes, often because they struggle to understand the process. West Heidelberg Legal Service, *A Report on the Implications of Unrepresented Litigants in the Magistrates Court, Victoria* (Victoria: West Heidelberg Community Legal Service and La Trobe Law, November 2002).

development; agreed goals across the fields that comprise citizenship and democracy in practice, from which specific rights and duties, charters, and national policy guidelines can be derived; and an effective system to monitor the present condition of the nation.<sup>124</sup>

Salvaris noted that civil rights were “quite precarious and don’t necessarily apply to all citizens”,<sup>125</sup> and he discussed social rights and the difficulties inherent in making them enforceable, for, unlike in some countries, the Australian constitution does not make clear commitments to particular rights.

The task of selecting benchmarks and standards for citizenship is complex. It cuts across public policy and involves identifying the formal rights and duties of citizens as well as the collective and government standards needed to sustain them. Salvaris proposed a clear definition of the basic rights and duties of individual citizens; identification and establishment of standards in at least those policy areas that are necessary to sustain social participation and social well-being; and careful consideration of the most effective way to implement them. He stated that it is necessary to have some agreed reference points and to have benchmarks in policy areas that affect the lives of Australians in employment, education, law, housing, and health, as well as poverty, discrimination, equality, and participation in society.

Legal rights in the broadest sense are linked with notions of citizenship. They enable a person to have certain rights and remedies, should those rights be impeded. Salvaris argued that such rights need not merely exist or be merely aspirations but have to be attainable and accessible in practice to enable full participation in society. This may not mean that all citizens choose to exercise or enforce those rights, but they should be able to if they choose, without the barriers imposed by class, ethnicity, and marginalisation, or limited finances. The degree to which the standards are attainable or unattainable may be a better measure than “need”. Salvaris cited the European Union and the United Nations Development Program as developing indicators, as well as the Swedish Level of Living Program. Benchmarks in the last example have been used and incorporated in government planning.

Salvaris’s suggestions offer a more encompassing opportunity for measurement than a concentration on “need” alone. This does not mean that the task will not be problematical, but as Sen pointed out,<sup>126</sup> as long as the approach is explicit and transparent and the weightings attached are the subject of reflection and discourse and take into account of freedom, rights, and creativity, and actual living conditions, then they must have relevance. Salvaris’s ideas link measurement with universally recognized standards and place the concept of need within the broader concept of what a civil

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124. *Ibid.* at 10.

125. *Ibid.* at 18.

126. Sen, *supra* note 108 at 68, 75.

society is, which includes notions such as the rule of law, acceptable living standards, and adherence to human rights.

In addition, the stakeholders who were interviewed also suggested that an examination of legal need must encompass broader notions than the minimum level of service affordable and examine benchmarks for human rights and the level at which these are attained.<sup>127</sup>

Australia is a signatory to, and has agreed that it will abide by, various human rights instruments, including the *United Nations Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *Convention on Economic Social and Cultural Rights*, the *Convention on the Rights of the Child*, the *Convention on the Elimination of All Forms of Racial Discrimination*, and the *Convention on the Elimination of Discrimination against Women*. Many of these instruments set standards related specifically to the manner in which rights can be enforceable and articulate the approaches that institutions and the state should take towards people. As such, they can be seen as an appropriate starting point in working out a framework for measurement, moving away from the highly criticized concepts of legal need. This is a move towards an analysis which can measure the broader notions of justice and its applicability in Australian society.

The approach of examining “capability” outlined by Sen<sup>128</sup>—which involves looking at what individuals are actually able to do and the alternatives that they have as real opportunities—encompasses a much broader approach to measuring legal need and explores what people can actually realize.

There are critics of the notions of human rights as universally agreed upon. Some have argued that human rights confound consequences of legal systems that give people certain well-defined rights and note that these “pre-legal systems” do not really provide justiciable rights and that they have no status unless sanctioned by the state. Sen called this the “legitimacy critique”.<sup>129</sup> Others claim that human rights are heartwarming sentiments that have not gained meaning, as there are no agency-specific duties attached to ensure that they are met. Sen called this “coherence critique”. Finally, he noted that some nations have argued that human rights are Western notions and do not apply to Asian cultures. Sen noted that such a view suits authoritarian regimes but it reduces the complexity of Asian cultural development, ignoring fundamental precepts that actually accord with human rights norms.

Sen, while conceding that human rights can be taken as aspiring legal entitlements or pre-legal claims that do not necessarily give justiciable rights in courts and institutions of enforcement, stated that “human rights may stand for claims, powers and

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127. Sisely, *supra* note 7; Colvin & Petit; Biondo, *supra* note 7; Cooney, *supra* note 7; Hunt, *supra* note 7; Horrocks 7 December 2002; Coate, *supra* note 7.

128. Sen, *supra* note 108 at 74–7.

129. *Ibid.* at 228.

immunities supported by ethical judgements, which attain intrinsic importance to these warranties.”<sup>130</sup> He commented that human rights are useful in the context in which they are typically invoked and are an appropriate focal point for debate. He argued that while it is not a specific duty of any individual to make sure any given individual has his or her rights fulfilled, the claims can generally be addressed to all in a position to help.<sup>131</sup> This could include governments, funding bodies, the legal profession, social services, non-government organizations, and local communities.

## CONCLUSION

The legal system is integrally linked to notions of the rule of law in democracies. People’s capacity to seek assistance when in legal difficulty, to enforce their entitlements, to seek redress, and to participate and generate change in civil society are also interconnected to a realization of other aspects of well-being including health, housing, and employment opportunities.

Law, and access to the legal system, is one of the great tools of social justice. By opening up the law and making assistance available to many more people, we make it more likely that governments and institutions will be challenged when they act unlawfully.<sup>132</sup>

Cognisant of the definitional issues around the concept of “legal need” and the problems with empirical measurement, we intend to develop benchmarks within a human rights framework. We are testing methodology for our new approach to measuring access to justice in a small project in a region of Australia. We draw on the work of Sen, the Legal Services Research Centre, and Salvaris. Human rights instruments form the reference point for measurement in Australia of levels of access to justice. The benchmarks can—if carefully constructed, with sophisticated indicators and critical input from service providers and members of the community about their experiences of attaining their human rights—provide an appropriate evaluative framework against which the actual experience of people with broader issues of access to justice can be measured.

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130. *Ibid.* at 229.

131. *Ibid.* at 230.

132. U.K., H.L., *Parliamentary Debates*, column 285 (14 April 1999) (Lynda Clark of Edinburgh).

