

**4TH ANNUAL COLLOQUIUM OF THE JUDICIAL CONFERENCE
OF AUSTRALIA
THE 20TH CENTURY – A CENTURY OF CHANGE**

A HISTORY OF LEGAL AID IN AUSTRALIA

OUR BRITISH ORIGINS

A little over 500 years ago, the 14th of October 1495 to be exact, a statute was enacted by parliament during the reign of King Henry VII entitled *“A mean to help and speed poor persons in their suits”*.

In that statute the King was held to *“willeth and intendeth that indifferent justice be held and ministered according to his common laws, to all his true subjects, as well as to the poor as rich, which poor subjects be not of ability nor power to sue according to laws of this land for the redress of injuries and wrong to them daily done, as well concerning their persons and their inheritance as other causes”*.

To thus help and speed such plaintiffs, parliament ordained that every poor person who had a cause of action against any person in the realm could have their original writs and their subpoenas sealed without payment of any fee to the Crown.

The Chancellor was enjoined to provide clerks to write up the writs and “Learned Counsel and attorney” without fees being charged. It appears that counsel were ordered to undertake cases for poor people without any prospect of remuneration. Although legal services to the “weaker” members of society had been ordained by the state as far back as Roman times this is probably the first example of the establishment of an administrative service by the court to assist litigants. It was only available to plaintiffs, who were liable for their opponents costs if unsuccessful. It was not all a free ride as many plaintiffs who received assistance under the statute of 1495 ended up being flogged when their cases were lost. Others were liable to be sent to the workhouse for a month.

In 1883 the system was expanded by legislation to cover defendants, an assets test applied with an eligibility limit of 25 pounds and for the first time a merits test was also imposed.

Henry VII’s statute was finally repealed in England in 1949, upon the establishment of the Legal Aid and Advice Act which covered proceedings in all courts in England and Wales. This Act was not greeted with universal rejoicing. It was reported in The Times on 20 March 1951 that the Lord Chief Justice, Lord Goddard, had said that he found *“Very little gratitude among person who get aid”* and that he was beginning to believe *“it would be far better to leave many of these people to defend themselves”*.¹

AUSTRALIA – FROM FEDERATION TO THE WHITLAM GOVERNMENT

The origins of the provision of Legal Aid Services in most Australian States rest largely with the efforts of the private legal profession. In most States legal aid for

¹ From an article by Kay Barralet, former Executive Officer, National Legal Aid, in November 1995 edition of Australian Lawyer.

criminal cases was available to people charged with serious indictable offences and was provided on a non contributor basis by private practitioners who were appointed by the court and compensated by the State.

Apart from the limited assistance that was available for defendants facing trial in criminal cases, the provision of legal assistance by private legal practitioners through their participation in law society schemes was, until the mid 1970's the predominant method of delivering legal aid services in Australia. The model was based largely on the English private practitioner system and the first, most comprehensive and ultimately most successful system emerged in South Australia in 1933.

South Australia

This scheme was implemented in September 1933 after an undertaking was given by the Law Society to the State Government that *"no person would be without proper legal assistance if he were deserving of such assistance and would be unable to obtain it without the help of the Society's members"*.²

In 1936 legislative sanction was given to the scheme by amendments to the Poor Persons Legal Assistance Act (1923). That Act, which had previously only covered the court appointment of Counsel for persons committed for trial, now provided that fees payable to the State in the way of filing fees and stamp duty were waived or reduced for assisted persons involved in civil proceedings. The Act also made it clear that the Court could order costs in favour of an assisted person even though they may not be liable to pay the costs themselves.

It was not until 1969 however that the scheme received any real financial backing from Government when the Legal Practitioners Act (Amendment Act) (1969) authorised the use of income from a proportion of solicitors' trust funds to finance the scheme.

Between 1933 and 1969 solicitors were entitled to attempt to obtain some contribution from their assisted clients but where this was not possible they could claim only a very small proportion of their costs from the fund. The right of reimbursement varied depending on the position of the fund but it was relatively rare that solicitors obtained reimbursement at any rate higher than 20% of the ordinary fees. Even with the advent of the 1969 amendments which gave access to a proportion of the income from the solicitor's trust funds, practitioners usually only recovered 40% of their normal fees.

It is clear that historically the South Australian legal profession led the way in providing a wide range of legal services to disadvantaged people.

In 1973 the South Australian Government first agreed to underwrite the scheme and as a result of additional grants from the Federal Government by 1974 practitioners were recovering fees at 80% of the normal rate.³

Unlike the systems which operated in most other States the South Australian Legal Assistance Scheme remained under the direct control of the Law Society Council. Having regard to the significant contribution the profession made to Legal

²Legal Aid in Australia; A Report by the Commissioner for Law and Poverty, Professor Ronald Sackville AGPS 1975 – paragraph 2.130

³ Sackville - Legal Aid in Australia; paragraphs 2.131 – 2.134

Aid in South Australia the society was determined to retain full control over legal aid. The Law Society Council made all policy decisions in relation to the provision of assistance and subordinate committees were given responsibility for determining individual applications.

Victoria

Victoria had established a Public Solicitors Office in 1928 to provide legal representation to persons who had been committed for trial on an indictable offence.

The Legal Aid Act of 1969 gave responsibility for the provision of aid in criminal matters to the Attorney General. Although the Act did not specifically mention the Public Solicitors Office the actual administration of aid was delegated to the Public Solicitors Office.

The Public Solicitors Office was a salaried service which would retain counsel from the independent bar to represent assisted persons.

A "Law Society Scheme" was established in 1964 under the Legal Aid Act 1961. It was intended to operate *"for the benefit of persons who would not qualify for assistance by the public solicitor but who for reason of their liabilities and family commitments were unable to afford normal legal costs"*.⁴

It was administered by a Legal Aid Committee appointed by the Victorian Bar Council and the Law Institute of Victoria. Free legal advice was available on a limited basis from staff employed by the Legal Aid Committee and committees of practitioners met on a voluntary basis to determine applications for assistance. The scheme was financed by grants from the State Government to cover payment of disbursements and administration costs whilst payment of solicitors and counsel participating in the scheme was limited to distribution amongst them *"in such proportions as the committee considers equitable of all costs received or recovered payable to the committee and all contributions paid by assisted persons"*.⁵

Western Australia

The Law Society of Western Australia established its own legal assistance scheme in 1960. Until 1971 the scheme received little financial backing from the State Government and practitioners received no payment of fees unless costs were recovered from the other side. In 1971 the Law Society Scheme received additional funding by virtue of the Legal Contribution Trust Act of 1967 and the Legal Assistance Rules of 1971. Ongoing responsibility for providing legal assistance was vested with a sub committee of the Law Society which continued to rely on private practitioners to conduct the cases.

"The Committee had a general discretion as to whether aid would be granted or refused, and no hard and fast rules are laid down.....some classes of

⁴ Sackville - Legal Aid in Australia; paragraph 2.184

⁵ Sackville - Legal Aid in Australia; paragraph 2.184

*applications are more deserving than others..... There is no assistance for hardened criminals except for capital charges.....*⁶

In Western Australia there were particular problems in providing legal aid to people residing in the remote areas of the State because of the small size of the profession and its concentration in and around the metropolitan area of Perth.⁷

Tasmania

The Law Society Scheme was established in Tasmania in 1954 by the Legal Assistance Act 1954. The scheme operated in a similar way to the system in South Australia in that it was initiated by the profession and practitioners performing the work received a very low rate of remuneration.

The lack of any real financial support from Government led to the virtual collapse of the scheme in the late 60's. It was revitalised in the early 1970's through the financial assistance of a newly elected Liberal Government which *"offered to meet the bills of the Legal Aid Scheme on the understanding that it would be administered with moderation"*.⁸

By 1974 the Law Society had extended the scope of the scheme to enable assistance to be provided in matters regardless of whether or not proceedings were involved and to enable non-residents of Tasmania to also seek a grant of assistance for matters arising under Tasmanian Law.

Queensland

The Queensland Public Defender had been providing assistance for persons facing trial on criminal charges in the District and Supreme Courts, since 1916. Originally the Public Defender was a member of the staff of the Public Curators Office which was a branch within the Department of Justice. In 1967 the Public Defender's Office was separated from the Public Curator and in July 1974 it became an independent statutory office under the Public Defence Act 1974.⁹

In 1966 the Legal Assistance Committee of Queensland was established. The Queensland Legal Assistance Act which established the service was based largely on the United Kingdom Legal Advice and Assistance Act of 1949. The service was governed by a statutory body consisting of three members – two representatives nominated by the Queensland Law Society and one representative of the Department of Justice.

The scheme provided legal advice and representation for eligible applicants, involved in civil matters. Assistance was also available in very limited circumstances for representation at committals.¹⁰

The Act made provision for the appointment of local committees in various parts of the State with responsibility for determining individual applications. These committees were spread across Queensland and were made up of practising

⁶ Australian Legal Aid Review Committee report Feb 1974 p 118

⁷ Sackville - Legal Aid in Australia; paragraph 2.220

⁸ Sackville - Legal Aid in Australia; paragraph 2.265

⁹ Sackville - Legal Aid in Australia; paragraph 3.56

¹⁰ Australian Legal Aid Review Committee report Feb 1974 p89

solicitors and other persons with legal training and experience. The day to day administration of the scheme was under the control of the secretary and other employed staff.

The Act required the Committee to prepare and maintain panels of barristers and solicitors willing to act for legal aid clients and whilst most of the profession were members of the panel, the Queensland system was unusual in that it provided that a practitioner may be excluded from that list if there is *“good reason arising out of his conduct when acting or selected to act for persons receiving legal aid or out of his professional conduct generally”* (section 18.2).

Australian Capital Territory

The Commonwealth funded legal aid scheme, instituted by ordinance, providing legal assistance in civil and criminal proceedings, operated in the ACT from 1972 until 1977. The scheme was administered by a statutory three person committee appointed by the Attorney General. The secretary of the committee was required to be a member or employee of the Law Society. Legal professional fees paid to private legal practitioners in criminal matters were paid in accordance with a scale fixed by the Attorney General. In civil matters fees were fixed according to a percentage rate of ordinary legal professional fees. In 1973 the Law Society of the ACT formed a Legal Advice Bureau through which its members voluntarily provided free legal advice to all members of the community, irrespective of income.¹¹

Northern Territory

Legal Aid was available under a Social Welfare Ordinance which provided legal assistance for persons who were suffering social or economic disadvantage.¹² The Ordinance decreed that there be a Register of Wards. Although the Ordinance didn't specify the race of wards, the Register was composed entirely of Aboriginal people. If a person named on the register was charged with a serious criminal offence, the Director would arrange representation through the private profession. Although Ian Barker QC, the only solicitor operating between Port Augusta and Darwin in the early 1960's, recalled *“It was a primitive legal assistance scheme.....in respect of Aboriginal matters the legal costs were just about enough to have a drink on after the case.”*¹³

Legal representation for non-aboriginal people was provided under the Legal Aid Ordinance for persons committed for trial or sentence and was administered by the Master of the Supreme Court.

New South Wales

¹¹ Legal Aid for the Australian Community Report for National Legal Aid Advisory Committee July 1990 page 35.

¹² Legal Aid for the Australian Community Report for National Legal Aid Advisory Committee July 1990 page 35

¹³ Lawyers in the Alice (Federation Press 1993) Interview between John Faine and Ian Barker QC.

New South Wales was unique among Australian States in that since the early 1940's it conducted a Public Solicitor and a Public Defender Service which provided relatively comprehensive legal aid services in civil and criminal cases.¹⁴

By setting up two important salaried services to give legal aid in both civil and criminal cases the New South Wales Government of the day took a significant step towards integrating a substantial public service sector within the legal profession.¹⁵

The Legal Assistance Act 1943 which established the Public Solicitors Office was the subject of much controversy in parliament. Arguments against the move included, *“that the bill would encourage ill-founded actions, that an applicant for assistance would be able to select his own solicitor and counsel, that the office would become the largest government department, that the bill was a step towards complete nationalisation of the legal profession and that the act would enable people to take unwarranted legal actions”*.¹⁶

Parliamentarian, Mr Drummond said, *“This measure will encourage the spirit of litigation within the community. If it does, it will encourage one of the most senseless, useless, and time wasting things that any man can possible engage in.”*¹⁷

The Attorney General of the day Mr C E Martin envisaged a wide-ranging scheme which would be available to about 75% of the people, due to the relatively generous means test. However, that means test was updated only twice between 1943 and 1974 and by 1974 the means test for civil cases was excluding applicants whose income fell well below the poverty line.

The Public Solicitors Office was a statutory institution which employed salaried solicitors. The Public Defender was also a statutory office holder and would be instructed by the Public Solicitor in indictable criminal cases.

General satisfaction with the operation of the Public Solicitors Office resulted in the comparatively late entry of the New South Wales Law Society into the field of Legal Aid in 1970.¹⁸

Under the Legal Practitioners (Legal Aid) Act 1970 the New South Wales Law Society established a scheme to offer legal aid in certain civil cases. The New South Wales Scheme was broadly modelled on the UK system and those more comprehensive programs which were already operating in some of the other Australian States. The New South Wales Scheme did not cover criminal hearings or proceedings in the Magistrates Courts and a contribution from assisted persons was made mandatory. Financial eligibility guidelines excluded low income earners as well as those above a maximum level and was designed to benefit middle income earners leaving the Public Solicitor with the sole responsibility of providing aid to poor people.

In 1974, amid strong criticism, the Legal Aid Act of 1974 was passed which transferred to the Law Society Scheme responsibility for the civil legal aid work

¹⁴ Sackville - Legal Aid in Australia; paragraph 2.2

¹⁵ Sackville - Legal Aid in Australia; paragraph 3.1

¹⁶ Sackville - Legal Aid in Australia; paragraph 3.1

¹⁷ New South Wales Parliamentary Debates (Legislative Assembly 29 April 1943 2759)

¹⁸ Sackville - Legal Aid in Australia; paragraph 3.3

that had previously been undertaken by the Public Solicitor. The Public Solicitor's Office was thereafter confined to the conduct of criminal cases.

The Commonwealth

The Commonwealth's role in Legal Aid commenced in 1903 with the Judiciary Act, which provided that any person "*committed for trial for an offence against the laws of the Commonwealth may at any time within 14 days after committal but before the jury is formed apply to a Justice in Chambers or to a Judge of the Supreme Court of the State for the appointment of counsel for his defence. If it would be found to the satisfaction of the Justice or Judge that such a person is without adequate means to provide defence for himself, and that it is desirable in the interests of justice that such an appointment should be made, the Justice or Judge shall certify this to the Attorney General, who may if he thinks fit thereupon cause arrangements to be made for the defence of the accused person.*" [s.69 (3)]

In 1942 the Commonwealth established the Legal Service Bureaux. The original function of the Bureaux were to provide legal advice and assistance to members and former members of the armed forces and their dependents during World War II.

The Interim Forces Benefit Act 1947 provided the Bureaux, post war, with an ongoing role in providing legal services to former members of the armed forces and their dependents. The Legal Services Bureaux was staffed by salaried solicitors, many of them ex-servicemen, and clients could be referred to private solicitors for advice and representation where necessary. Twelve offices around Australia were opened and representation extended mainly to tenancy and pension cases.

COMMUNITY LEGAL CENTRES

The Community Legal Centre movement began in Australia with the establishment of the Fitzroy Legal Service in December 1972. It was an initiative of a small group of lawyers, law students and social workers and commenced its operations in premises of a very basic nature underneath the Fitzroy Town Hall.

The service had four broad objectives –

1. To provide an easily accessible free legal service for people in Fitzroy and neighbouring suburbs;
2. To function as a centre which would develop a local awareness of legal rights;
3. To forestall legal problems by practising preventative law; and
4. To provide legal education and foster community involvement.¹⁹

The service was originally staffed entirely by volunteers however it soon became clear that the service was addressing an important need in the community so funds were obtained to employ full time staff.

The success of the Fitzroy Legal Service prompted the development of a number of other similar services in Melbourne and Sydney, and by 1997 there were 151 Community Legal Centre's operating throughout Australia.

¹⁹ Legal Aid and Legal Need - M Cass and J S Weston 1980 page 30

The majority of Community Legal Centres are generalist centres providing services to their local geographic communities over the whole range of legal areas including family, criminal and civil law.²⁰

However over the past 10 years there has been a significant increase in the development of Community Legal Centres which specialise in particular fields of law affecting low income and disadvantaged groups such as tenancy law, consumer credit, mental health, immigration, welfare rights, environmental issues and women's issues.

Client involvement has always been central to the community legal centre movement's ideology. Community Legal Centres operated under the belief that by establishing networks of people facing similar problems they could overcome the sense of powerlessness their disadvantaged clients experienced when confronting the legal system. The formation of community groups and organisations was seen as a vehicle for solidarity with the capacity to create community campaigns and social movements addressing the social problems facing their clients. As well, the Community Legal Centres served as a resource for the community, providing assistance and advice.²¹

Community Legal Centres have made a great contribution to providing advice and information about the law, community legal education and the process of law reform. Most of the advice services and legal representation is provided by volunteers from the private and public profession. The National Association of Community Legal Centres estimates that collectively they assisted 300,000 people in 1997.

Funding for Community Legal Centres is now provided through a combination of Commonwealth and State Government Grants, State Law Foundations, Local Government financial and other assistance together with self generated revenues.

Although the Community Legal Centre Movement was initially perceived as radical and has at various times attracted criticism from government and the profession it has managed to use its grass roots attachments to local communities to effectively lobby Federal and State politicians.

The past decade has seen an increasing proportion of Community Legal Centre funding being provided by the Commonwealth. In 1990, the Commonwealth contributed \$2.6million to the CLC program and, by 1994 that had risen to \$8million. In 1998/99 the figure was \$22.2million and provision has been made in the budget for that amount to be increased by \$11.4million over the next four years.

The increasing investment by the Commonwealth in the Community Legal Services sector has brought with it the requirement that Community Legal Services enter into service agreements which are highly prescriptive in relation to the services that can be provided, as well as imposing extensive data reporting requirements. The Commonwealth in conjunction with the States is proposing to conduct reviews in relation to the Community Legal Centres operating in each of the States. The reports of the reviews in Victoria and South Australia have already

²⁰ Legal Aid for the Australian Community – page 40

²¹ The Transformation of Legal Aid: Can Community Clinics Survive, Frederick H. Zemans and Aneurin Thomas 1999 Oxford University Press

created a deal of controversy over a number of the recommendations including the suggestion that a number of existing services be amalgamated and others established in areas where there is no current coverage.²²

Whilst Governments might see Community Legal Centres as a less expensive method of delivering certain legal services than the private profession and legal aid commissions, their cost effectiveness is in no small measure due to the selfless efforts of volunteers, including not only volunteer lawyers, but also social workers, paralegals, and students. The National Association of Community Legal Centres calculated in 1997 that on average each community legal centre had two to three solicitors, three or four other paid staff and twenty one volunteers.²³

It is remarkable that Community Legal Centres have fared so well with the growing focus of governments (of both political persuasions) on economic rationalism with consequent cuts in social welfare spending. However, while governments may endorse community participation in Community Legal Centres, recent developments in the legal aid system indicate that increasingly the measure of success is the quantity of legal services purchased for every dollar. Community Legal Centres will have to compete for decreasing funding with the private profession, with commissions, with other welfare organisations and each other.²⁴

The challenge for the Community Legal Centre movement in the future will be to maintain its strong links with the community in order that it might continue to develop innovative solutions to old and new problems. The centres also need to be able to respond quickly to address new legal needs and resist the pressure to adopt more corporate-like structures which could see them turn into second rate legal aid commissions.

If Community Legal Centres travel much further down the economic rationalist road and become enmeshed in purchaser provider arrangements with government, then they run the real risk that it will be government dictating what services they will provide to the disadvantaged rather than was the case when the Fitzroy Legal Service commenced, of the centre showing the government what services the disadvantaged need.

ABORIGINAL AND TORRES STRAIT ISLANDER LEGAL SERVICES

The New South Wales Aboriginal Legal Service was an initiative of a group of young aboriginal activists in Sydney, assisted by a number of lawyers and academics including Professor J H Wootten who was then Dean of the Law Faculty at the University of New South Wales. Professor Wootten as Foundation President was able to gain the support of a number of New South Wales barristers and some solicitors and the service commenced operation formally in September 1970 by assigning cases to volunteer lawyers on its panel.²⁵

²² Impact Consulting Group Final Report Profiles of Community Legal Centres funded by the CLC Funding Program July 1998

²³ The Transformation of Legal Aid: Can Community Clinics Survive, Frederick H. Zemans and Aneurin Thomas 1999 Oxford University Press page 67

²⁴ The Transformation of Legal Aid: Can Community Clinics Survive, Frederick H. Zemans and Aneurin Thomas 1999 Oxford University Press page 70

²⁵ Interview between Paul Coe and John Faine – Lawyers in the Alice - Federation Press 1993 page 14

A grant of \$24,250.00 was subsequently obtained from the Commonwealth Department of Aboriginal Affairs and a full time solicitor, field officer and receptionist were employed at a store front office in Redfern.²⁶

The New South Wales service was modelled on the “neighbourhood law offices” which had been established in the United States under the auspices of the Office of Economic Opportunity. The service had two aims: firstly to provide aborigines with legal services in situations where their poverty and lack of access to lawyers had previously denied them legal help; and secondly to provide a channel through which aboriginal people could identify and articulate broader problems confronting them, in order to advocate reform of legislation, policies and the procedures of courts and other agencies.²⁷

Aboriginal Legal Services, based on the original New South Wales model, are now operating in all States and Territories of Australia. A feature of all these services is the employment of aboriginal field officers as para professional staff working both in the office and within the aboriginal community.

From its inception an essential component of the scheme was that it would be directed by the aboriginals whom it sought to benefit and who would best appreciate the needs and problems of their own community. Constitutions of all Aboriginal Legal Services provide for the governing bodies to consist substantially or entirely of aboriginal people, who are thus directly responsible for the employment of both legal and non legal staff and for all aspects of policy and administration.²⁸

In this respect, the ATSILS’s have a similar structure to the Community Legal Centres. However the Community Legal Centres rely heavily on the input from volunteers and most operate on much smaller budgets than the ATSILS which are responsible for providing a range of services more in line with what is expected from a legal aid commission. It may be timely to consider whether these structures are still appropriate today.

The Aboriginal legal services have been fortunate in the main in attracting competent and dedicated staff who are all too often called upon to carry enormous caseloads. They have achieved major improvements in the way Aboriginal people interact with the criminal justice system, if not the frequency of their contact with that system.

ATSIC is now responsible for funding ATSILS’s which now operate in every State and Territory and received approximately \$41.5million in total funding in the last financial year.

As part of a review of Commonwealth funded services, the new Howard Government announced that it was considering “mainstreaming” ATSILS by transferring the responsibility for delivering legal aid to aboriginal people to the State legal aid commissions. There was little support for this proposal from the States and ATSIC embarked upon a major program of reforming the structures and procedures which existed within the legal services.

²⁶ Sackville – Legal Aid in Australia paragraph 4.5

²⁷ Legal Aid and Legal Need - M Cass and J S Weston 1980 page

²⁸ Legal Aid and Legal Need - M Cass and J S Weston 1980 page 27

In April 1998, the Government endorsed the reforms that had been conducted in ATSILS since 1996 and announced, the "Cabinet had agreed to retain legal services within ATSIC".²⁹

FORMATION OF THE AUSTRALIAN LEGAL AID OFFICE

As I indicated earlier, many of the State legal aid schemes were based largely on the system that was established in the United Kingdom under the Legal Aid and Advice Act (1949), following the recommendations of the 1945 Rushcliffe Committee. By 1970 however, there was growing dissatisfaction with the adequacy of the "private practitioner" model both in the United Kingdom and Australia. Those criticisms related primarily to the limited scope of the schemes, to excessive caution in granting assistance, and to the high cost of the services provided.³⁰

In its first report to Government in February 1974, the Legal Aid Review Committee advised *"The winds of change both refreshing and stormy are blowing through the legal profession, a profession which has been described as the largest of the remaining cottage industries. It sees itself as a service industry entrusted by its fellow citizens with the duty of protecting their personal, corporate and quasi corporate rights in a Rule of Law society..."*

*Most of the existing legal aid facilities are inadequate in scope and structure. They are not sufficiently comprehensive in types of matters handled or in numbers served and are under-financed. The operational structure of the existing bodies renders them inaccessible to many people in that they are only located in capital cities, operate only during working hours and are poorly advertised."*³¹

In the early 1970's in Australia and the UK, there was increasing interest in an alternative approach to the provision of legal aid services in line with the developments that had occurred in the United States in the early 1960's as part of the Federal Governments "war on poverty". The United States Legal Services Program instituted in 1965 established networks of neighbourhood law offices which employed salaried staff to work full time on the problems of legal aid clients.

Some American commentators had described the limitations of the traditional private practitioner schemes which saw legal aid as a kind of armory in which the poor are outfitted before trial with the weapons naturally possessed by the rich. Those programs were seen as entrusting the poor with a fairly wide measure of individual responsibility for recognising their problems, for bringing them to the attention of the program, and for deciding how to proceed once legal aid was granted. They argued furthermore, that by emphasising individual rights and responsibilities the programs only coincidentally attacked problems that transcended individual interests or capacities.³²

On the 25th of July 1973 the Attorney General, Senator Murphy announced that the Federal Government intended to establish the Australian Legal Aid Office. On the 13th of December 1973 the Attorney General announced to the Senate the

²⁹ ATSIC, "Aboriginal Legal Service Reforms", Media Release 19/4/98

³⁰ Sackville - Legal Aid in Australia; paragraph 1.15

³¹ Australian Legal Aid Review Committee Report February 1974 page 10

³² Legal Aid: Modern Themes and Variations (1972) 24 Stanford L. Review 393

reasons behind his Government's decision to establish the ALAO. The Attorney General said that –

“the Government has taken action because it believes that one of the basic causes of the inequality of citizens before the law is the absence of adequate and comprehensive legal aid arrangements throughout Australia..... The ultimate object of the Government is that legal aid be readily and equally available to citizens everywhere in Australia and that aid be extended for advice and assistance of litigation as well as for litigation in all legal categories and in all courts.

There are four major problems that, I believe, need urgent attention. First, the need to provide on an equal basis throughout Australia legal advice and assistance that will fill the gap left by the Law Society or Legal Aid Committee Schemes for aid in litigation and to see that advice and assistance reaches disadvantaged people; Second, the need to provide legal aid in divorce cases and in proceedings ancillary to divorce; Third, the need to provide legal aid for representation in magistrates courts; and Fourth, the need to avoid the bottomless pit of ever increasing costs of providing legal aid.’³³

The ALAO was established administratively following the Ministerial announcement in the Senate. It was intended that it would replace the Legal Service Bureaux and provide legal assistance on all matters of Federal law and on all matters of both Federal and State law to persons for whom the Australian Government had a special responsibility such as pensioners, aborigines, ex-servicemen and migrants.

The Australian Legal Aid Office had a short but turbulent history.³⁴ In April and May 1974 ALAO offices commenced operations in cities and towns in Queensland, Tasmania, Victoria, Western Australia, South Australia and New South Wales. By June 1974, ALAO's around Australia employed 80 staff of whom over half were salaried lawyers. By the end of 1974 over 227 staff were employed by the ALAO, with the number of salaried lawyers totalling 95.³⁵

The intention of the ALAO was to provide a community service of advice and assistance, including assistance in litigation, in co-operation with community organisations, referral services, existing legal aid schemes and the private legal profession. Legal advice was to be available to any person in need without a formal means test. The office would also provide assistance in a wide range of litigation using a means and needs test to determine eligibility for such assistance.

The regional offices were intentionally designed to promote a “shop front” image, the belief of the Director being that these offices were a major step in making legal services accessible to disadvantaged people who were unfamiliar with the law and with lawyers.³⁶

The ALAO expanded rapidly throughout 1975 with greater community awareness leading to an increased demand for its services and an increase in the volume of casework conducted by salaried lawyers or referred to the private legal profession.

³³ Ministerial Statement, Attorney General, Senate, 13 December 1973, Parliamentary Debates page 2802.

³⁴ Legal Aid and Legal Need - M Cass and J S Weston 1980 page 24

³⁵ Legal Aid for the Australian Community National Legal Aid Advisory Committee page 26.

³⁶ Role of the Australian Government in Legal Aid – Address by Mr J P Harkins 23 November 1994 to Sydney University Law Graduates Association.

By 30 June 1975 ALAO's throughout Australia were interviewing some 10,000 clients a month with referrals of legally assisted matters to the private legal profession costing an estimated \$1 million per month.³⁷

Although it was intended that the ALAO would be established by legislation as an independent Federal statutory authority, the Legal Aid Bill 1975 never passed through the Senate. Consequently the staff of the ALAO remained employees of the Australian Government and *"as another administrative unit within an established bureaucratic empire, the nature and style of the services of the ALAO were inevitably determined on a day to day basis by senior personnel of the Minister's department, the Public Service Board and Treasury. As such, the ALAO, lacking statutory independence, remained from the outset highly vulnerable to internal manipulation and/or frustration of Senator Murphy's original intent"*.³⁸

LEGAL AID COMMISSIONS

The emergence of the State and Territory Legal Aid Commissions as the major providers of legal aid services has been a significant feature of the Australian legal system over the past 20 years. Following the dismissal of the Labor Government in 1975 the incoming Government put on hold the plans to provide a legislative basis for the Australian Legal Aid Office. A review of the existing regime of legal aid led to the enactment of the Commonwealth Legal Aid Commission Act of 1977 which established a Commonwealth State Co-operative Administrative and Advisory structure which envisaged legal aid being provided through independent statutory commissions in each State and Territory. As the Attorney General Durack put it in October 1977,

*"The new scheme is based upon the principles of co-operative federalism. Instead of the Federal Legal Aid Service providing legal aid in the 'Federal' area alongside State and law society legal aid services providing assistance in the 'State' area the Commonwealth Government has proposed a co-operative exercise between the Commonwealth and the States. Under the proposed scheme, legal aid in a State or Territory will be provided by a single independent statutory commission established under State or Territorial legislation. While operating in conjunction with a Commonwealth monitoring, co-ordinating and advisory Commission. It is intended that each State Commission will take over the operation and staff of existing Australian Legal Aid offices, and State and Law Society schemes in that State. Each Territorial Commission will do likewise."*³⁹

In 1977 the first Legal Aid Commission was established in Western Australia. By 1981 Commissions were also operating in New South Wales, Victoria, South Australia, Queensland, and the ACT. By April 1987 the ALAO offices, with the exception of those in Tasmania and the Northern Territory, had been merged with the new Legal aid Commissions. The Northern Territory and Tasmania established their Commissions in 1990 and 1991 respectively.

The Legal Aid Commissions were established as independent statutory corporations constituted by boards of commissioners as prescribed by the governing legislation. For example the NT Legal Aid Commission was constituted by the Legal Aid Act 1990 (NT) which provides for a Commission comprising a Chairman, a person nominated by and representing the Territory Attorney

³⁷ Legal Aid for the Australian Community National Legal Aid Advisory Committee page 27.

³⁸ Legal Aid and Legal Need - M Cass and J S Weston 1980 page 2

³⁹ Address by Senator Durack to Nth Queensland Legal Convention 9 October 1977.

General, a person nominated by the Territory Treasurer, persons nominated by the Territory Attorney General on the recommendation of the NT Law Society, a person representing community interest together with two nominees of the Commonwealth Attorney General and an elected staff representative. The Director is also a member of the Commission.

The primary functions of Legal Aid Commissions are to provide legal assistance by referral to private legal practitioners or salaried lawyers employed by the commission in accordance with the constituent legislation. In the performance of that function the Legal Aid Commissions are required to have regard to a range of matters affecting the efficiency and effectiveness of providing legal assistance.

The Legal Aid Commission legislation also incorporates a detailed scheme for the administration of applications for legal assistance.⁴⁰

In 1981 the Commonwealth Legal Aid Commission was transformed into the Commonwealth Legal Aid Council. The Council had similar functions to the Commission but it was primarily to be a body *“keeping under review the need for legal assistance in Australia and making recommendations from time to time to the Attorney General as to the most effective, economical and desirable means of satisfying that need.”*⁴¹

The council was subsequently replaced by two advisory bodies: The National Legal Aid Advisory Council, (NLAAC) all of the members of which were appointed by the responsible Commonwealth Minister; and the National Legal Aid Representative Council, (NLARC) with a membership which mainly comprised a Chairperson and Director of each Legal Aid Commission together with representatives from the Community Legal Centres.

In 1991, NLARC was abolished. NLAAC was overtaken by the establishment of the Access to Justice Advisory Committee headed up by Professor Ronald Sackville QC in October 1993, it was asked to consider: *“Ways in which the legal system could be reformed in order to enhance access to justice and make the legal system fairer, more efficient and more effective”*.⁴²

The committee presented its report to Government on 2 May 1994 and its recommendations in relation to legal aid included the following:

“The object of equality before the law is unattainable if people experience barriers that prevent them from enforcing their rights. The most obvious barriers are the financial difficulties faced by people who cannot afford legal advice and representation. But there are others. For example, cultural barriers may inhibit recent migrants from seeking the help they need.....Many Australians living outside population centres face a geographical barrier to obtaining legal advice and representation. Equality before the law requires that measures be taken to overcome these barriers. In this respect, the legal aid system is critical to improving access to justice.

⁴⁰ Legal Aid for the Australian Community page 37

⁴¹ The Honourable PD Durack, Attorney General, Second Reading Speech, Parliamentary Debate Senate 14 May 1981 - 1975

⁴² Access to Justice Report of Access to Justice Advisory Committee 2nd May 1994 page VI.

It is not enough that financial assistance be provided for litigation. While important, this will not of itself remove the barriers to justice. Legal aid should be (and in practice often is) more broadly directed.....

.....In recent years, funding for legal aid has kept pace with the rate of inflation. However, allowance has not generally been made for identifiable factors that increase the demands on legal aid services. These include such factors as deteriorating economic conditions, change in population, a greater emphasis on law enforcement (generating a need for criminal legal aid) and court decisions imposing obligations to provide legal assistance in serious criminal cases.....

.....We also identify deficiencies in the structural arrangements for the provision of legal aid. There are, for example, marked differences in the means tests and eligibility criteria applied by legal aid commissions throughout Australia. There is also insufficient coordination among legal aid commissions on issues relating to infrastructures (such as computer systems) and management issues.

In order to achieve the goals of national equity and efficiency, we propose the establishment of an Australian Legal Aid Commission (ALAC). This body, which should have only a small membership, should be responsible (among other things) for:

- developing minimum legal aid eligibility standards throughout Australia;*
- monitoring and coordinating legal aid commission to identify best practices and reduce duplication; and*
- administering Commonwealth legal aid programs, such as a national legal aid fund for public interest test cases.*

The ALAC should be assisted by a coordination group, including all directors of legal aid commissions and a representative of community legal centres.⁴³

Although as a response to the committees report the Australian Legal Assistance Board was established with the aim of informing the Federal Government on legal aid policy, that body was a casualty of the change of government in 1996 and there is now no government sponsored body that is concerned with developing future legal aid policies.

In 1987/88 total funding for Legal Aid Commissions was \$156million, \$85.2million of which was provided by the Commonwealth, \$18.5million from the States and \$29million from the interest on solicitors trust accounts. Ten years later (1997/98) total funding for Legal Aid Commissions was \$254million of which the Commonwealth provided \$111million, States and Territories \$85.6million and the statutory interest schemes only provided \$27.5million.⁴⁴

Historically a great deal of money for legal aid had come from interest on trust accounts held by solicitors. In 1991/92 Legal Aid Commissions received a total of \$45.6million from the statutory interest schemes. In 1998/99 that figure had declined to \$25.6million, so it is clear that in real terms the income from this source has declined sharply.

⁴³ Access to Justice an Action Plan – Overview p xxxvii-xxxviii

⁴⁴ Total Income also includes self generated income with all the costs recovered and client's contributions - \$24million in 1987/88 and \$29million in 1997/98.

There are several reasons for this decline. First interest rates have fallen in most jurisdictions, the amount of conveyancing conducted by solicitors has decreased and new banking technology has reduced with the amount of time client's funds stay deposited in solicitors trust accounts.

The implication of declining interest income is that the States have had to significantly increase their share of Legal Aid Commission funding. For example in 1988/89 the Victorian Government only contributed \$0.5million to the Victorian Legal Aid Commission with the statutory interest scheme making up a further \$18million to account for the State share. In 1998/99 the Victorian State Government had to contribute \$22million to VLA with only \$3.5million being received from statutory interests accounts.⁴⁵

During the 1996 election campaign the Coalition in its Law and Justice policy confirmed the place of the national legal aid scheme as a "Central element in providing access to justice" and promised that if it were elected that the Coalition would "maintain current funding levels of legal aid funding as well as funding to Community Legal Centres" it also indicated the Coalition would look for ways to reform legal aid and reduce costs, and establish a National Legal Aid Access Forum.⁴⁶

In June 1996, following the election of a Coalition Government, the new Commonwealth Attorney General wrote to the State and Territory Attorneys giving notice of the Commonwealth's intention to terminate the existing legal aid agreements as from the 30th of June 1997. Shortly afterwards as part of the release of the 1996/97 Federal Budget the new Commonwealth Attorney General announced that Federal outlays on Legal Aid would be cut by \$33.16million in the 97/98 financial year. He explained the reasoning behind the Government's decision to renegotiate the legal aid agreements on the basis that the Commonwealth:

*"believes it has a responsibility to provide legal aid for matters arising under Commonwealth Law and that the State and Territory Governments have responsibility for matters arising under their laws. Put simply, if the government passes a law it must be prepared to meet the Legal Aid costs arising in relation to that law. From 1997/98 the Commonwealth will no longer provide funds to support the growing demand for legal aid for matters arising under State or Territory laws."*⁴⁷

The Coalition was roundly criticised for breaching an election promise to maintain legal aid funding however the Attorney General responded that

*"The new arrangements would simply withdraw an unjustified subsidy to State and Territory Governments who had been using their Commonwealth funds to provide aid in State and Territory matters. If the States and Territories now meet their proper responsibilities, the total funding available to legal aid will remain"*⁴⁸

⁴⁵ Access to Justice Advisory Committee Report – para 9.25

⁴⁶ Professor Don Fleming – Paper presented to National Legal Aid Conference in Vancouver 16-18 June 1999 "Recent Developments in Australian Legal Aid: The Experience of the first Howard Government:

⁴⁷ Attorney General's Portfolio 96/97 Budget Summary, page 8

⁴⁸ Commonwealth Attorney General, "States Should Pay Their Share of Legal Aid", News release 24 October 1996

Apart from the funding cuts the Commonwealth indicated a new agenda in relation to legal aid. The Federal Government was now committed to establishing a clear link between its policy priorities and expenditure of Commonwealth legal aid funds, and to become more interventionist and assertive in the conduct of its legal aid policies. This was not an altogether new policy direction by the Coalition Government. In its response to the Access to Justice Report in the 1995 Justice Statement, the Keating Labour Government signalled an expectation that in future the national legal aid scheme should produce specific outcomes reflecting the Commonwealth's policy concerns.⁴⁹

With the benefit of hindsight, the first signs of a desire on the part of the Commonwealth to distance itself from the funding morass, of increasingly expensive State criminal cases can be found in the Labour Government's 1995 Justice Statement – *“There is no question that legal aid must continue to be available to those who need it most. Unfortunately, people requiring assistance particularly in the areas of family law and civil matters, have not always had access to it, due to the priority being given by Commissions to the funding of criminal matters. The Commonwealth is committed to a reassessment of the priorities that are being given to funding all types of cases to ensure that funds go to those most in need of assistance.*

*While the Government recognises that anyone accused of a serious criminal matter needs legal representation, providing assistance in criminal matters can not always be at the expense of legal assistance in other matters. These legal problems have different but equally serious, consequences for the people concerned. For example, women seeking protection from violence may have their lives at risk and an unemployed worker and his or her family may face eviction proceedings without access to legal assistance.*⁵⁰

Despite a number of the States initially raising the prospect of the Commonwealth being forced to go it alone and develop its own legal aid system, all States and Territories eventually entered in to new three year legal aid agreements with the Commonwealth. The relevant Commonwealth funding levels for the three years of the agreements are set out below.

Commonwealth funding of the national scheme 1996-99⁵¹

State/Territory	Payments 1996/97 A\$m	Payments 1997/98 A\$m	Funding 1998/99 A\$m	Population (9/97)	A\$/ per head of pop 1997/98m
New South Wales	40.967	31.100	31.100	6,293,000	4.94
Victoria	35.502	32.955	27.750	4,617,400	7.14
Queensland	19.821	18.574	18.000	3,417,400	5.44

⁴⁹ Professor Don Fleming “Recent Developments in Australian Legal Aid: Experience of the First Howard Government” paper presented to the International Legal Aid Conference Vancouver, June 1999

⁵⁰ Attorney Generals Department Justice Statement May 1995 page 102

⁵¹ Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System, Third Report*, (Canberra, Senate Printing Unit, June 1998), p.4

South Australia	10.091	9.379	9.000	1,418,600	6.60
Western Australia	12.546	8.285	8.250	1,805,400	4.59
Tasmania	4.442	3.720	3.720	472,700	7.87
Australian Capital Territory	2.921	3.147	3.006	309,200	10.17
Northern Territory	2.011	2.436	2.011	188,700	12.91
Totals	128.303	109.596	102.837	18,588,600	5.90

The payments and funding data are based on figures supplied by Commonwealth Attorney-General's Department to the Senate Inquiry in May 1998.

The new agreements required the States and Territories to act as agents in ensuring that Commonwealth funds were expended in accordance with its scheduled priorities. A variant of the "purchaser/provider" model had been substituted in lieu of the old intergovernmental co-operative model in which legal aid was seen as a partnership between the State and Commonwealth Governments and the private legal profession.

There has been a paradigm shift in the manner in which eligibility for legal aid is determined in relation to matters arising under Commonwealth law. The legal aid commissions no longer have responsibility for setting the guidelines and priorities for the granting of assistance in Commonwealth matters. This has passed from a representative board to the Commonwealth bureaucracy.

One of the most controversial changes to the Coalition's Legal Aid Guidelines related to immigration and refugee cases. Since the 1st of July 1998 Legal Aid has generally not been available for immigration and refugee cases. This is an area where the Immigration Department has long seen involvement of lawyers in immigration and refugee matters as less than helpful; it no doubt welcomed these changes.

The new Commonwealth policies in relation to legal aid were the subject of a wide-ranging inquiry by the Senate Legal and Constitutional Affairs Committee. The Senate Inquiry commenced in September 1996 and released three reports the first of which was tabled on the 26th of March 1997 and the final report was tabled in June 1998. The Inquiry received evidence from numerous individuals and organisations associated with the delivery of legal aid services including officials from the Commonwealth Attorney Generals Department. The majority report concluded that the changes made by the Commonwealth to the legal aid system were based on unacceptable and inadequate data. The committee was highly critical of the Government's policy changes in relation to legal aid and made numerous recommendations for reform however the only real point the Government appeared to pick up on was the need to secure improved data from Legal Aid Commissions and Community Legal Centres.

The new legal aid agreements required all Legal Aid Commissions to consider installing the LAOFFICE computer system which had been developed by the Queensland Legal Aid Commission. This has now occurred, with New South Wales being the last of the legal aid commissions to install the system earlier this year. Legal aid commissions now produce nationally consistent data which enables timely analysis of the demand for various types of legal services across the country. National Legal Aid, a body which represents each of the Directors of the eight Legal Aid Commissions is now publishing on its website the monthly statistics detailing the services provided by each of the Legal Aid Commissions.

THE FUTURE

It appears that the legal profession may be losing its once dominant role in formulating legal aid policies. The Law Council's campaign to have the legal aid funding cuts overturned has fallen on deaf Government ears. Legal Aid Commissions such as VLA have restructured their management structures so that the Law Institute and Bar Council no longer have representatives on the board. There also seems to be a determination on the part of the Commonwealth to encourage "non legal" responses to areas of disputation that have traditionally been addressed through the involvement of lawyers and the courts.

In an address to the National Press Club on the 27th of October 1999 the Attorney General Darryl Williams QC outlined the Government's policy on Family Law for the future. He announced – *"The coalition's agenda is to shift the focus in family law away from legal remedies. People want simpler, faster and cheaper methods to resolve disputes rather than protracted litigation. Not only will couples feel better about the results, they are more likely to stick to their agreements in the long term."*

However, research by the Justice Research Centre referred to by the Australian Law Reform Commission indicates *"that where parties have representation they are more likely to attempt and to be successful in negotiations to resolve the matter. The converse is that unrepresented litigants are less likely to resolve their dispute through negotiation and more likely to have the matter dismissed or discontinued or to withdrawn or receive default judgement"*.⁵²

It is ironic that at a time when Governments are moving to reduce the involvement of the profession in both formulating legal aid policy and providing services, that legal aid fees are lower than ever before. An analysis of legal aid activity levels in 1996 which also took into account the decline in the real level of the funding base, revealed that the legal profession were subsidising the legal aid system to the extent of \$65million a year.⁵³

The fees paid by legal aid commissions to private practitioners accepting family law referrals are now approximately half the scale rate. We are massively dependent on the goodwill of the profession to keep the system afloat.

Legal aid directors would be the first to admit that we need systemic reform to bring down the cost of justice for all Australians not just legal aid clients. However, legal aid only accounts for 4% of the money spent in the Australian legal services

⁵² Review of the Federal Civil Justice System: ALRC discussion paper 62

⁵³ Meeting Tomorrow's needs on Yesterdays Budget - NLA July 1996

market so it is not realistic to expect financial restraints on legal aid providers to drive the reform process alone.

Whilst governments have a legitimate interest in seeking greater cost effectiveness and accountability of legal aid services they need to be developing policies which will address the legal aid needs of tomorrow.

As Professor Don Fleming stated in Vancouver last year,

“the citizen’s access to the legal system is more important today than ever before. Many of the reasons for this situation are associated with modern legal regulation in welfare capitalism.

*.....Since the early 1960’s Australian society has witnessed the steady expansion of the legal machinery of the welfare state. Even its “downsized” version in the 1980s and 1990s has remained “a giant machine for making and applying law and for social control which is exercised through law. Moreover the “consumer – citizens” of the market welfare state have notionally greater needs for access to legal services than their predecessors, as consumerisation, privatisation and corporatisation have encouraged pro-active, legally assertive styles of citizenship”.*⁵⁴

So, it is not just a matter of addressing the same needs with the same but less expensive services. We need to identify the areas of future need for legal aid and start developing innovative strategies to deal with those issues now.

The courts have played a part in determining future legal aid policy through the decisions in Dietrich v Queen⁵⁵ and In re K⁵⁶. Those decisions, which I hope we would all welcome, have effectively created an obligation on the state to provide legal aid in serious criminal matters and in family law cases where there are children at risk. However, the resulting readjustment of legal aid priorities has meant that other areas of need must now go unanswered.

It cannot be left to government alone to develop future legal aid policy. Governments have a habit of believing in the infallibility of their own legislation and tend to be dismissive of interests which are contrary to their own. Neither can it be left to the profession, the courts or legal aid commissions to be the sole arbiters of legal aid policy.

We need to strengthen and nurture the co-operative legal aid partnership between governments, independent legal aid commissions, indigenous and community legal services and the legal profession in order to navigate the course ahead. The Australian community has, in the main, been well served by this partnership which has produced a legal aid system which is regarded as one of the most effective and efficient in the world. This partnership must continue to survive if we hope to meet the legal needs of disadvantaged Australians in the next decade let alone the next century.

⁵⁴ Professor Don Fleming “Recent Developments in Australian Legal Aid: Experience of the First Howard Government” paper presented to the International Legal Aid Conference Vancouver, June 1999

⁵⁵ Dietrich (1992) 177 CLR 292

⁵⁶ K, Re (1994) 117 FLR 63

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