Professional Conflict and Legal Services:

The Legal Aid Debate in Australia, 1972-1982

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TABLE OF ABBREVIATIONS

ABFRJ	American Bar Foundation Research Jnl.
ABAJ	American Bar Association Jnl.
ACOSS	Australian Council of Social Services
ACTR	Australian Capital Territory Reports
AJS	American Jnl. of Sociology
ALAO	Australian Legal Aid office
ALARC	Australian Legal Aid Review Committee
ALJ	Australian Law Jnl.
ALJR	Australian Law Jnl. Reports
ALR	Australian Law Reports
ALS	Aboriginal Legal Service
ANU	Australian National University
ANZJC	Australian & New Zealand Jnl. of Criminology
ANZJS	Australian & New Zealand Jnl. of Sociology
ASR	American Sociological REview
BJS	British Jnl. of Sociology
CAB	Current Affairs Bulletin
FLS	Fitzroy Legal Service
LSB	Legal Service Bulletin
LCA	Law Council of Australia
LIS	Law Institute Jnl.
MULR	Monash University Law Review
NLR	New Left Review
NSWIT	New South Wales Institute of Technology
NSWLR	New South Wales Law Reports
QIT	Queensland Institute of Technology
RMIT	Royal Melbourne Institute of Technology
SACOSS	South Australian Council of Social Services
SMH	Sydney Morning Herald
UCLALR	University of California at Los Angeles Law Review
UNSW	University of New South Wales
UNSWLJ	University of New South Wales Jnl.
UCOSS	University Council of Social Services
WACOSS	West Australian Council of Social Services

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Schedule of Interviews

7/9/84	Julian Disney	Welfare Rights Centre. Formerly Chairman of New South Wales Law Reform Commission and the commission's legal profession inquiry.
20/2/85	Madeleine Campbell	Principal Legal Officer, Legal Aid Branch, Attorney-General's Department, Canberra.
15/11/85	Alan Nicol	Education Officer, Legal Aid Commission of Victoria. Deputy Executive Director, Law Institute of Victoria, 1974-1979.
15/11/85	Julian Gardner	Director, Legal Aid Commission of Victoria. Former member of Commonwealth Legal Aid Council.
24/2/86	Robert Ellicott, Q.C.	Attorney-General of Australia 1976-1977, formerly Commonwealth Solicitor-General.
27/2/86	Mark Richardson	Executive Director, Legal Aid Commission of New South Wales.
13/3/86	Mr. Justice Lionel Murphy	Justice of the High Court of Australia, Attorney-General of Australia, 1973-1975.
20/3/86	Terry Murphy	Principal Legal Officer, ALAO, New South Wales.
21/3/86	Sue Armstrong	Lecturer in Law, University of New South Wales. Formerly Senior Research Officer, Commonwealth Law and Poverty Commission, and Director of Legal Services Commission of South Australia.
17/10/86	Joe Harkins	Retired. National Director of Australian Legal Aid Office, 1974-1977. Former member of Commonwealth Legal Aid Council.
17/10/86	Peter Duncan, MHR	Attorney-General of South Australia, 1975-1979.
22/12/86	Ken Kershaw	Solicitor. Legal Aid Manager, Law Society of New South Wales, 1968-1979. Referral Director, Legal Services Commission of New South Wales, 1979-1984.

Summary

The bulk of the sociological literature on the professions and profession-state relations is underlaid with a misleading ideal-type of the free-market practitioner whose situation is contrasted from those employed in large bureaucracies. The autonomy, status and privileges of many professionals are seen as threatened by state encroachment in the form of direct control of professional work as an employer, or through the regulation of the market for professional services. 'Deprofessionalisation', or even 'proletarianisation', are seen as resulting from this.

The need for a more sophisticated view of state-profession relations which considers their complex, mutual effects is suggested by the history of the legal profession and legal aid policy in Australia in the 1970s and 1980s. In this period, new professional groups 'engaged' the state to expand public legal services and fill the unmet 'legal needs' of the poor and disadvantaged. An increased state responsibility for equal access to the legal system was evident in the rapid development of services in the Whitlam era. Despite the election of a conservative Federal government at the end of 1975 and the subsequent restructuring of legal aid on state lines, this responsibility, and the increasing cost of services, have not waned.

This brief, rapid expansion of salaried government aid led to a political mobilisation of the legal profession's traditional elites through the various state Law Societies. But the process of state engagement and the development of a diverse and vocal 'legal services' segment of the profession has altered its internal political balance. The Law Societies now have a much diminished influence and control over legal aid policy and administration. These developments parallel important changes in the size, social composition, training and

work of the profession, as well as threats in the legal market from oversupply, economic downturn and rival occupations, which made an increase in the demand for legal services necessary.

The declining influence of some lawyer groups over legal aid and related areas of policy, has not meant an overall loss of status or work autonomy for Australian lawyers. It is lawyers per se who still control these matters and who benefit from the public subsidisation of the legal market, expanded work, and the legalisation of a greater number of social problems and disputes.

Introductory Note: Sources and Methods

This work is a study of the contemporary development of mainstream government legal services in Australia and related debates. Its particular focus is the decade between 1972 and 1982 in which major changes occurred, but some description and analysis of more recent events are given. A limited discussion of the history and expansion of Aboriginal Legal Services and community legal centres in Australia is also provided where appropriate.

Considerable background information was obtained from published materials including the now extensive international literature on legal aid and legal services. But there are still comparatively few Australian academic and research publications in this field. These have been supplemented by information from such other sources as government reports, inquiries and news releases, the annual reports of Law Societies and various legal aid bodies and commissions, Hansard, reports of legal conferences, and articles and letters from several newspapers.

This study also relies upon a large amount of unpublished material that can be obtained on request. Some of this was freely available through the libraries of the Legal Profession Inquiry of the New South Wales Law Reform Commission and the Legal Aid Section of the Attorney-General's Department in Canberra (formerly CLAC). This material also includes dozens of rival submissions and papers to officials concerning proposed legal aid reforms, as well as documents and private correspondence. Most of this valuable material was given by former lobbyists who acquired it in undisclosed ways, and would not have been available by any official means or straightforward requests.

Information from these sources has been supplemented by a limited number of 'elite' interviews. These were conducted with either key historical figures or persons in close proximity to debates and reforms. This assisted the

interpretation of the above sources and gave further information regarding the history of lobbying, policy and organisational changes. Transcripts of these interviews (some of which run for several hours) are also available on request.

Statistics regarding ALAO lawyers were obtained from the Planning and Statistics Service Section of the Commonwealth Public Service Board. Unfortunately, its records are imperfect and information regarding ALAO recruits prior to 1976 is still being sought from other sources. The level of information available on state commission lawyers is highly restricted. Statistics regarding the funding and operation of various legal aid bodies are more freely available and comprehensive in the 1980s. These were taken from either published state commission reports, reports of the now defunct Commonwealth Legal Aid Council or from the Legal Aid Clearinghouse Bulletin published by the Commonwealth Attorney-General's Department.

CHAPTER ONE

PROFESSIONS, LAWYERS AND CONTEMPORARY CAPITALISM

PART A:

The Sociology of the Professions

Early sociological discussions of the role of professional groups in capitalist society commonly adopted a conservative and apologetic stance. But as Ben-David notes, they were highly conscious of and structured by debates regarding the nature and historical role of the state and class divisions.[1] This was reflected in positive depictions of the professions as a curative for the ills of bourgeois society, including worker alienation, the selfish individualism of the market, and most importantly, class conflict. A classic example is Durkheim's vision of a guild-socialism based on the organisation of many occupations on professional lines.[2] Their resulting sense of service, ethical duty, and communal bonding would counterbalance the anomic moral condition of complex industrial societies without a resort to models of socialism founded on the extension of state power.[3]

More recent positive accounts of professionals were offered by theorists in the political turmoil of the inter-war years. Mannheim saw them as part of a 'declasse' or socially unattached stratum of intellectuals which might become the bearers of an objective, universal societal interest transcending the endemic factionalism of German politics.[4] English writers including Tawney saw major political consequences in the imputed altruism and social responsibility of professional groups which could counter the self-interest of the capitalist class.[5] In their 1933 classic, The Professions, Carr-Saunders and Wilson also gave an overall flattering account.[6] The stabilising effects of the spread of professional associations imbued with traditional values could protect the liberal democracies

from revolutionary movements including communism. In a period of economic strife these organisations, they argued, stood 'as rocks against which the waves raised by these forces beat in vain.'[7] This vital role in the protection and reinvigoration of the existing social order was put another way by Marshall. The altruism of new professional groups working within the state rather than the private market, and their ideal of personal service would humanise the expanding public welfare systems of advanced capitalism and thereby offer 'for the sick and suffering democracies a peaceful solution to their problems'.[8] In the same period, Parsons noted some of the similarities between the capitalist and professional organisation of work.[9] But he also claimed that the smooth functioning of 'society', meaning contemporary liberal capitalism, depended on these occupations. A spreading of their public-spiritedness and self-regulation would help overcome the old narrow choice between market capitalism and state control of economic production.[10] He repeated this same idea some three decades later to claim that the 'professional complex' which dominated modern societies could 'render obsolescent the primacy of the old issues of political authoritarianism and capitalistic exploitation.'[11]

These rather monumental claims for the professions viewed them as the key to the resolution of the ill effects of the social phenomena which formed the central intellectual concerns of both Marx and Weber: the selfish egoism and exploitation of capitalism, and the 'iron cage' of the bureaucratic rationalisation of work and social life, possibly in the form of expanding state control of these spheres. However, discussion in terms of these broader concerns regarding capitalism and the state receded in the post-war years. With a new general domination of research by American-derived empiricism and an increasingly atheoretical stance, Ben-David concluded in his 1963 review of the field that 'the class nature of professions has become a peripheral issue in sociology'.[12]

In this same period, the structural-functionalist school inspired by Parson's

later work produced ahistorical accounts such as those of Goode and Barber which stressed the essential rationality of professional work and colleague relations.[13] Johnson noted that this reified various elements of professional ideology, particularly the claims regarding altruistic service and a unitary professional culture and ethics.[14] This was reflected both in accounts of the development and reproduction of homogeneous professional 'communities' with characteristic shared beliefs and culture, and in the ongoing debate surrounding the appropriate definition of a 'profession'.[15]

This took the form of various attempts to isolate the distinguishing traits of these occupations.[16] The resulting lists recited features which occupations accorded this title claimed to hold; supporting, either knowingly or unknowingly, their particular claims and privileges. For example, Barber in 1963 noted such characteristics as shared esoteric knowledge and work autonomy, and stressed altruistic service, shared ethics, collegiality and a 'community orientation', all rendering the professions 'indispensable in our society as we know it and as we want it to be'.[17]

The general result for the field of this 'trait' approach, with its methodological subjectivism and arbitrariness, was the construction of a narrow ideal-type of the free-market, independent solo practitioner. Johnson also observes that this carried a particular Anglo-American bias, ignoring the varied forms of professionalism in other nations and periods.[18] It suggested a common unilinear model of professionalism, which reinforced a tendency to disregard the development of salaried professional employment, or to view it as a deviant case. The resulting sociological representation of professionals, corresponds to a self-image which Larson argues has become more important as an ideological defence of professional autonomy and privileges against encroachment by the state and corporate capital, as their employment in large bureaucratic organisations increases.[19] But these broader issues were outside the focus of this

literature. Discussion of professional relations to the state, class structure, or even to particular economic and political elites, remained neglected.

There were some exceptions to this approach in the post-war period. For example, C.W. Mills conceived of many professional groups as part of an expanding middle-class of white-collar employees, readily serving as the agents of American corporate and political elites.[20] But the principal challenge to the functionalist school came in the 1960's from the neo-Chicago (or 'interactionist') group of occupational sociologists, comprising Hughes and his followers. The latter stressed the ongoing conflicts within established and aspirant professions across a constantly shifting occupational order that the professions could not be marked-off from in an a priori fashion, as well as the power relationships that exist between professions and with various client groups.[21] The subjective trait approach to designation was replaced by a historically objective though relativist view of the professions as those occupations which had successfully acquired that honorific title by social action.[22]

The close study of social relations at the level of individual and group interaction, produced a wealth of descriptive material regarding client relations, the difficult socialisation of students in training institutions into the professional 'role', and rich accounts of the link between changing work relations and practices in such fields as medicine and psychiatry and the professionalisation of new groups.[23] These recognised the self-interest involved in the pursuit of professional status, and the related importance of the representation of the group interest as the community or public interest in professional ideology.

Most importantly, this 'process approach' stressed the dynamic and constantly evolving form of the professions. The functionalist view of a single community of professional colleagues was rejected for an emphasis on their heterogeneous internal form with constant conflicts around the exclusion or inclusion of certain groups in the market and workplace, and around the

accommodation or subordination of other occupations.[24] The observed divisions between the work practices, beliefs and interests of groups within the professions led Bucher and Strauss in 1961 to describe them as merely,

> Loose amalgamations of segments pursuing different objectives in different manners and more or less held together under a common name at a particular period in history.[25]

These various 'segments', with their distinct techniques, work bases, clientele, and even separate professional organisations, it was argued, develop their own sense of historical mission within the occupation.[26] They each stress their own unique contribution to the occupation's work and the satisfaction of some public need.[27] Bucher and Strauss noted that this process of territory-claiming through the pursuit of such a mission can result in alliances with external occupations with the resulting intra-occupational conflicts and power relations veiled by neutral descriptions of the specialist 'team'.[28] But as well as this, the challenge to existing entrenched elites may temporarily assume the apparent form of a whole social movement with distinct goals and tactics.[29] This may so much alter the profession's self-image that, for a period, there are claims of crisis within it.[30]

This literature displaced apolitical functionalist accounts with a conflict perspective. Yet the narrow focus of its methodology and the socio-psychological emphasis of the study of individual and local group consciousness, limited the extent to which it could generate a fully historical analysis. In particular it could not bring into focus the wider structural relationships between professional elites and society. The resulting absence of an analysis of professional work as it is conditioned by wider economic and political forces, in place of accounts of the struggle for resources and power in local institutions reflects, in Larson's words,

> ... a tendency to present professions as categories which emerge from the division of labour in unmediated connection with society as a whole.[31]

The key relationship with sectors of the state and corporate capital which may determine the success or failure of the pursuit of professional status, is omitted.

This neglect of macro-sociological concerns was generally reinforced by studies of the interaction between professionals and bureaucratic organisations conducted in this period.[32] Following the work of Mayo and the 'human relations' school of organisational theory, these emphasised the importance of local informal relations in bureaucratic structures.[33] Such features of formally rational bureaucracies as hierarchical lines of authority, set rules, subdivided tasks, lay supervision and impersonality, were tested against imputed features of the professional organisation of work including autonomy and individual judgment, accountability to colleagues and client loyalty.

Several studies, including those of Gouldner and Blau and Scott, and Kornhauser and Pelz and Andrews on industrial scientists, suggested considerable conflict, often manifested as 'role tension' in bureaucratic employment.[34] This was said to be due to 'the fact the authority of knowledge and the authority of administrative hierarchy are basically incompatible.'[35] But other researchers, such as Hall, Engel, and then Freidson, drew more ambiguous conclusions.[36] Despite perceived threats to autonomy, these found a growing interdependence of employing organisations and salaried professionals who traded the delivery of expert services for considerable material and institutional resources. The distinction was also made between types of professionals who were and were not suited to bureaucratic work, often with a veiled admiration for the implicitly 'more professional' misfits.[37] Some were found to assume the dual role of professional and bureaucrat without feeling a conflict of interest.[38]

The early distinction was also made between types of bureaucracy by

Litwak, Hall and others.[39] It was found that some bureaucracies can accommodate the needs and demands of professionals, whereas others cannot. Scott, for example, came to contrast 'autonomous' profession-controlled organisations from those 'heteronomous' organisations in which less powerful professions and semi-professions were subject to effective lay control.[40] This recognised that compatibility varies according to the particular form of the relevant organisations and occupational groups and their interrelation.[41] Some groups, including such weaker semi-professionals as social workers, nurses and teachers, fail to attain or retain work autonomy.[42] But bureaucratic employment can also reinforce some professional features. This may be through the provision of adequate material resources, close colleague relations, or a job security that gives freedom from the profit requirement and autonomy from client pressure.[43] More generally, Crozier has challenged the common assumption that the so-called dysfunctional aspects of bureaucratisation will undermine, rather than enhance, employee autonomy.[44]

From these and other studies, criticisms have been made of the unitary, static and rational model of organisations that derive from Weber's ideal-type of bureaucracy.[45] Satow, for example, has called for a new model to explain the situation of professionals in a bureaucracy, based on her typology of value-rational, rather than purposive-rational, authority.[46] These writers stress that bureaucracies are the loci of continuous conflict and divisions regarding goals, policy and the control of resources.[47] This conflict conditions the extent to which professional groups become entrenched and monopolise organisational power, often dominating policy and determining work patterns to the disadvantage of subordinate groups.[48] Sometimes, as with surgeons in hospitals and academics in universities, this may be so extensive as to determine the whole character of an organisation.[49] With evident borrowings from 'technocratic' or 'managerial' theory, Freidson has even argued that a new 'occupational

principle' expressing the power of bureaucratic professionals threatens the authority of old-line administrators and managers in public and private organisations.[50]

However, the bulk of this work in the field of organisational studies, discussed the relation of those two entities, profession and bureaucracy, in vacuo. The role of broader historical and economic forces in shaping this relation or in determining the contemporary trend towards organisational employment, is again seemingly irrelevant to local, institutional outcomes.

The way to a more critical, macro-sociological account of the professions was indicated by the radical criticisms of these occupations deriving from the general attacks on social injustice and inequality made in the 1960's and early 1970's by student, new left, and other social activists in the advanced capitalist nations. These criticised not only the economic exploitation of the working class, but also, the many forms of political and social oppression - such as racism, imperialism and sexism - experienced by other groups in corporate 'neo-capitalist' society.[51] By way of reply to post-industrial and technocratic theorists, these forms of oppression were said to be reinforced by a new domination of society through the privileged use of allegedly value-free scientific knowledge, and the increasing transformation of political issues into technical, 'expert' ones.[52] These developments were linked to the employment of an expanding number of technicians and experts in the capitalist labor process and state agencies.[53]

In this analysis, the professions did not escape unscathed. They were criticised by writers including Dumont, Lieberman and Illich, for their alignment with the privileged and powerful which resulted from the unequal distribution of their services.[54] Their self-interest and the falsity of their service ethic was drawn out by reference to their power and material privilege above lower-status clients.[55] The reinforcement of this inequality was said to result from their

propagation of an ideology of superior expertise.[56] Furthermore, they assumed a domineering and patronising attitude to clients, and created false needs that were amenable only to professional treatment. In the words of Illich,

> In any area where a human need can be imagined these new professions, dominant, authoritative, monopolistic, legalised - and, at the same time, debilitating and effectively disabling the individual - have become exclusive experts of the public good.[57]

Particularly with the development of what Halmos terms the 'personal service' professions advocating individual counselling and the modification of the personality or behaviour of clients, this had individualised and depoliticised problems deriving from wider social causes. The resulting dependency and fragmentation of client groups, it was argued, restrained their discontent and the pursuit of political solutions to their problems.[58] The professional's general 'ethical neutrality' regarding clients also simply excused this reinforcement of social inequality and the refusal to give a more committed form of assistance to poor and underprivileged clients.

These extensive attacks were even more notable for their origin. Some of them appeared to derive from oppressed groups themselves, in the form of the so-called 'revolt of the client'.[59] But many of them came from the radical caucuses of both practitioners and students which emerged in most of the established professions in the advanced capitalist nations in this period.[60] These criticised the elitist, anti-democratic internal structure of the professions as well as their complacent support for the political and economic status quo.

The sharpness of these criticisms was not often matched with theoretical rigour. The relationship between 'the professions' as a unitary category and capitalism was assumed, rather than proven, in much of this discussion of occupational self-interest. These did not offer detailed accounts of the role of professional groups in capitalist production, but instead stressed their role in maintaining bourgeois rule through the ideological domination of clients. The

self-interest of professionals in the stimulation of needs and client manipulation was equated with the interests of capital, or even more generally, the 'privileged'.[61]

Professionals were described as a key element in the direct control of oppressed groups, and, at the same time, as neglecting these to work for the wealthy and privileged.[62] This depiction of professionals as both controllers and the servants of power, suggested the need to distinguish more clearly between the level of dealings with the underprivileged among professionals. Furthermore, these accounts gave no adequate historical explanation of the abovementioned contemporary radicalisation of many practitioners. This was generally reduced to an idealist explanation in terms of the simple realisation by a minority of professionals that they had an oppressive function, or seen as a response to a process of 'deprofessionalisation' in which they were subsumed by the bureaucratic rationalisation of their work.[63] In these accounts, its possible relation to the mobilisation and expansion of new professions and segments of professions, often with increasingly more complex relations to the state, was not considered.

Recent Works

Despite these omissions, this growing atmosphere of criticism made possible the emergence of more detailed and theorised accounts which analyse the relations between the professions, capital and the state. The studies of Johnson in England and Larson in the United States have been foremost among these. Johnson's seminal Professions and Power, published in 1972, focused much greater attention on the state.[64] This work rejected both the subjective 'trait' approach in the debate regarding what constitutes a profession, as well as the more objective, but relativist and circular approach of the interactionists (in which professions are what are called professions), to define professionalisation as, '... a peculiar institutionalized form of occupational control.'[65]

This view of the professions, not as given forms of occupations but as a means of controlling occupations, led to an emphasis on the historically and culturally varied means of such control. A great diversity of form and development was thus stressed.[66] This diversity, Johnson argued, had been overlooked because of an analytical adherence to the orthodox ideal-type of the free-market professional in the bulk of previous sociological literature on the professions.[67] Accordingly, important contemporary changes in the pattern of occupational control in capitalist society had been downplayed. These include the wider use of professional services by the state and corporate capital which represent expanded forms of patronage mediating the relations between professional producers and consumers.[68] State mediation could occur at different levels. For example, the state may either intervene to define the needs of clients as citizens and provide financial support for existing professional institutions, or control delivery by employing a number of professionals itself, and in an extreme case, by nationalisation of production.

> Mediation arises where the state attempts to remove from the producer or the consumer the authority to determine the content and subjects of practice. It may do so with a minimum of encroachment upon an existing system of professionalism, through grants in aid to needy members of the public - grants which may be administered by the occupation itself.... At the other extreme, the state may attempt to ensure a desired distribution of occupational services through the medium of a state agency which is the effective employer of all practitioners who have a statutory obligation to provide a given service.[69]

As well as these circumstances, the state may employ professionals to provide services to the state itself, in matters ranging from the day-to-day administration of its departments and agencies to the rendering of expert advice on issues of public policy.[70]

Johnson also concluded that intervention has major internal and external effects on professional groups. Extensive state mediation will generate and aggravate divisions within the professional 'community', undermining their sense

of colleagueship by creating new specialties with separate work practices, clientele, interests and ideologies. Furthermore, a field of practice may become politicised and more open to public scrutiny, as a result of the state's assumption of public responsibility.[71] This may force an occupation to increasingly anticipate, respond to, and seek to direct state actions, especially if those actions surround not only matters of delivery, but also, such matters as work patterns, selection of clients, recruitment and education.[72] This will render more crucial the requirement to successfully represent the profession's interests as being the same as the public interest.

This account of mediation addresses the contemporary welfare state's heightened intervention in such spheres as health, education and social security, but the historical circumstances that determine and surround this intervention are largely unexplained. Johnson notes that the state may in the first instance act to help construct professional monopolies, but intervention is still depicted as an intermittent process, presumably characterising only the formative and late periods of professionalisation in some undeclared model of typical development.[73] Thus, while he claims to reject the ideal-type of the free-market professional and any unilinear model of professionalisation, it returns in the analytical distinction he eventually makes between 'professionalism' and such other forms of occupational patronage as state mediation.[74]

While Johnson notes distinct forms and levels of intervention in the case of state mediation, he offers no means of understanding their actual determination, and how this relates to different levels of support, resistance and political mobilisation both between and within various occupations. The possibility that intervention may result from, follow and express the divisions within an occupation is not examined; only ex post facto reactions to the state's activities are outlined. Furthermore, no guide is given as to under what circumstances the divisions which accompany intervention will be minor, or have an ongoing effect

on the structure of an occupation, permanently altering its internal political balance. Put simply, how great is the threat posed to traditional elites by such developments as the rise of new state-dependent segments of the professions?

Johnson also fails to detail or theorise the broader, reciprocal effects of the process upon the state itself. His account of the public employment of salaried professionals, finally only reverts to a commentary within the orthodox empiricist discourse regarding the individual and group role tensions of bureaucratic professionals.[75] The complex relationships of many occupations to the state, particularly those of the expanding group of professions and semi-professions which as 'state professions' are wholly dependent upon public agencies for their livelihood (although they may significantly alter the form and nature of various sectors of the state), requires a fuller analysis than this.[76]

A more sophisticated account of the relationship between the professions and the state was offered in later work by Johnson.[77] The model of unilinear development, positing an original self-forming 'free profession later threatened by intervention, was subjected to detailed historical criticism.[78] This criticism reiterated the state's role in the original creation of professional monopolies, particularly he noted, in colonial states including Australia.[79] But more generally, he attacked the misconceived account of state relations underlying the preceding literature, which assumed a necessary inverse relation between levels of state intervention and professional autonomy.[80] In this view, more of one means less of the other. Further state involvement will always finally undermine professional power, ending some previous period of non-intervention and greatest autonomy.[81]

This assumption, he argued, ran through both conservative accounts of state encroachment and an inevitable bureaucratisation, and left depictions of the incorporation and 'proletarianisation' of professional and 'middle-class' groups, by forces including the capitalist state's expansion into more and more

areas of civil society.[82] In either case, intervention is said to undermine the power of professional groups. Their possible self-interest or active role in this process, is ignored.

> State intervention, implying as it does the existence of some external, repressive public authority, has the consequence of transforming professionals into functionaries and their associations into outposts of corporatist organisation or branches of the ideological state apparatus. The major variation allowed for in such theory is the location of the professional-functionary in the state hierarchy; are they bureaucratic heads and, therefore, agents of the controlling apparatus or are they subordinated to bureaucratic authority? In either case the professions are viewed as becoming engulfed by state power and their autonomy conceived of only as an aspect of the general and relative autonomy of the state itself.[83]

Revising his earlier views, Johnson insisted that the historical processes of state formation and professionalisation are always in some degree interrelated, whether or not the contemporary form of extended patronage characteristic of the welfare state is reached. The state constantly intervenes in the development, maintenance, or loss of professional monopolies. Accordingly, the concept of professionalisation,

> ... can only refer to a process towards partial autonomy, being limited to specific areas of independent action which are defined by an occupation's relationship to the state; areas of autonomy which vary from time to time and place to place.[84]

This ongoing importance of the state and the qualified nature of any autonomy, does not mean that the professions are in general rendered powerless by this relation. The interests of the state and professions are never fully identical. But they are often so intertwined that they mutually effect the development of each other, with the state becoming in various ways dependent on those occupations. State intervention often is - from the other side of the looking glass of history - a type of professional intervention into the forms and institutions of the state determining its own evolution such that, 'what the state

has become includes its relationship with the professions'.[85]

This point is illustrated by a reference to the development of the English legal profession in the eighteenth and nineteenth centuries.[86] This profession developed with vital state-sanctioned monopolies, especially over conveyancing, that were granted in return for its administrative role in implementing the major bourgeois land reforms of this era.[87] As well as this, with the further development of the doctrine of the separation of powers stressing the autonomy of law and justice from day-to-day government, the liberal state became ideologically dependent on the profession, particularly the bar and judiciary, to perform legal activities in an 'independent' and, by implication, impartial manner, as this reinforced the state's own appearance of political impartiality.[88] This conforms with Parson's observation that this profession, has a highly ambiguous, formally independent, but substantively interdependent relationship to the state. Private lawyers assume an important public role as bearers of legal ideology and as defacto agents or officials of the legal arm of the state which provides the necessary infrastructure - including courts, legal departments, and legal rules - for their work.[89]

Highlighting the complex interrelation of the professions and an always 'intervening' state, illuminates many issues in this field. But it does not resolve the earlier problem of how to theorise the primary determination of intervention, the form and extent, or the levels of relative autonomy attained by different occupations in different periods. Johnson has elsewhere attempted to explain the autonomy attained by groups of professional employees in corporate firms as well as their class position in the wider social structure, through the extent to which they fulfil what Carchedi terms the 'global function' of capital.[90] But his account of the state skirts around discussion of its class nature and relationship to various forms of capital, or even of its own political economy as would be required by an analysis of the fluctuating contemporary

tendency to employ more professionals in the public welfare sector of the advanced capitalist nations.[91] Similarly, the rejection of left hegemonic accounts of welfare for their misconceived view of intervention, leads to a postponement of analysis of the wider relationship of professional practices and ideology to bourgeois rule. Radical accounts of the ideologies of clientism, status and dependence, the individualisation of social problems, and a growing stress on hierarchies of merit and presumed expertise, all suggest further general links between the professions and the reproduction of class divisions in capitalist society.[92]

Johnson rejects the view that intervention will necessarily disadvantage professionals, and contends that although their interests are not identical to those of the state their growing interdependence will give rise to a more 'apparent hostility'.[93] Accordingly, his chief historical example, that of the monopoly and power attained by English lawyers, suggests an expanding symbiotic relationship with the state with a trade-off of concessions according autonomy to the profession for practices which legitimate the states' authority.[94] As a particular account this may be historically accurate, but it is also misleading if taken as representing some universal pattern of state-professional relations. Intervention may be complex, continuous and no threat to professional power. But why cannot there also be real and irreconcilable conflicts of interest between the state and certain groups of professionals? State activities might not undermine the overall power of a profession, but they could also influence and alter its internal political structure with adverse results for certain segments or elites. The potential for such a conflict of interest between professional groups and the state or sectors of the state, can be readily conceived if the material interest of many professionals in public welfare schemes and the recent political pressure to curtail government spending in a period of economic recession, are considered.[95]

The rejection of the view that state involvement in professional activities is always detrimental for professionals, should be complemented by a rejection of the unitary conceptualisation of both the professions and 'the state'.[96] The latter category has its own heuristic value and a certain objective unity, but historically and empirically it is an unsteady unity. Both entities are internally heterogeneous, comprising divided and continuously evolving forces. The origin, form and extent of state intervention and the level of resistance or acquiescence expressed by any profession are always historically contingent. It relates not only to the complex material and political conditions of the profession, but also, to the internal divisions and balance of power between various sectors of the state as well as the wider social forces acting upon them.

The most ambitious work attempting to study the relationships of the professions to the state and contemporary capitalism is Larson's The Rise of Professionalism, published in 1977.[97] This gives a wideranging account of the rise of the traditional professions, particularly medicine, in England and the United States, as well as more recent changes in the general form of professionalism. Larson begins by noting the historical parallel between the growth of the professions and the development of capitalism.[98] But despite the incorporation of their services into the logic of the private market, the professions' appropriate features of pre-capitalist society in professional ideology. These include the anti-market stance of such features as their declared sense of vocation, the ideal of ethical service, the 'community' of professional colleagues, and the sense of community responsibility which is expressed as a paternal duty to clients.[99] These are all stressed such that the professions',

> ... ideological status model appears as a secularized version of the feudal notion of noblesse oblige, which embodied the nobility's ideological aversion to commercial pursuits and its belief, anchored in a religious view of the social world, that high rank imposes duties as well as conferring rights.[100]

At face value, this ideology would conceal the relationship with capitalism, suggesting that professionalisation is an antithetical process. But the professions' rise clearly coincides with the expansion of the capitalist market. The resulting increased demand for professional services created favourable circumstances for the monopolisation of their role.[101] Accordingly, professionalisation is defined as 'the process by which producers of special services sought to constitute and control a market for their expertise.'[102] Among groups of producers this usually takes the form of the pursuit of a professional 'project'.[103] The latter is directed towards 'a collective process of upward social mobility', through maintaining and extending the status, autonomy and material rewards of professional practice.[104]

This involves a steady control of the forms and level of the production of services. The means employed to achieve this may include selective entry to a profession through exclusive practices usually requiring given fitness of character, specified training and certain educational credentials. Additionally, a body of ethical rules may directly protect a situation of monopoly. The requirements of independent dealings with clients, colleague supervision and restrictions on advertising and competition are examples of this.[105] These market practices, with varying levels of success, serve to reinforce the social and material privileges of producers.

But just as the form of capitalist production has evolved historically, so too has the typical form of professional production. Larson notes that with the transition to corporate capitalism the market for professional services became restructured.[106] This introduces the other major historical parallel. Adding elements of Weber to her Marxism, as well as stressing the relationship to the capitalist market she argues that the rise of the professions and the spread of bureaucratic modes of organisation belong to the same historical process - the rise of rational administration.[107] The professions and occupational groups

pursuing professional projects have become increasingly dependent for their expansion and employment on the purchase of their services by the state and corporate firms. The characteristic mode of organisation of professional work has become the bureaucratic one, and the common locus of employment - the large-scale bureaucratic organisation.[108]

From drawing this larger historical parallel, she rejects the orthodox claim of the likely incompatibility of professional and rationalised modes of work and the presumed conflict of ideal-typed professionals and bureaucracy.

> In a bureaucratized world, professions can no longer be interpreted as inherently anti-bureaucratic. Both professions and bureaucracy belong to the same historical matrix: they consolidate in the early twentieth century as distinct but nevertheless complementary modes of work organisation.[109]

Despite the force of the professional ideology of individualism and the idealised image of the solo practitioner, as organisational employees professionals have become dependent on the corporation, the state bureaucracy, and the university, for their reproduction.

This stress on the tendency towards bureaucratisation becomes a central element in Larson's view of the condition and prospects of contemporary professionals. Certain higher-status professionals increasingly hold positions of managerial and administrative authority in public and private bureaucracies. In these cases professional status and bureaucratic power will coalesce to give 'technobureaucratic power'.[110] This has a reciprocal effect on these organisations. Their status as institutions is reinforced in accordance to the status of their professional employees. The organisation may even appear more 'rational' and 'expert' in its activities and policies.[111] But apart from these instances, and a brief and downplayed reference to accounts of autonomous professional organisations, she insists that professionals are becoming increasingly powerless.[112] As salaried employees their autonomy and collegial power is constantly undermined by the bureaucratic rationalisation of their work. The

great majority of them are without real institutional power and can finally only serve the purposes and interests of their bourgeois employers and senior administrators.

> As a heterogeneous category of the occupational structure, professionals are, in general, only agents of power. Consciously and unconsciously, they spread the technocratic legitimations of the new structures of domination and inequality, contributing to their ideological convergence with other beliefs, aspirations and illusions. The individual freedom and control which professionals enjoy in and out of work is in part a mask: for themselves as well as for less privileged others, it helps to conceal collective powerlessness, subordination and complicity.[113]

This powerlessness is, in general , only reinforced by the professional's ideological stress upon individual status and autonomy. The individual pursuit of a professional career may enhance the status and privilege of some more successful groups. But among bureaucratised professionals it will more commonly serve to 'cool out' lower-status groups with blocked mobility.[114] For these groups, the ideological appeal of the professional model may only represent '... an attempt to establish a last-ditch defence against subordination', and will forestall the development of a group, or even class consciousness, among employees despite the growing threat of 'potential proletarianisation'.[115]

As Schudson notes, Larson's central claim that professionals are overall becoming increasingly powerless, runs an unusual course, contrary to the bulk of recent left, feminist and radical accounts of the attainment of 'professional dominance' over clients from the working class and oppressed groups.[116] This is partly a result of circumventing the issue of local client control. But it is also an outcome of this underlying stress on bureaucratisation. This claim that professionals are rendered weak as they are constantly swallowed up by the growth of bureaucratic organisations is a highly problematic one, especially if their relations to capital and the state are to be adequately theorised.

Larson recognises that the numerous studies of the difficulties experienced

by professionals in bureaucratic settings presuppose the common ideal-types of professionals and bureaucracy.[117] But her own final stress on the encroachment of professional autonomy disregards those studies of professional power in organisations, mentioned above, whcih have contrary, or even ambiguous findings.[118] This emphasis relies in part for its plausibility on the unstated assumption that most bureaucratic organisations closely approximate the ideal-type monocratic bureaucracy. This loss of autonomy is assumed to be a general consequence of the 'rationalisation' and further specialisation of the labour process in a bureaucratic setting. There is conflicting evidence on this point; Larson cites Braverman's account of the 'deskilling' and 'proletarianisation' of the white collar strata in corporate capitalism for support.[119] But other accounts of the effects of this process on professional and managerial groups - a much narrower category than 'white collar workers' - draw the opposite conclusion. As both Freidson and Derber note, the increased degree of specialisation of the work of bureaucratic professionals will often lead to a greater level of expertise and work autonomy rather than deskilling of these groups.[120] Larson's stress on the subordination, and loss of autonomy and colleague control experienced by organisational professionals, and the growing unreality of the professional ideologies which they carry and project, appears to finally reinvoke elements of the ideal-type of the free-market practitioner which she is so critical of. The implication that salaried professionals are not 'real professionals' but are mostly just hirelings with aspirations to be such, appears to underlie the continuous emphasis on subordination. Consequently, Larson gives organisational professionals a less serious analysis than she first intended, reviving features of the linear model of development and demise, with a last act encruachment by a widespread process of bureaucratisation rather than the state.

As a basis for an analysis of the interrelationship between professions and

the state, this falls short of Johnson's call for a rejection of the false opposition of intervention and autonomy, and for a study of the varied, complex and contradictory forms of this interaction and the resulting interdependence with the state which can often favour professional groups. Halliday notes that this overall emphasis on encroachment overlooks considerable evidence that professionals play a key role in state decision-making, particularly over areas of social policy where they seek to both articulate public needs and determine the pattern of the state's response to those needs in a manner favourable to the profession's interests.[121] This may take the form of either the internal influence of the 'state segment' of a profession, or the external mobilisation of private professionals as a political pressure group.

This theme of the increasing weakness of bureaucratised professionals echoes through Larson's discussion of professional ideology. The starting point for this is an account of the growing dependence of the professions on the modern university. The latter is now a major factor in their reproduction, offering a 'defensible cognitive basis' for their status claims and generating a system of credentialism which provides a basic mechanism for the control of entry to many occupations.[122] The privileges and social exclusiveness of professional groups is increasingly legitimated by the apparent meritocracy at this end point of highly stratified education systems. The university credential that is held to objectively represent individual abilities, achievement and merit, is, for larger structural reasons, inaccessible to the bulk of the working class and disadvantaged in society.

Following Macpherson's account of the link between the capitalist market of formally 'free' contracting individuals and the force of the classic liberal ideology of possessive individualism in bourgeois society, Larson notes how university credentials are now reified as individually possessed exchange values.[123] Despite their social origin, they are now viewed as a form of private

property according subjective individual status.

> ... in the juridico-political framework of bourgeois society, the individual is the sole owner of his person and, therefore, of his socially produced competences. Professional training appears, therefore, as a lengthy process of production which, under special institutional conditions, creates exchange values and makes them the sole property of individuals. The general contradiction between the social nature of production and the private appropriation of its products, is especially visible in the case of specialized training.[124]

Professionals benefit from both the job market advantages they derive from this system of credentialism, and more widely from the obfuscation of class and social inequality by education systems.

But this discussion of credentialism and the related spread of what she terms 'monopolies of competence', leads to Larson's view of the general relationship of professional ideology to the overall reproduction of capitalist society.[125] Although she notes the relationship between the political quiescence of salaried professionals and their adherence to the ideology of individual status, Larson is primarily concerned with the more general results of the propagation of professional ideology throughout society.[126] Accordingly, discussion does not focus on the issue of the role of professional ideology in the domination of client groups. The predominant ideology of this society is understood to be the belief in individualism.[127] Professional ideology, with its emphasis on personal status and careerism, so potently expresses individualism that it substantially reinforces class divisions through the general circulation of this outlook.[128] Furthermore, the existing capitalist order and its 'dominant ideology' are bolstered by the technocratic ideology of expertise and presumed competence which professionals articulate.[129]

Larson maintains that the basis for understanding professional ideology is by analysis of these beliefs through their generation in the actual work practices of professional groups.[130] The adherence to these beliefs will seem meaningful and rationally based, although this may have outcomes not anticipated by these

groups, including the legitimation of state power and class rule. Thus, this work appears to follow the insistence of certain neo-Marxist theorists that ideological systems are not conscious, planned formulations of self-interest, but derive from practices grounded in the lived experience and relations of individuals, groups and social classes.[131] Thus understood, ideology is at once both 'real' in deriving directly from given social relations and practices, but also unconscious and mystifying for what its partial quality obscures about the objective effects and place of those relations and practices in the social totality.[132]

But given Larson's emphasis on the bureaucratisation and powerlessness of more and more professionals, it is one side of this dual nature of ideology which she stresses to the detriment of the other. Although professional ideology is acknowledged as serving a purpose in justifying the protection of monopolies or the extension of professional work, it is still overwhelmingly understood as a residual system of beliefs which mystifies 'real' social relations and structures to ensure bourgeois hegemony.[133] Because of their propagation of a dominant bourgeois ideology, in the particular form of professional ideology which is described as being just a part thereof, the social power of professionals is greatest at this very abstract level.[134] This finally suggests the relative ease of the attainment of a hegemonic situation through a near-universal adherence to the beliefs encapsulated within the problematic unitary category termed the 'dominant ideology'.[135] Together with her description of professionals as ideological 'agents' whose beliefs serve as a 'mask' veiling real social relations, this clearly has overtones of idealism and functionalism which flaw the more general conceptualisation of the nature of ideology.[136]

These views are highly problematic for an understanding of the connection between professional beliefs and interests. Schudson observes that the homogeneous view of ideology suggested by this account gives scant attention to the specific ideologies of different professional groups.[137] The benefits professionals

derive from these beliefs, conceived only as a moment of bourgeois ideology, are much the same as those derived by the privileged and powerful in general, these being the obfuscation and justification of class divisions and exploitation. The particular self-interest of professional groups in their ideologies of status, service and expertise, and how this may diverge from, or conflict with, the interests of other privileged groups must be further examined. The importance of these particular professional interests is suggested by recent critical accounts of the stimulation of needs subject to scrutiny and treatment by professional groups, with such results as the medicalisation or legalisation of certain wants or behaviours.[138] Similarly, the evident relationship of professional ideology to internal divisions requires a more extended analysis.

The divisions within any profession resulting from different forms of work, institutional location, and clientele, are often articulated as distinct professional ideologies and conflicting models of appropriate practice. An important contemporary example of this is linked to the expansion of the university education of professionals which so much concerns Larson. Many professions are now increasingly characterised by an often hostile relationship between the academic segments and more practice-oriented traditional organisations of these occupations. Frequent ideological divisions regarding the appropriate forms of professional education, do not merely reflect a narrow contest for control of training, but express tensions regarding such developments as the changing social composition and work base of professions, and a much closer overall relation to the state.[139]

This relationship between ideological division and major changes in the internal structure of professions is also reflected in a related contemporary development. Larson refers to the occasional efforts of alienated organisational professionals to more fully meet client needs in a committed advocacy that may conflict with organisational goals and policy.[140] But more broadly, theorists are

faced with the important phenomenon of the emergence of various 'radical caucuses' in the bulk of the professions in the advanced capitalist nations in the last two decades.[141] These caucuses, or radicalised segments of students, academics and practitioners, have reconstructed traditional ideals regarding service and public duty to support the concept of committed advocacy as well as new modes of delivery and practice. These may range from the mainstream public welfare bureaucracy to such 'alternate' forms as independent local services cultivating a community base among the poor and disadvantaged.

These developments are sometimes accompanied by a declared rejection of the very notion of professionalism - attacked for its elitism and the falsity of the service ethic, and strategies including lay involvement in management and delivery intended to 'deprofessionalise' services are implemented.[142] But these statements are usually underlay with ambiguity; rejecting orthodox practice in the service of the privileged and bringing great pressure on the traditional elites of many professions by their revival and literal interpretation of the professional ideals of service and duty and the notions of vocation and noblesse oblige.[143] This historical irony draws out the real complexity and contradictoriness of professional ideologies.

The major dilemma behind this account of powerlessness and bureaucratisation concerns the location of the class position of professionals. Larson's approach to this is quite contradictory. Professionals are at one point conceived, with borrowings from Gramsci, as belonging to many social classes which each reproduce their own fraction of organic intellectuals.[144] But they are elsewhere described as being scattered about in '... the middle and upper middle levels of the stratification system'.[145] Larson later refers to the influential accounts of the 'new working class' deriving from the study by Mallet and Gorz of the radicalism of student groups and technical workers in the 1960's.[146] She notes that organisational professionals increasingly 'may appear'

to be members of this class, but does not openly declare their class location.[147]

However, support for this theoretical tradition is implied by the overall direction of this work and its repeated references to a likely proletarianisation of the bulk of organisational professionals.[148] The view that they mostly comprise a group of falsely conscious salaried employees facing proletarianisation and without any long-term existence, sits well within part of the Marxist literature on the class structure of advanced capitalism which includes the accounts of Oppenheimer, Aronowitz and McKinley.[149] But Larson's own account suggests borrowings from elsewhere. As already noted, the emphasis on bureaucratisation links this work to the Weberian tradition.[150] This is particularly reinforced by the market-derived definition of professionalisation and the constant stress on the central importance of practices of monopoly, inclusion and exclusion to each professional 'project'.

In fact, Larson's work represents a major but most peculiar intervention in the principally British debate between Weberians and neo-Marxists regarding the professions, the new middle class, and the very mode of conceptualisation of social class. As Halliday notes, this recent debate has made the class nature of the professions a central issue in this field again.[151] The recent Weberian literature has focused on the importance of the market and practices of exclusion (or in Parkin's term 'closure') in the reproduction of status differences between groups of employees which are ignored by a mechanistic class categorisation based on the ownership or non-ownership of private productive capital.[152] This perspective appears to more readily concede the existence and analytical importance of a new middle class, and relieves some of the problems involved in theorising the class location of such groups as the expanding numbers of public employees in the advanced capitalist nations. Furthermore, it is apparent that market control is a central means by which professions develop and secure their privileges.

But as Johnson argues, the attainment of this market position is in many ways an outcome of the wider forms and relations of production in the capitalist economy.[153] These market-derived status groups may be described through their relations of authority above work subordinates. But viewed from the level of individual relations, no account of their complete function in the productive process (including their performance of the global function of capital), or how their role or very employment or non-employment in the division of labour is conditioned by the wider needs of capital, can be offered.[154]

Larson notes the increasing need of the modern corporation for specialist expertise in the production of goods and services.[155] At the same time, she avoids the mechanistic prior classification of these groups as petty bourgeoisie by virtue of the 'unproductive', that is, non-surplus-value giving quality of their work, that was given considerable influence by Poulantzas.[156] But their essential role in the capitalist division of labour is not detailed. In contrast with neo-Weberian accounts which generally stress the organisational entrenchment and autonomy of professionals which follows from their market advantages, Larson stresses the major effects of bureaucratisation to deny that power is held extensively or that most professionals are ever secure from proletarianisation.[157] The resulting paradox is that Larson appropriates certain elements of the neo-Weberian analysis of the professions and the classic account of bureaucracy to give an implicit defence to an orthodox dichotomous class model in which groups other than capital and labour are viewed as historically transitional.

Much of the contemporary sociological discussion of the new middle class, derives from, or has theoretical parallels with, conservative accounts of this social grouping. These have predicted the resolution of political and ideological conflicts in capitalist societies through the rise of managerial power, specialist expertise and technocratic decision-making, in what is termed 'post-industrial', or even, 'post-capitalist' society.[158] From this perspective, the new middle

class, or in some recent accounts, the 'new class', has been seen as a historical subject which will objectively express a universal societal interest, transcending the older class divisions of capitalism.[159] It is generally implied that radical political solutions to the exploitativeness and social divisiveness of capitalism are outmoded. Positive change will derive from the beliefs and practices of new groups of the privileged, not from a mobilisation of the working class and oppressed.[160]

But even if the literature on the new middle class has often had links with conservative ideology, it is not incumbent on left and radical theorists to either deny the importance of this social grouping or its likely continuing existence. In this respect, Larson's orthodox conceptualisation of the class structure and the class position of professionals, contrasts several recent prominent neo-Marxists. Writers including Carchedi, Johnson, Wright, and the Ehrenreichs, have attempted to more fully examine and theorise the productive role and relations, as well as the politics and culture of, the new middle class employed in both corporate and state sectors in contemporary capitalist societies.[161]

PART B:

The Legal Profession

The generally atheoretical character of the sociology of the professions is reflected in the development of an international literature on lawyers. This includes a large amount of material describing such matters as lawyer's training, their occupational subculture, work patterns and clientele.[1] The bulk of this comes from the United States where there is a substantial academic interest in the legal profession, and where the empirical tradition is firmly established.[2] This work has provided a firm basis for the rejection of the functionalist paradigm which assumed that a strong homogeneity of beliefs and culture characterised the 'community' to be found within any professional occupation.

Various studies including those by Ladinsky, Carlin and Heinz and Laumann, have emphasised the divisions between groups of lawyers which result from the internal stratification of the profession. These have been found to be due to factors including differences of social background, race, ethnicity, religion, education, and in recent research, of gender.[3] Additionally, lawyers are divided in the actual performance of their work by their forms of employment, areas of specialty, clientele and incomes. For example, the well-known work of Carlin in the early 1960's found that a major cleavage exists between the economic security of lawyers employed by large New York law firms and corporations and that of low-status solo practitioners.[4] The economic insecurity of solo practitioners, he argued, resulted in a lower degree of conformity to ethical standards regarding such matters as soliciting for work.[5] This division was thus found to follow from a basic difference between working for clients who are wealthy and powerful, and those who are not.[6]

Other studies have found status divisions between entrants to the profession are reinforced by a streaming of lawyers into areas of practice which vary greatly in their prestige and level of rewards. Heinz and Laumann found

that lawyers with higher-status backgrounds and elite training overwhelmingly work for powerful corporate and wealthy clients, whereas lower-status background lawyers mostly engage in 'personal plight' practice with individual clients.[7] But this difference does not always enhance the professionalism of the elite practitioner. These writers also noted the paradox that lawyers with corporate and major clients are accorded the greater professional recognition and status although they frequently have less work autonomy and control of client relations than those who work for poorer, less powerful, and less demanding clients.[8] This drawback is apparently more than compensated for by the vicarious status and material rewards acquired in working for the wealthy and powerful. In such cases it appears that professional status is more closely linked to the status of clients than to the degree of autonomy attained in the direction of work.

The claim that a major division exists around working for the wealthy and non-wealthy, has been refined by an emphasis on the divisions of work, career patterns and professional culture that follow from work on behalf of either individual clients or large institutions.[9] These divisions were found to be so extensive that Heinz and Laumann concluded their study of the Chicago bar with the claim that legal practice in that city is virtually split between two separate legal professions.[10]

Parallel to this rejection of the functionalist view of the unified professional 'community', the claim that the service ideal is a major element in the professional performance of legal work was undermined by studies in several countries in the 1960s-1970s. These criticised the failure of the legal profession to meet those 'legal needs' of the poor and disadvantaged that were neglected in the private legal market.[11] This considerable 'legal services' literature also studied the many new legal aid schemes developed to meet these needs in this period. As part of the trend which Cappelletti and Garth term the 'access to

justice' movement, these attacked the narrow availability of legal professionals and their restricted patterns and modes of practice, and the limited, charitable form of traditional legal aid schemes that were mostly controlled by organisations of private lawyers.[12]

These criticisms were reinforced by numerous empirical studies of legal needs appearing in this period, such as the work conducted by Carlin and Howard in the United States and by Abel Smith, Zander and Brooke in Britain.[13] As argued more fully below, these frequently relied on an ahistorical conceptualisation of legal needs as pregiven phenomena.[14] Accordingly, the denial of access to legal services was treated in an empiricist vein. Inaccessibility was regarded as a problem of either blocked physical and material access, or of inadequate 'legal competence' on the part of the client, rather than as a historical or structural issue.

The more sophisticated and critical material on legal needs did call for new modes of delivery and representation to overcome the conventional individualisation of client problems and the underdevelopment of the law relating to the problems of the poor and disadvantaged. This formed the basis of the 'activist' model of legal practice which became the goal of the neighbourhood law firm (or 'community legal centres') movement in several western nations.[15] These have sought to contrast themselves from salaried-government and private-profession dominated schemes. This is through such features as the involvement of client groups in service delivery, community education and organising, the representation of group and diffuse 'public' interests in test cases, and lobbying and reform work seeking changes in the substantive law that might benefit the poor and disadvantaged.[16] These firms and centres have also often rejected the traditional professional precept regarding ethical neutrality - the claim, based on the fiction of the equal access of all to legal resources, that the equal pursuit of the interests of all clients guarantees effective equality before the law.[17]

The latter has been rejected in favour of a committed advocacy on behalf of specific groups and interests that are regarded as unfairly neglected.

In some instances, the 'deprofessionalisation' of service became an openly declared goal.[18] This usually appeared as support for the involvement of client groups and 'non-lawyers' (often confused with 'lay persons' as the career goals and status claims of newer professionalising occupations in the field are overlooked) in administration and delivery.[19] In practice, however, it was quite uncommon for either these client or non-lawyer groups to reach and maintain a position of power in policy-making and the management of newly evolved legal services in countries including Australia.[20] Even the more radical legal services literature, with its call for alternate modes of delivery and occasional anti-professional stance, appeared to keep a final, if even reluctant, faith in the usefulness of legal services to the poor and disadvantaged.

This legal services literature is too lacking in historical reflexivity and theoretical rigour to offer a full explanation of the social causes of the contemporary push to expand legal aid services for the underprivileged and the increased state assumption of responsibility in this field. An entirely idealist view of the rise of professional and academic interest in the discovery and satisfaction of unmet legal needs, is avoided by several accounts of the legal service movement's relation to civil and student unrest and radical social movements in the 1960s and 1970s.[21] The events which followed efforts to develop new schemes, have also resulted in the production of several accounts including those of Katz, Scheingold and Handler of aspects of the legal service movement, outlining the development of neighbourhood and public interest law firms in the United States.[22] These detail the divided reactions to these changes from different segments of the profession, as well as the conservative political mobilisation against the more innovative schemes which has gathered strength in the Nixon and Reagan eras.[23] This marks out the close relationship

between the profession's internal politics and government policy.

But there is a need to extend these accounts to a fuller analysis of the complex and evolving relationship between the profession and the contemporary liberal welfare state and how this results from and reinforces the political and ideological fragmentation of legal professionals. For example, Cappelletti and Garth have broadly described the contemporary reform of the legal aid systems in several nations and note the increased state responsibility for the attainment of substantive, not merely formal, equality before the law.[24] But no adequate historical explanation for this shift is offered. The latter is discussed in idealist terms with constant references to the importance of the post-laissez faire 'theoretical conception' of legal aid as a form of civil right rather than charity, without regard to the related historical changes in the legal professions in those institutions which have prompted and reinforced this new approach.[25] Similarly, state activity to extend legal aid services is described within the interventionist paradigm. Its results upon the organisation of any legal profession and legal work appear after the fact, coming from 'the state', and not as a consequence of any change in the balance of the complex interrelation of the state and the legal profession.[26]

Several studies including those of Garth, Katz, Handler and Erlanger, have also appeared regarding the distinctive types of lawyers who work in the legal aid field. These have found these lawyers to be characteristically younger, politically liberal, more female, and with more elite social and educational backgrounds than previous legal aid lawyers.[27] The more recent studies have qualified this last finding - the 'elite' qualities of many of these lawyers, it seems, have been exaggerated.[28] This work has regularly criticised the self-interest of private professionals in certain forms of legal aid, but it has not also offered detailed accounts of the interest of new groups of salaried professionals in the extension of services. A complete historical explanation of

the contemporary move to broadly extend services to underprivileged groups formerly denied access to the legal system and the discovery of widespread 'unmet needs', must consider its relationship to changes in the structure of various legal professions and their political economy. This means such factors as new patterns of education, employment and specialisation, expanding numbers of graduates and their changing social composition in this period, and shifts in the level of demand for services from different sources, are to be considered.

The liberal assumptions of the bulk of this work that reduce the problems of the poor and disadvantaged to a question of access to legal services, and its partial explanation of the increased support for expanded legal aid schemes, were partly overcome by radical left accounts from the 1960s of lawyers and their activities in capitalist society. These stressed that lawyers work primarily on behalf of the ruling elite and corporate firms in the capitalist economy. But as Lefcourt and Kidder note, lawyers also assume a social control function with low-status clients.[29] In their role as mediators or brokers, they tend to reformulate political issues into narrow legal matters with legal remedies.[30] As a result of this, the link between client problems and such oppressive social structures as capitalism and imperialism is concealed. This contains political conflict and results in a tendency to compromise the long-term interests of client groups. In Lefcourt's view the symbolic value of the extension of legal assistance to such groups as the poor and blacks is what is always paramount; the class nature, racism and repressiveness of the legal system can only be enhanced by it.[31]

As argued below, this depiction of a complete and apparently trouble-free incorporation of oppressed groups through the provision of legal representation is highly problematic.[32] Furthermore, this focus overlooks the specific self-interest of groups of lawyers in the extension of such services. This interest is

treated as merely part of the general bourgeois interest that is bolstered by the development of legal aid schemes. But these radical left accounts did lead to a far more critical view of the activities of legal aid lawyers. They opened up the important theoretical and practical question of the wider ideological meaning of these activities and the relationship between such extended welfare services and the attainment of bourgeois hegemony in contemporary capitalist societies.

Other critical accounts of legal aid have appeared in the last decade which do focus on the issue of lawyers' occupational self-interest. For example, Geerts rejects the idealism of the 'access to justice' paradigm to argue, with theoretical borrowings from Bucher and Strauss, that such schemes may be primarily understood as a consequence of internal change and conflict within the profession.[33] The latter is most often due to the rise of new segments seeking to extend their job chances and to develop new markets for their skills.[34] He concludes his outline of recent reforms and developments to European schemes by insisting that,

> The lobby for [extended] legal services is located within the legal profession itself. These [extended services] were not a response to needs of the public, community, or neighbourhood, but to needs perceived and induced by the profession.[35]

This makes an important point: that the profession itself is the hidden subject of the wide literature on unmet 'legal needs'. This provides a useful starting point for an explanation of the rise of the legal services lobby. But this perspective is too narrow to give a thorough historical explanation of legal aid reforms. Its singular focus on the relationship between such developments and the occupational self-interest of certain lawyers, tends to postpone an analysis which considers the wider issue of hegemony, as well as the place of the state and effects of the capitalist economy upon these changes.

More global accounts of the legal profession have appeared in the last decade in line with the general renaissance of macro-sociological concerns in the study of professions and occupations. The richly detailed account of the formation of the elite of the American profession, its links with corporate capital, and its response, restructuring, and survival in the face of the threats posed by social and political change throughout the twentieth century, given by Auerbach in Unequal Justice stands as a major contribution to this.[36] These threats, particularly deriving from emerging groups of lower-status lawyers in a profession that has always been highly stratified on class and ethnic lines, peaked in periods where external conditions including growing state intervention gave greatest support to them.[37] For example, this occurred with the expanded public employment of salaried lawyers through New Deal reforms in the 1930's and in the 1960's with the development of the nationwide legal services programme of local legal offices.[38]

Other recent accounts of the legal profession have moved beyond the descriptive and atheoretical quality of this work. More theoretically sophisticated views of the relationship between occupational change and conflict among lawyers and the contemporary state and class structure of advanced capitalism, have been offered in Britain, by Bankowski and Mungham, and in the United States, by Abel. These reflect the influence of, and carry parallels with, the work of Johnson and Larson.

In Images of Law, first published in 1976, Bankowski and Mungham outlined a study they made of the implementation of a duty solicitor scheme in a provincial English city.[39] Although state-financed, it used the services of private practitioners rather than salaried lawyers. This scheme, they observed, had a significant effect on the political balance between groups of local lawyers.[40] In particular, it created new work and opportunities for marginal lawyers without established practices, and broke up the virtual monopoly over

representation in lower court, and especially criminal matters, held by a small number of local firms.[41] To explain this outcome they borrowed from Johnson's original discussion of the increasing contemporary state mediation of the relation between professional producers and their clients. State mediation and a guaranteed clientele may, for a while, support existing professional structures.[42] But it will also have contradictory effects. In time, it will reinforce a tendency to greater work specialisation and will weaken the profession's internal sense of community.[43] These new divisions and the further politicisation of the field that will follow on from growing public expenditure and the reconceptualisation of legal aid as a social service, may finally undermine the control of this area of professional work by private lawyers and control of delivery by the organised bar.[44]

This threat, Bankowski and Mungham conclude however, is not a major one to the profession. It has detrimental results for certain segments, but overall this state intervention '... has the effect of still further increasing the power of lawyers and the domination of law in society', as it allows the legalisation of more and more social relations and disputes.[45]

Although it rejects the interventionist view that state mediation will necessarily undermine professional autonomy and produce a conflict between state and professional interests, this discussion lacks an adequate explanation of the actual origin of intervention and its reciprocal effects upon the state. Bankowski and Mungham focus principally upon the internal divisions within the profession which follow on from intervention, and in another outline of this study argue that, 'the expansion of legal services can be viewed as the outcome primarily, of intra-professional politics and professional self-interest'.[46]

But it is perhaps because of this internal focus of their study that the wider circumstances surrounding mediation and which determine its form and extent are not fully elaborated. These include the political circumstances

around the actual development of any scheme. Why, for example, would a 'judicare' private scheme be adopted in preference to others and what would this indicate about the state's overall relation to the profession? The particular form of any given scheme would relate closely to factors including the degree of influence exerted by different segments of the profession over matters of public policy, and their relationship to various sectors of the state. The latter may also be internally divided with regard to their view of the 'appropriate' form of any scheme, and their internal balance may alter over time with the development of any new departments or public bodies concerned with the delivery of legal aid.

Johnson's later work emphasises the close relationship between the professions and an 'always intervening' state; almost equating their interests. But here, Bankowski and Mungham go the full distance in running 'state' and 'professional' interests together, repeatedly stressing their final convergence. Thus, although various commissions and other public bodies may be developed to administer new legal aid schemes, and the private profession may or may not have a dominant presence on them, they insist that 'it is difficult to envisage the interests of the state on the one hand, and the legal profession on the other, becoming incompatible'.[47] This view is repeated in their later submission to the Royal Commission on Legal Services, where the evolution of legal aid services is described as a form of 'professional corporatism' in which the interests of the profession and the state are the same.[48]

As a general guide to state-professional relations over legal aid matters, this is quite simplistic. The interests of certain groups of lawyers and sectors of the state may coincide in different periods and different circumstances. But they also regularly conflict. Indeed, if these interests so readily coincide, a reader might wonder why the field has become so politicised, or why the hostility of certain private lawyers to some schemes has been so extensive.

Even in the British circumstances, which Bankowski and Mungham seem to generalise from, this has been suggested by the negative reactions to the recent growth of a law centres movement and their partial success in obtaining public funding, which would include the Royal Commission's own discussion of this development.[49]

Furthermore, although Bankowski and Mungham refer to the role of legal aid activists in the discovery and creation of legal needs, and briefly note the links between this process of the professional construction of needs and the career interests of the new middle class, they do not discuss how this may come to conflict with state policy, especially where considerable pressure exists to reduce public expenditure on welfare services including legal aid.[50] The latter has become more evident in the last decade with political moves against various legal aid schemes being made by neo-conservative governments in the United States, Britain, and for a while, in Australia.

A discussion of the wider political and economic context of the contemporary legal aid debate was offered by Bankowski and Mungham in their 1978 article on legal education.[51] This gave a lucid account of the recent debates regarding the 'relevance' of aspects of the training and education of lawyers, and the growing tension between the academic and private segments of the profession, as they relate to the changing material conditions of the profession.[52] They argue convincingly that this debate reached a new level of urgency with the threat to professional privileges posed by the general downturn in private economic activity in the later 1970s.[53] In these circumstances, the development of new markets, clienteles and the protection of old ones from rival occupations become more important. The restructuring of legal education away from private training in favour of the expansion of university law departments with a growing number of graduates exacerbated this concern regarding legal employment. But it also gave rise to an educational strategy directed

towards alleviating it. The academic sector has extended the boundaries of legal education to stress such new areas as poverty law, welfare and administrative law, and it favours state intervention in these areas to create new markets and career opportunities for law graduates.[54] The state has responded to this appeal, further 'mediating' in the affairs of the profession through the development and expansion of legal aid schemes.[55]

This discussion of legal education is well anchored in historical detail and draws out the complexity of the internal divisions of the profession. But it is also tied to a unitary view of 'the state' which downplays the internal complexity of its interests and tends to run state and professional interests together. The state is overall depicted still in interventionist terms as a given external agency ready to respond to calls from such interests as the academic law sector (oddly conceived as external to the state), rather than as a diverse range of public institutions with contradictory and divided policies, goals and interests. Accordingly, a successful outcome from the 'petitioning of the state' towards further state patronage is presupposed.[56]

Richard Abel stands out as a key figure in the 'Wisconsin School' of legal sociology. Members of this group have attempted to produce non-idealist, historical accounts of the process whereby social disputes are converted into and treated as legal problems in different cultures and social systems.[57] In this perspective, the results of extended legal representation for the poor and disadvantaged cannot be assumed to be positive. Legalisation is not a necessarily desired end, but is itself a problematic phenomenon which requires explanation and critique.[58] In particular, the notion that equal access to legal services will result in social justice, even in class divided societies, is viewed as an example of a legal fetishism that is tied to the occupational ideology and interests of certain groups of lawyers.

Thus, in his distinction between the levels of success reached in the pursuit of disputes between 'repeat players' and 'one-shotters', Galanter has given a highly influential account of the myriad ways in which privileged individuals and institutions, which make regular use of legal services and legal procedures, gain major advantages through the resolution of disputes within the legal system.[59] Abel has also noted how the legal service movement's concentration on providing 'representation' for the disadvantaged in litigated matters, ignores the many other services which lawyers provide for the wealthy and powerful, including extensive preventive advice and financial planning.[60] He argues that this results in a misleading view that lawyers mostly work in a public 'adjudicative role' and that the post facto provision of representation to all parties in a legal dispute amounts to equality.[61] The privileged hold this prior advantage in legal matters even when disputes are conducted in so-called 'deprofessionalised' forums.[62] The redistribution of legal services by legal aid schemes will result in incremental gains for the disadvantaged. But the massive private legal market is still skewed in favour of the wealthy and privileged and, at least in the United States, this tendency appears to be increasing.[63]

Abel attempts to explain both the origin of the legal services movement and the increased state and professional support for expanded access to the legal system throughout the advanced capitalist nations in the last two decades. The increase in international discussion regarding legal services which has accompanied these changes, has run parallel to a heightened level of scrutiny and debate regarding the structure and regulation of the legal profession in many countries.[64] Frequent trenchant criticisms, often deriving from some form of public inquiry, have been made regarding such matters as complaints against lawyers, and the legal monopoly and costs in such areas as conveyancing, compensation, divorce and probate.[65] These criticisms have often been followed up with proposals for the development of less expensive 'informal mechanisms'

for the resolution of disputes with a limited involvement of legal professionals.[66]

In his 1981 discussion of the Report of the English Royal Commission on Legal Services, Abel attempts to explain these developments and threats to the autonomy and privilege of the profession, with a conscious borrowing from the lexicon of Bankowski and Mungham, in terms of the 'political economy'; that is, in the changing conditions of the legal market.[67] Threats to the professional control of both supply and demand in this market, he insists, are now so extensive that,

> The core relationship between the lawyer and an undifferentiated market for legal services, upon which rests the tenuous unity of the profession, has dissolved.[68]

The key elements of this change are the bureaucratisation of legal work and the greater involvement of the state. State intervention, especially in the form of expanded tertiary education since the 1960s and 1970s, has resulted in a rapid loss of the private profession's control of the supply of professional producers.[69] This loss concerns the number of producers, as suggested by the recent oversupply of graduates in advanced capitalist nations. It also concerns their social type, as reflected in the comparatively greater diversity of recent graduates, by race, ethnic background, gender, and to a lesser extent, by social class in several countries.[70]

The profession's response to these divisions and the threat to its market monopoly, is to seek the means of securing new clients and markets. This takes the form of a strategy of 'demand creation' - aiming to stimulate the consumption of legal services by current and new groups of users.[71] Thus, lawyers' services have been delivered in new ways with extended advertising, group legal plans, legal insurance schemes, and the high-volume specialisation of firms in certain fields.[72] But this alone is not enough to balance the loss of market supply and the overproduction of producers. The extension of legal

services to the vast bulk of the population who use them rarely or never, and have little inclination to do otherwise, can only be met by a strategy which involves extensive state involvement in the legal market. This strategy presses the view that the state has a responsibility to guarantee effective equal access to the legal system by its citizenry, and the claim that the poor and disadvantaged have widespread unmet legal needs in both traditional areas of law and in new areas where novel remedies are required.[73]

However, this strategy in the long-term only serves to aggravate the original problem of the loss of market control. State intervention may prop up the market in a period of recession, and provide new avenues of employment for potentially troublesome young and minority lawyers.[74] But it will further the fragmentation of the profession through encouraging the development of new areas and forms of work. This is most obvious in the case of extended government legal aid services, which reinforce a trend towards salaried bureaucratic employment that is shared with corporate lawyers.[75] As well as this, the expansion of legal aid with state finance will generate divisions and internal political conflict over the profession's response to this development and struggles over the allocation of new work. The resulting political and ideological differences between groups of lawyers has also led to the establishment of new professional organisations that rival traditional Law Societies and Bar Associations. But more importantly, even if intervention only takes the form of a subsidisation of the private market, governments and state officials are regarded as accountable for the results of the expenditure of public money. A heightened official and 'public' interest in the form and administration of legal aid services will lead to a greater interest in such matters as the organisation, training and work of the profession itself.[76]

Abel's discussion usefully details the economic and political pressures faced by contemporary groups of lawyers and their important relationship to the

state's activities and state policy. His work suggests that the international debate regarding legal services and legal aid policy, probably more than any other contentious feature of legal work, is a significant marker of the level of these pressures and the future prospects of the profession in facing them. But Abel shares some of the flaws of Larson's narrow market definition of the professions and her stress on the overwhelming quality of those social forces which are undermining professional autonomy and privilege. As noted above, Larson's treatment of the relationship between the professions and the state falls back on the interventionist view of a linear model of professional development - with 'free' market professionals finally encroached upon by bureaucratisation and state expansion.[77]

Abel notes the importance of the state in the original creation of professional monopolies. But a mechanistic view of the twin processes of market supply and demand creation underlies his account. The former process, it seems, simply precedes the latter and stimulates its development. Abel notes the loss of professional autonomy that is due to a large scale use of legal services by American corporate capital.[78] But the actual forces generating this loss of supply through such state activities as the major restructuring of legal education at university level, are not sufficiently explained.[79] Professional reaction or 'demand creation' appears as a post hoc development. This may reinforce a loss of market control, but Abel does not here indicate whether these forces inviting state involvement originate within the profession or elsewhere. Nor are the important divisions within the too uniformly conceived 'state' regarding such matters as legal aid policy, outlined. The real complexity of state-profession relations can only be veiled by any tendency to regard these processes as analytically distinct, and generally equating one with the activities of the state, and the other, with those of the profession.

Elements of the interventionist paradigm also appear at other levels.

Larson adheres to a narrow definition of professions as occupations in which private market control is vital and argues that the increasing dependence of many professionals on bureaucratic organisations will result in a decline in the overall power of the professions. Abel notes that the ideal image of the small-scale independent lawyer is increasingly inaccurate and tied to a false but appealing professional self-image.[80] But rather than reject this misleading ideal-type, he also appears to accept its premises and then only notes its loss of descriptive accuracy. He thus concludes his account with the claim that,

> The lawyer today (and even tomorrow) is an entrepreneur selling his services in an increasingly competitive market, an employee whose labor is exploited, an employer exploiting subordinates - all increasingly dependent upon state or capital for business and therefore increasingly subject to their control. Although the ideal of professionalism undoubtedly will linger on as an ever more anachronistic warrant of legitimacy, as an economic, social and political institution the profession is moribund.[81]

As with Larson's account, this bleak view of the future of the professions is not fully convincing. It also does not treat the power and influence of new groups of professionals in bureaucratic organisations with sufficient seriousness. This is despite evidence that lawyers, perhaps more than any other professional group, have a considerable influence over aspects of state and political policy. The possibility that this influence has been enhanced, or at least held firm rather than undermined, by the further entrenchment of groups of lawyers in many sectors of the state, is left aside. Accordingly, although Abel fully outlines the increasing internal divisions within the legal profession, and notes the separate interests and ideologies of new organisational lawyers, these are not theorised with their changing class location,and an apparent new middle class segment of the profession, in mind.[82] It is implied instead that they represent a historically transient, aberrant form of professionalism - the mark of the decline of the legal profession, rather than its contemporary restructuring and diversification with gains and losses in influence for different groups.

Abel's discussion, however, differs from Larson's in one important respect. Abel readily adopts Larson's understanding of professionalism and the 'professional project' as a form of market monopoly of special skilled services. This account also conforms with her depiction of the professions as increasingly threatened by the spread of bureaucratic forms, especially the corporation, university and the state. But in contrast to Larson, he gives a full consideration to the considerable internal divisions among lawyers that originate with, or have been aggravated by, increased state activities. These broadly include the differences between private practitioners and such groups as salaried government lawyers, academic lawyers, and groups of 'radical' and alternate lawyers, often involved in legal aid services, which have emerged in various countries.[83] This animosity, he implies, is tied to a marked sense of difference. These new segments are characterised by their own professional ideologies and ideal models of a form of practice which is felt to best answer public needs and protect the public interest.

This more sophisticated view of professional ideology is in Abel's other work extended beyond just drawing out its diversity and internal complexity.[84] Whereas Larson analytically reduces professional ideology to a moment of bourgeois ideology, to give a functionalist account of the attainment of bourgeois rule, Abel has called into question the whole orthodox Marxist tradition which stresses the essentially hegemonic purpose of ideological forms in capitalist society. Abel has noted that many researchers have found that the working class and underprivileged generally have limited expectations of, and little faith in, the legal system and the professionals who work in it.[85] They are quite conscious, apparently, of the inability of such a system to really achieve its declared goal of substantive justice in a fundamentally unjust class society. Both Marxist theory and liberal political theory which takes too seriously this claim of justice, equality and fair treatment, have been in error in

mistaking these groups to be the key audience of legal ideology. Abel insists that measures to increase access to legal institutions, whether by extended legal aid or reform of substantive and procedural law, have the greater ideological meaning for the privileged. They are the principal audience of an ideology which legitimates their own social power and privilege, and which is most meaningful to them in terms of their own more 'just' experience of the legal system.[86]

This view parallels some of the contemporary critiques, mentioned above, which have been made of the notion that there is a coherent 'dominant ideology' pervading capitalist societies and ensuring class rule.[87] But it has its own analytical difficulties. This is evident in the vagueness of such categories as 'the privileged' and 'the elite', from which the distinct belief systems of 'the masses' are contrasted.[88] It would be difficult to assert that there is a straightforward uniformity of beliefs within these categories. Most obviously, a fair number of the privileged could be well aware of the substantive inequality reproduced within legal institutions, and only have a qualified or no commitment to the ideals of social justice and equality.

But more significantly, differences of class interest may arise within 'the privileged' which lead to varying levels of commitment to the ideals of social justice and equal treatment in public and legal matters. Of all the privileged groups in advanced welfare capitalism, these liberal ideals would commonly be most meaningful to that segment of the professional new middle class which has career interests that are tied to efforts to attain them. Other members of the middle and ruling class of these societies would generally have a lower degree of interest in social reform programmes which have the attainment of these ideals as their goal, particularly where the expenditure involved is understood as a threat to the accumulation of private capital.

However, Abel has elsewhere directly related this account of ideology to

the particular career interests of lawyers. In a 1979 article which discussed possible measures towards attaining social justice through the socialising of private legal services, he denied the viability of such measures without a related wide programme of social reform and political change that would fundamentally alter the class structure of the United States.[89] At the same time, in seeking to explain the origin of the contemporary concern for redistributing these services, increasing levels of legal representation, and generally advancing access to the legal system, he observed that,

> Most, if not all, of those who seek to promote social or formal justice through legal institutions are members of the legal profession: lawyers, judges, legislators, administrators, law teachers.... It is not just that they are pursuing their narrow economic interests by making work for themselves (although there is undoubtedly an element of that, too). Rather, they are insisting on the centrality, the importance, and the legitimacy of law in society, and therefore of themselves as social actors.[90]

Thus, this legal ideology is viewed as safeguarding and advancing the occupational interests of lawyers, as well as more broadly reinforcing the bourgeois liberal claim that real social justice is attainable in a situation of economic inequality. Abel does not suggest, however, that the expression of this ideology will result in any extensive influence over state affairs or will reverse the general demise of the contemporary legal profession as it is further encroached upon by the bureaucratic forms of corporate capital and the state.

PART C:

The Sociology of Australian Lawyers

The Australian literature on the professions has also been generally characterised by a narrow analytical focus and theoretically undeveloped quality. This is especially evident in the local accounts and studies of lawyers which have emerged in the last decade. These have been mostly produced by professional bodies or lawyers and, as argued below, they do not offer any adequate critique of the professional interest in extended legal aid services.

Sociological accounts of the professions began to emerge in the 1960s with the work of Anderson and Western founded upon empirical surveys of the socialisation of university students into the values and outlook of distinctive 'professional cultures'.[1] In the following decade more critical discussions appeared which stressed the socially oppressive role of expanding groups of professionals and technocrats in neo-capitalist societies increasingly dominated by the use of 'expert' knowledge.[2] This material shared the conceptual failings of many of the overseas radical and new left accounts which it drew on. Thus, this frequently assumed, rather than studied and illustrated, a general relationship between the activities of professionals and capitalist production, as well as the effective society-wide reproduction of bourgeois beliefs and values.

For example, Boreham and Pemberton in 1976 attacked previous accounts of the professions as conservative and apologetic, and insisted that these occupations work to reinforce 'the interests of the dominant strata'.[3] But the unified interests of this 'strata' are presupposed. This process was not explained beyond references to the 'social control' presumably always exercised by professionals over dependent clients.[4] This implicitly plays down the wide diversity in the institutional settings, client relations and social power of different groups of professionals.

These would include the increasingly diverse and divided segments of the

legal profession. Rejecting the naive reproduction of professional ideology in depictions of lawyers as essentially public-spirited, sociologists and political scientists have noted the elitism, political conservatism, and the 'upper-class' links of Australian lawyers, as well as their extensive influence in business, politics and public life.[5] But the small amount of detailed writing has mostly assumed a policy-oriented and atheoretical form that reflects its origin. Because Australian sociology developed late, most studies of the legal profession have been conducted by its own members and their agencies.[6] O'Malley points to a number of studies that are characterised by a 'lawyer-dominated empiricism', and which have been carried out 'for law bodies, about lawyers and overwhelmingly reflecting matters of concern to the profession'.[7]

This lawyer dominance is reflected in the limited scope of the bulk of the contributions to a number of recent edited works on the profession and legal services. Most of these are papers from professional conferences of lawyers, judges and legal officials. These include legalistic discussions of changes to administrative and constitutional law in the volumes edited by Hambly and Goldring (1976, 1980), and mostly policy-oriented accounts of legal needs and legal aid administration in that edited by Cashman (1981).[8] The issues of lawyer unemployment, the protection of existing monopolies, and the search for new areas of work against a range of occupational threats, generally divorced from any consideration of the public interest in this process, comprise the predominant concerns in the works edited by Bowen (1978) and Tomasic (1978).[9]

But the ahistorical, empiricist tendency noted by O'Malley has been most obvious in the quantitative studies of the profession in New South Wales and Victoria commissioned by the Law Foundations in those states in the 1970s. The focus of the report of a 1974 research project published by Hetherton as Victoria's Lawyers in 1978, directly reflected growing professional concern regarding the employment and career opportunities of lawyers in that state.[10]

This concern, Hetherton notes at the start, was justified in view of the threat to lawyers' work deriving from the activities of such groups as accountants, estate and tax agents.[11] As well as this, the number of new annual admissions to practise in Victoria rose fivefold between 1960 and 1975.[12] This work provides useful demographic detail. It notes that the majority of practitioners have high status social backgrounds, and although this tendency remains unchanged, the profession is increasingly youthful and female.[13] Information is also given regarding work patterns including the still limited degree of specialisation among solicitors.[14] This is extended by a 1981 report which gives further detail regarding specialisation, noting that lawyers with higher status backgrounds are concentrated in such prestigious areas as commercial law, taxation and property.[15] Additionally, information is provided as to the backgrounds of women lawyers, their marginalisation in the legal workforce, lower than average incomes and an overrepresentation among those practising in lower-status areas.[16]

Hetherton also refers briefly to the further fragmentation of the profession that has resulted from these trends and the rise of new specialties and clientele.[17] But this needs extending by a broader account of how this relates to changes in the legal market, especially as a result of increased state activities. This 'intervention' is not discussed or theorised as to its origin. It is simply presupposed as a solution to the underlying concern with lawyers' employment levels and remuneration.

This 'manpower planning' purpose is also evident in the report of the survey of the profession in New South Wales, conducted in 1977 and published in 1978 by Tomasic and Bullard as Lawyers and Their Work in New South Wales.[18] This also provides important detail about the social backgrounds of lawyers, finding that New South Wales practitioners also mostly have high-status origins.[19] Additionally, these authors conclude that the profession is highly and

increasingly stratified according to the backgrounds, education, training, forms of employment, areas of practice, and clientele of different groups of lawyers.[20] This is reflected in the status differences and cultural divisions between elite city, suburban and country practitioners, as well as those in corporate and government employment.[21] But although Tomasic and Bullard note this significant trend towards salaried employment, their discussion also revolves around the straightforward presentation of empirical information and the issues of employment, work and income levels. Again, this needs extending with a discussion of the wider historical causes of these various divisions and how they reflect important contemporary changes in the profession's relations to both capital and the state.

Although these works have avoided theoretical confusion by avoiding theory, this is not so with the report of a 1975 study published by Tomasic in 1976 as Law, Lawyers and the Community and in 1978 as Lawyers and the Community.[22] This study comprised an attitudinal survey of public perceptions regarding lawyers, the need for legal services, and various aspects of the legal system. But despite the apparent breadth of this project, its critical purpose, at least regarding the social significance of the profession's work, was a limited one. In the introduction to Lawyers and the Community Tomasic declares that,

> It is clear that the most important advances in our understandings of lawyers will come from a close scrutiny of the communication processes between lawyers, clients and the community.[23]

Discussion focuses upon aspects of lawyer-client interaction, and means are sought to resolve the frequent 'poor communication' which mars relations with clients.[24]

This research produced findings which suggest major problems with the current form of legal services and their delivery. These include a high degree of public disillusion with lawyers and the law, dissatisfaction with and ignorance

of existing legal aid schemes, and lawyer use patterns that are obviously skewed on class lines.[25] Tomasic correctly notes that the appropriateness of legal solutions to social problems reconceptualised as 'legal needs' cannot be assumed. But he also mostly circumvents the major issue of the extensive lack of access to legal services of a large number of poor and disadvantaged individuals and groups, and the apparent inadequacy of existing types of service and remedies for the expression and protection of their interests.

This work is more concerned with lawyer relations to current groups of clients. Lawyers, it is conceded, have a good deal of 'ill-repute' among less informed groups which irregularly use their services.[26] More regular consumers also express dissatisfaction regarding such matters as costs and client contact.[27] But this only draws the mildest censure, 'in certain respects', it is noted, 'lawyers are failing to provide the high quality of service that would seem to be desirable'.[28]

Tomasic maintains that the major problem with the current delivery of legal services is inadequate communication with existing clients, and that any improvement to this will result in 'a fundamental contribution to the demystification of society'.[29] A ready solution, he argues, would be an increasing professional consciousness of a 'consumer perspective', and the attainment of 'structural changes' in the lawyer-client relationship along the lines suggested by Rosenthal's 'participatory' model.[30] Here, the traditional relationship in which the professional determines all important decisions regarding a legal matter, is replaced by frequent consultation and shared decision-making with 'active' clients obtaining a more satisfactory service.[31]

Tomasic's empiricism accords an analytical privilege upon the experience, perceptions, and 'attitudes' of the individual subject, and discussion is focused at the level of interpersonal relations and individual consciousness with a tendency to reify the existing legal market, use patterns and legal relations. As a

sociology of lawyers, this correspondingly lacks a structural dimension. Tomasic does note that the distribution of legal services is related to such factors as the ownership of property.[32] Similarly, he cites the view that lawyers are among a group of occupations that support 'upper social groups in the capitalist system'.[33] But this claim is not developed by an account of either the direct role assumed by lawyers as either agents or employees of corporate capital and the bourgeoisie, or their possible role as hegemonic ideologists. The critique goes no further than a criticism of poor client relations.

The proposed solution to these poor relations also appears flawed. Rosenthal's model of traditional delivery which is contrasted with the 'participatory' model, is only a misleading ideal-type deriving from his study of atypical low-status clients pursuing personal injury claims. As Cain concludes from her own study of lawyers' work, characteristic legal clients comprise wealthy and privileged institutions and individuals that do not normally assume a passive stance in the pursuit of their legal claims.[34] In fact, they more frequently assume a demanding role akin to that of Rosenthal's ideal 'active' clients. Given the existing skewed distribution of legal services in favour of these client groups, the claimed radical and 'demystifying' quality of protecting or extending this role is unconvincing.

The inherent conservatism of the empiricist perspective and the contradictions that follow the juxtaposition of a liberal outlook and appropriated radical terminology become evident at other levels. As his survey suggests that even the more regular users of legal services often do not receive a satisfactory service, Tomasic comes to the absurd conclusion that both these clients, and groups which are rarely or never served by lawyers, are all 'generally powerless' in relation to the legal system.[35] This also contradicts the earlier insistence on the greater support given to the wealthy and privileged.

These contradictions are also apparent in Tomasic's discussion of the so-called 'crisis of legal culture' - the term applied by academic commentators to an alleged contemporary breakdown in belief in legal authority and widespread disillusion with the legal system and lawyers.[36] To explain this phenomenon he borrows from Eliot's idealist and elitist conceptions of culture and cultural decay in an industrial mass society, to argue that the legal subculture is increasingly undergoing challenge from a new ideology of 'consumerism'.[37] This threat is evident in the divided views of the law taken by legal professionals and the community. But the origins of this worsening 'schism' or the current mobilisation against lawyers of a 'community' that is newly intolerant of incompetent or unresponsive professionals, remains mystifying.[38]

The legal subculture is said to be tied to the 'system of social stratification' of an entity termed 'capitalist post-industrial society'.[39] But no wider consideration is given to the relationship between this cultural 'crisis' of public criticism of existing legal services and their delivery, to the 'crisis' of a changing private legal market and a restructuring of relations to the state. Readers are instead left with a faith in a claimed growing 'responsiveness' of lawyers to their clients which will render the legal system 'less oppressive' to those it favours.[40]

Material concerning the profession which can be more completely regarded as part of the international legal services literature also appeared in Australia in the 1970s. The various reports of the Law and Poverty Section of the Henderson Poverty Commission discussed below, comprise the major local examples of this work.[41] In summary, these were highly critical of existing private professional and government legal aid schemes for their small scale, narrow scope, and charitable forms, and attacked an alleged neglect of extensive

unmet legal needs among the poor and such disadvantaged groups as aborigines, juveniles and criminal defendants.[42]

Empirical research produced to reinforce these claims included Cass and Sackville's 1973 survey of legal needs in working class areas of Sydney, published in 1974 as Legal Needs of the Poor, and Fitzgerald's 1974 Melbourne survey which found that there was a low level of contact with the poor by private lawyers in that city, published in 1977 as Poverty and the Legal Profession in Victoria.[43]

Sackville's main report emphasised the need to reform the substantive law and existing legal remedies which have historically developed in favour of the privileged.[44] It also suggested that the imbalance in access to the law be redressed by a form of 'activist' lawyering that develops neglected areas relating to the needs of the underprivileged, and is distinguished by new modes of service delivery and client representation.[45]

But, as argued below, much of this material suggests an empiricist conceptualisation of legal needs.[46] These reports could also be advanced by a historically reflexive discussion of the origins of the increased contemporary call for equal access to legal services, and the broader relation between the 'discovery' and construction of legal needs and the work and employment patterns of new groups of lawyers. Sackville has outlined the legal 'needs' generated by the contemporary growth of public welfare systems and exhorted lawyers to meet them. But the state is here viewed as an external agency - the new opponent of legal aid lawyers and their clients in such matters as Social Security claims.[47] A more extended discussion of the implications of the state's increased assumption of responsibility for legal aid as a 'welfare right' and the expansion of government schemes for its relations with the profession could be generated.

This liberal discourse which is critical of the profession's conservatism and

general complacency regarding the denial of access to the law of the poor and disadvantaged, has been substantially extended by the publication of Sexton and Maher's The Legal Mystique in 1982.[48] This gives a readable account of aspects of the work and culture of lawyers (including the bar and judiciary), their role as powerbrokers in business and politics, as well as the structure and function of the various professional organisations in Australia.[49]

A brief but useful outline is given of the history of the private professional, particularly Law Society reactions, to the expansion of salaried government legal aid in the Whitlam years, and their mobilisation against the Australian Legal Aid Office in an increasingly overt political role.[50] This work also broadly details aspects of the effects of state 'intervention' upon the profession's work and internal composition in the 1970s. The Whitlam government's reform programme, they note, rapidly expanded the number of salaried public lawyers in Australia.[51] But less obviously, its reforms also led to a closer relationship between lawyer groups and corporate capital. The increased government regulation in such areas as trade practices, mining and investment, environmental and consumer law, led to a greater use of legal services either from expanded major law firms (themselves increasingly organised on corporate lines), or from the growing number of 'inhouse' corporate counsel which Sexton and Maher view as a new though still only nascent elite within the private profession.[52]

Although Sexton and Maher note that Whitlamite reform extended the segmentation of the profession, new professional divisions are played down by an overstress on the homogeneity of lawyer groups. New groups of radical lawyers are mentioned only in the context of conservative reactions to them.[53] The particular interests of the expanded legal services segment of the profession and their relation to state involvement in the legal market and professional matters are passed over. Similarly, references to legal needs remain in the empiricist

mould. The professional interest in articulating them is not regarded as problematic. These needs are presupposed and their satisfaction is narrowly discussed as the panacea to professional unemployment and contracting levels of work in traditional areas.[54]

Sexton and Maher refer constantly to the rising level of public criticism of lawyers, regarding both inadequate assistance schemes and such more directly professional matters as the accessibility and cost of private services and the regulation of practitioners.[55] But they also have incomplete views of the origins of this. With a firm belief in the value of extended access to professional services, the increased criticism of lawyers is linked to an alleged growing power and critical consciousness of the underprivileged. The reason, they claim, why lawyers are now subject to such criticism,

> ... is that various disadvantaged groups in the society are beginning to gain access to the system of justice and to discover just how poorly it is geared to serving their needs.[56]

As argued, this appears to be a teleological explanation of calls for the expanded availability of legal services, as being itself an outcome of extended access. It also suggests another 'interventionist' view of state-professional relations, in this case with a reform government acting upon its own initiative to restructure the profession and meet apparently self-evident public needs.

This liberal perspective is also reflected in the authors' account of professional ideology. This revolves around an ongoing critique of what they term the 'myth of neutrality' regarding the law. This comprises the myth that legal rules and legal reasoning are free of social and political values, and in which,

> To a large extent the law is seen as a set of immutable principles that have always and will always exist, and lawyers always as the priests who reveal these principles to laymen always with remoteness and neutrality, especially in the case of judges, that transcend any question of personal values or interests.[57]

The professional belief in this myth, they maintain, is reinforced by the general conservatism of formalist legal education, and the closed nature of professional training and work, especially as regards the bar and judiciary.[58] This critique of simplistic claims to be 'value-free' resembles several accounts in the debate regarding the objectivity and epistemological status of social 'science' discourse. It joins with liberal theorists who have rejected the claims of the positivist tradition and stressed the inevitability of subjectivism in knowledge production.[59] However, it also shares their theoretical flaws. In particular, its implicit model of the production of knowledge and ideology stresses the primacy of the individual value-laden subject above determination by structural factors.[60]

For Sexton and Maher, ideology is also understood in an empiricist vein. They discuss the articulation of private lawyer opposition to salaried legal aid through the support for a narrow model of appropriate 'independent' legal practice. But this critique of legal positivism, which calls for more enlightened lawyer views, holds to the general liberal faith in legal discourse and legal intervention.[61] It must be asked, which particular lawyers have an interest in the expression of 'enlightened' views and how does this relate to their own material practices as legal producers?

The wider role of lawyers and other professionals in the reproduction of social exploitation and oppression comprises far more than an ideological adherence to the conservative approaches and opinions which become the principal target of Sexton and Maher. The 'real problem' with lawyers, they conclude, is one of attitudes.[62] Thus understood, injustice becomes a problem of consciousness. Their view of contemporary Australian society is one of a flawed pluralism, especially evident in unequal access to the law. Thus, the lack of public accountability of lawyers and judges is contrasted with the supposed representativeness of liberal democratic political systems.[63] Beyond the myth

of a neutral and just legal system, this itself reproduces another larger myth, the myth that social justice is a real possibility in a class-divided society.

A more radical and theoretically sophisticated account of Australian lawyers is offered by O'Malley in Law, Capitalism and Democracy, published in 1983.[64] This work gives a broad overview of the relationship between areas of the legal system and the maintenance of class rule in capitalist society. In a neo-Marxist vein, O'Malley rejects simple instrumentalist views of the state and law as necessarily and consciously expressing the interests of a capitalist ruling class. He finds support here from such 'commodity form' theorists as Pashukanis and Balbus who argue that the ideology of legalism is essential to capitalist hegemony, but that this arises more indirectly from a particular conception of the juridical subject which is tied to the conditions of the individualised and 'free' bourgeois market and thereby permeates bourgeois society.[65]

As well as this, O'Malley notes that contemporary changes in the form of capitalist production, have led to major changes to legal rules and institutions. He insists that with the rise of monopoly capitalism, such advanced capitalist nations as Australia are increasingly characterised by 'corporatist' forms of economic organisation in which the 'neutral' state intervenes extensively to co-ordinate and harmonise relations between capital and organised labour, and thereby secure the necessary conditions for capital accumulation.[66] This organisational form may extend well beyond the direct relations of labour and capital. Following such theorists as Panitch and Schmitter, O'Malley argues that corporatist modes of organisation, and ideologies of unity and the protection of the community's interest under 'expert' state guidance permeate the social formation of advanced capitalism.[67] This ideology is seen as evident in an array of reforms and initiatives made to both the substantive law and legal institutions.

In these the primacy of the individual legal subject is displaced by the administrative regulation of the state's citizenry as specific social categories.[68]

O'Malley's discussion of Australian lawyers outlines information regarding their social backgrounds and changing work patterns, in addition to their role in reproducing class privilege via their work for productive capital, and more commonly, through their organisation of the personal property relations of the bourgeoisie and middle class.[69] His main theoretical focus, however, surrounds the evolving relations between the profession and the state. O'Malley suggests that professional 'autonomy' is built around the attainment of an unmediated relationship with clients.[70] The state is a key factor in this, market dominance depends on non-intervention and legitimation of the legal monopoly.[71] This part of his account suggests the market definition of professionals and the autonomy/intervention dyad attacked by Johnson, as he refers to the inherent dangers of 'bureaucratisation' of professional work by the state.[72]

However, he advances to a discussion of the more complex relation that results where certain lawyers, particularly judges, assume quasi-state functions, or are increasingly in the direct employment of state agencies. In such cases, the services rendered by these professionals and their institutional entrenchment, allows them to develop 'autonomous spheres of action' inside the state.[73] Lawyers' 'autonomy' is at once both attained and undermined by the location of professionals within the state. In such cases,

> ... it is not the state which penetrates the legal profession, but the legal profession which penetrates the state, thereby securing the reproduction of professional autonomy.[74]

This work refers to the development of public legal aid schemes and the subsidisation of the legal market, as a major form of state activity that may either threaten professional autonomy or leave it intact. A brief outline of the private profession's moves against expanded salaried government schemes in the

1970s is given, with victory for private lawyers as the implied outcome.[75] But despite voicing a more sophisticated view of profession-state relations, O'Malley's account also offers few leads as to how to explain the historical origins of this 'intervention' or the rise of a legal services lobby in Australia.

A brief mention is made of the material benefits which lawyers derive from public subsidisation of the legal market. O'Malley denies that the profession is a homogeneous one; it is much fragmented by work and clientele.[76] He also refers to the recent rise of marginal groups of reformist and radical lawyers and the development of a growing number of community legal centres.[77] But the political struggles of, and within, the profession over legal aid policy could be related to the appearance of new divisions and of new segments with distinct interests and ideologies. Professional ideology is discussed principally as a source of unity by O'Malley. The common ideology of the 'rule of law' is said to restrict the level of state intervention in this field.[78] But it has also become a terrain of intra-professional struggle. Legal service lobbyists advocating expanded access to law, vindicate their claims and new modes of legal practice by reference to old tenets of professional ideology - service, duty, and legality.

This account is built around a more abstract explanation of the contemporary concern with the expansion of legal services within the terms of the principal argument regarding an 'emergent corporatist legality' in the advanced capitalist nations.[79] O'Malley claims that the distinct 'organic ideologies and interventionist practices' which are associated with the rise of monopoly capitalism are beginning to confront substantive social inequality.[80] Thus, legal aid is assuming a form appropriate to monopoly capitalism and debates surrounding legal aid policy and reform can be understand as an expression of the struggle between the two major ideologies of capitalist social organisation, laissez-faire and corporatist beliefs.[81] O'Malley does note that in these debates and conflicts the interests of lawyers have their own specific role.[82] He briefly

provides that 'these generally reinforce the non-interventionist forces'.[83] Some further discussion is required of how these 'corporatist' beliefs are related to the actual practices of certain lawyers, or more generally particular occupational groups and social classes, and thereby translate into state policy.

With this stress on the primacy of corporatist practices, the underlying purpose of legal aid schemes is understood as social control. Legal aid as a part of the substantive 'recognition and containment of differences' forms part of a process of incorporating underprivileged and marginal social groups into the legal system where their claims are redefined, depoliticised and narrowly resolved.[84] Legal aid is here radically theorised at one level - in its relation to hegemony. But the direct interest of some of the privileged in the construction of legal needs and their resolution could be subject to a more detailed critique.

Notes to Chapter One

Part A

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11. T. Parsons, 'Professions', International Encyclopedia of Social Sciences 12 (1968), 546.

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13. See B. Barber, 'Some problems in the sociology of the professions', Daedalus, Fall 1963, 669.
    W. Goode, 'Community within a community: the professions', Americ. Soc. Rev. 22 (1957), 194
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17. B. Barber, op. cit., p.686.

18. T. Johnson, 'Imperialism and the professions' in D. Halmos (ed.), Professionalisation and Social Change, Soc. Rev. Monograph N20, Univ. of Keele, 1973, p.281.
T. Johnson, 'The professions' in G. Hurd (ed.), Human Societies, London, RKP, 1973, p.121.

19. M.S. Larson, The Rise of Professionalism, Berkeley, Univ. of Calif. Press, 1977, p.219.

20. C.W. Mills, White Collar, New York, Oxford, 1956.

21. See E. Hughes, 'The professions in society', in H. Vollmer and D. Mills (eds.), Professionalisation, op. cit., p.64.
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CHAPTER TWO

LEGAL AID AND LEGAL NEEDS

Introduction

The past two decades have been characterised by a notable shift in conceptions of the scope and social purpose of legal aid schemes in the western capitalist nations. It has been acknowledged by numerous commentators and officials that the free market structuring of available legal services and their delivery, has resulted in an effective denial of access for many social groups. The poor, disadvantaged and minority groups have been either excluded from the legal system or experience their involvement therein in a biased and alienating form.

This changed view is reflected in a radical departure from classical liberalism and a shift in legal ideology and notions of the ideal attainment of the rule of law. The formalist conception of a legality built around the imputed equivalence of abstract free individuals (which Macpherson has related to the world view of the ascendant English bourgeoisie), has been challenged by a perspective which gives recognition to, and stresses the effects of, various social factors upon participants in the legal system.[1] The latter ambitiously sets the goal of actual substantive equality as the object of reform and extension of legal services.

Traditional legal aid schemes have been criticised both for their failure to provide for the basic requirement of representation by counsel as needed, or to deliver advice services which may prevent and resolve legal disputes outside of litigation. This critique also includes attacks upon the lack of resources of the traditional schemes mostly controlled by the private profession, and the utility of charitable models of delivery which are always constrained by the degree of

professional commitment to the ethic of community service.

Through this discourse of legal needs, it is asserted that access to legal services is not derived from privilege, but is due as of 'right'. The formal juridical right to counsel which had some limited recognition in early English statutes and rules of court, and the restraining force of the constitutional doctrine of the separation of powers, have been slowly undermined by what Cappelletti terms,

> ... the existence in the west of a pattern of struggle towards the realization of the principle that the state must affirmatively and effectively guarantee the right of all to competent legal assistance, wherever and in whatever form it is needed.[2]

Calls for reformed or alternative systems of legal services view the modern state as the responsible guarantor of a substantive access to the legal system. This is reconceived as a welfare or 'social' right necessitating positive enabling legislation and state involvement through either a substantial subsidisation of services or the separate development of public schemes. This requirement of affirmative state action is reinforced by the primary importance of legal access to the protection of individual rights. These include the right to various entitlements in neo-capitalist welfare states, which may not be effectively asserted without resort to law. Within this view, Cappelletti and Garth argue that,

> ... the right of effective access to justice has gained particular attention as recent 'welfare state' reforms have increasingly sought to arm individuals with new substantive rights in their capacities as consumers, tenants, employees, and even citizens. Indeed the right of effective access is increasingly recognized as being of paramount importance among the new individual and social rights, since the possession of rights is meaningless without mechanisms for their effective vindication. Effective access to justice can thus be seen as the most basic requirement - the most basic 'human right' - of a modern, egalitarian legal system which purports to guarantee, and not merely proclaim, the legal rights of all.[3]

This pressure for an expanded access to legal services has been accompanied by a reworking of ideas about the proper domain of legal discourse and of the subjection of various social problems and relationships to legal intervention. A reflection of this tendency is the rise of new or formerly neglected areas of legal specialisation surrounding the regulation of disputes involving the working class and disadvantaged groups, which include poverty law, welfare and social security law, consumer law and discrimination. In this historical development, a key inspiration and political justification for demands for widespread legal aid schemes, expanded access, and the further legalisation of certain spheres of civil life, has derived from contemporary sociological studies of unmet legal needs.

Early History

Many aspects of legal aid delivery, including the centrality of notions of charity, derive from its early historical evolution in the common law system which has been adopted in Australia. A limited representation of the impoverished was first given in medieval England through the good works of ecclesiastical lawyers in secular courts.[4] A Statute of Henry VII in 1495, directed judges to assign counsel for the indigent in civil matters in courts of common law. Accordingly, the system of 'in forma pauperis' measures which allowed volunteer lawyers to take pleas and give limited representation, was developed and survived to this century. This system did not suggest any duty of the state to provide representation; in the absence of a developed conception of 'the state' as a political entity which articulates some abstract general will and the universal interest of its citizenry, it derived from older notions of chivalry and a paternal duty to the poor and unfortunate.

However, a reluctance to act on this noble attitude and the fear of encouraging vexatious actions were evident in the early restriction of assistance

to plaintiffs, who, by amendments in later centuries, could be punished with a flogging or time in a workhouse if unsuccessful in their suit. This scheme remained highly restrictive in later years. From the eighteenth century a counsel's certificate of merit was required for assistance. This was always so hard to procure that even under the later Poor Persons Rules, there were only ninety-nine petitions for legal assistance granted in all of England in 1914.[5] Furthermore, the means test applied for applicants was made progressively harsher by the effect of four centuries of inflation; the five pound limit of 1495 was not raised until the court reforms of 1883.6 In criminal matters, a related system whereby courts allowed counsel to take 'dock briefs' from defendants in serious matters, also formed the basis of a meagre voluntary service for the poor.

Prior to the nineteen sixties, criticisms of the limited help offered by various legal-aid schemes and a concern to alleviate their omissions, were not commonplace in England or elsewhere. However, there were some exceptions to this. Inequities in access to law had been attacked by a minority of lawyers with Chartist and trade union links in the nineteenth century. The growth of the urban working class, legislation on employment and industrial accidents, and divorce law reforms late in the century, increased the demand for legal services by excluded groups. Under the rubric of liberal municipal reform, 'poor man's lawyers' entered London's slums and offered legal advice to the poor. With close links to the social service settlement movement, a legal centre - similar to those then existing in Scandinavia - was established at Toynbee Hall in 1884; several others including Cambridge House and Mansfield House developed in the following decade.[7]

Very little is known of the history of these centres, or of the lawyers who worked in them. It is likely that the motivating ideology included a notion of the moral rebuilding through almsgiving of dissolute impoverished individuals,

which structured much of the 'welfare' of the times. Despite this, some more radical conceptions of poverty were held by participants in the settlement movement. These included Samuel Barnett, the founder of Toynbee Hall, who rejected liberal individualist models of charity for a stress upon the structural genesis of poverty in bourgeois society.[8] These centres were limited in their activities by the ancient strictures against maintenance and champerty which allowed prosecution of those who 'stirred up' litigation, and they were regarded with disdain by many lawyers as they developed in the same period as several 'legal aid societies' which had bad reputations for touting.[9] But it seems likely that their marginal existence was mostly tolerated by legal officials as a balance to a general professional disinterest in charitable work.

Eventually, the existing system of aid proved so cumbersome that under the new Poor Persons Rules of 1914 applications for assistance in higher courts were taken by a small government department - though no remuneration was to be provided for counsel and no substantial expansion of assistance provided resulted from this reform.[10] The widespread rejection of notions of an individual right to legal aid or of any duty of the state to ensure its provision, was fully reflected in the findings of the influential Finlay Committee on British legal aid in 1928. This committee contended that there was no appreciable number of cases of injustice in serious criminal trials deriving from the commonplace lack of representation of defendants. Although calling for a greater voluntary efforts from the bar, the committee argued that assistance was also unnecessary in the bulk of lower court matters, criminal and civil. A fear of increased workloads and the elitist belief that the legal claims of currently excluded groups were overwhelmingly trivial, led to a rejection of the idea of a need for a state scheme akin to public medicine, arguing instead that, 'It is manifestly in the interests of a state that its citizens should be healthy, not that they should be litigious'.[11]

This same strong opposition to state intervention, had been evident in the recommendations of the earlier Lawrence Committee that control of the allocation of assistance ought to fall to the private profession. Accordingly, the Law Society was granted full administration of the much resented Poor Person's Department by the Baldwin government in 1926.[12] This new Law Society scheme underwent years of crisis due to a continuing professional complacency and the increased demands upon it by the working class, especially in matrimonial matters. The lawyers' enthusiasm for the professional control of legal aid was not matched by their voluntary efforts, and the scheme responded with an increasingly high rate of rejection of applications for assistance.[13] Its collapse seemed inevitable with the final refusal of Welsh lawyers to handle any further unpaid matters due to both the harsh economic conditions in 1938, and a further liberalisation of England's divorce laws in the preceding year.

A parallel development was the establishment of a further narrow court controlled scheme granting assistance in serious criminal matters, in 1930. Although it received some state finance, this scheme was hampered by the inadequate funding which reflected a wavering government commitment to legal aid, and could only offer low remuneration to counsel.

The initial growth of legal aid schemes in the United States was marred by narrow judicial interpretations of the constitutional guarantees of counsel and access to the courts; together with a patchwork adoption of the narrow English procedures for voluntary representation.[14] But the development of a sizeable number of legal aid organisations was prompted by the Foundation of the New York Legal Aid Society by a group of German immigrants, for their own self protection in 1876.[15]

The Society's founder, Von Briesen, procured finance and support from the city's ruling business elite, by arguing that allowing further access to the law, would restrain the growth of radical beliefs among workers and immigrants in a period of economic recession and political upheaval. In fact, he even claimed a

privileged role for the society in already securing this hegemonic aim:

> The work done by us comes home to every citizen, it keeps the poor satisfied, because it establishes and protects their rights; it produces better workingmen and better workingwomen, better house servants; it antagonizes the tendency towards Communism; it is the best argument against the socialist who cries that the poor have no rights which the rich are bound to respect. Communism and Socialism have, it seems, lost their grip upon our New York population since our society has done its effective work on behalf of the poor.[16]

This success was followed by the growth of voluntary societies in New Jersey, Chicago and elsewhere; though most had few resources and they were very uneven in quality.

The continuing lack of legal services for the underprivileged in the United States, was well documented in a controversial study by Heber Smith, commissioned by the Carnegie Corporation and first published as Justice and the Poor (1919).[17] As a liberal reformist, Smith contrasted the delays, costs and lack of representation in the legal system with the unrealized ideal of equal justice. Stressing the political objectivity of the substantive law, he denied claims of a systematic class bias in the legal system, but instead criticized the current unfairness of procedural provisions.[18] Wider access to an essentially just system, he contended, would promote the virtues of 'good citizenship' and patriotic loyalty among politically disaffected workers, poor and immigrants.[19]

> Nothing rankles more in the human heart than the feeling of injustice. It produces a sense of helplessness, then bitterness. It is brooded over. It leads directly to contempt for law, disloyalty to the government, and plants the seeds of anarchy.[20]

The force of this critique, its appeal during the outburst of nationalist sentiment which spread across the country in the early nineteen-twenties, and Smith's personal influence within the American Bar Association, led to the foundation of what some term the early American 'legal aid movement' in that decade.[21] With the increased support from corporate business and benevolent

societies, legal aid organizations proliferated in number and a national association was formed in 1923.

However, despite these improvements, insufficient finance, a voluntary structure, and the large caseloads during the depression in the nineteen-thirties, hindered their substantial development till decades later. Thus, in her 1947 national survey of legal aid in the United States, Brownell concluded by noting the general paucity of assistance offered in civil and criminal matters, and that the proportion of demand for services met by legal aid organizations had remained relatively static since the nineteen-twenties.[22] This same pattern of narrow development extended throughout the Anglo-American legal world. In the various Australian states, the system of in forma pauperis procedures had been written into statutes enacted early this century.[23] A small government legal aid scheme to provide representation in serious criminal trials was pioneered by a Labor government in Queensland in 1916.[24] South Australia followed with a similar scheme, in establishing a Public Solicitor's Office in 1926. However with the strength among the profession of a free market ideology which interpreted this change as a direct threat to professional independence, and the vacillating nature of government support, the office was shortlived. It was replaced in 1933 by an early private scheme with the undertaking of the South Australian Law Society that aid would be provided in all 'reasonable' cases.[25] The new scheme was relatively wide in scope; it covered both civil and criminal matters, some pleas and commitals, and offered advice in matters outside of litigation. But despite the considerable voluntary effort of many solicitors, the replacement of the State department may have seemed a pyrrhic victory. Inadequate resources, low remuneration for counsel, and a periodic lack of volunteers, finally culminated in a crisis for the scheme in the nineteen-sixties.[26]

Within the Australian legal profession, there was until fairly recent times,

a pervasive fear that any major expansion of legal assistance would undermine lawyers' business and lower their profits. This coexisted with an adherence to a laissez faire ideology which limited charitable measures by the profession and sought to justify the paucity of existing schemes for assistance. These beliefs, the rejection of any notion of a 'right' to aid, and that heightened opposition to state involvement in hard economic times which has only recently in the profession's history been reversed, were all evident in the editorial commentary of the Law Institute Journal upon the first year of operation of the Victorian Public Solicitor; the latter state department was founded in 1929 to provide aid in serious criminal trials only.

> Elsewhere we have published by courtesy of the Attorney-General ... the statistics for the first year of working of the office of the Public Solicitor. The figures speak for themselves. It is pleasing to note that the refusals of service have been very large. Many people are always in search of 'something for nothing', and it would be very easy for a benevolent Government to carelessly cater for them. Apparently no judicial tests have been laid down for the guidance of the Public Solicitor in the determination of the means of the applicant for free legal services. The profession needs to be on its guard against inroads upon its legitimate legal business, which are continuously evident from several quarters. One danger is the granting of free aid to criminals and others who recklessly using up their own means, are able for the moment to plead poverty.[27]

This depiction of the underprivileged was partly altered by the effects of external historical circumstances in the nineteen-forties, which included the greater obligation upon the state to secure the well-being of its working class citizens in wartime. The legitimation of calls for a national mobilization, through corporatist ideology, stressed the displacement of individual and group self-interest with a constructed general interest. A concern that the legal system have a more plausible appearance as the embodiment of a universal societal interest, expressed itself in various reforms.

In Britain, this period was characterized by a heightened official sensitivity to the claim of critics like the Haldane society of socialist lawyers

and liberal academic commentators, that access to the legal system was structured around differences of social class and who warned of the political dangers which followed from this.[28] Critics asserting a clear state duty to remedy this included Cohn who contested that,

> Legal aid is a service which the modern State owes to its citizens as a matter of principle. It is part of that protection of the citizens' individuality which, in our modern conception of the relation between the citizen and the State, can be claimed by those citizens who are too weak to protect themselves. Just as the modern State tries to protect the poorer classes against the common dangers of life, such as unemployment, disease, old age, social oppression, etc., so it should protect them when legal difficulties arise. Indeed, the case for such a form of protection is stronger than the case for any other form of protection. The State is not responsible for the outbreak of epidemics, for old age or economic crises. But the State is responsible for the law.[29]

With additional pressure from groups including army lawyers, the National Council of Social Service, and the employees of newly established Citizen's Advice Bureaux, the British government set up the Rushcliffe Committee on legal aid and advice in 1944. Alongside considerable criticism of existing services, the Committee took some account of arguments that the state carried a responsibility to provide assistance and recommended the state financing of an expanded Law Society Scheme.[30] Despite an atmosphere of post-war reconstruction and early welfare state expansion, the Attlee Labor government resisted calls for either a nationalisation of legal services or a separate legal services commission.[31]

The political leverage of the profession and the force of its insistence on the control of services, led to the adoption of the main Rushcliffe recommendations in a new scheme under the Legal Aid and Advice Act of 1949. This scheme was substantially the same as that proposed by the Law Society Committee in 1942. Salaried advice centres were planned as a later addition. However, retrospectively, the scheme represented, in its combining professional

control together with increased state finance, a significant historical compromise between conflicting ideas concerning the organization of legal aid. This acceptance of a limited state responsibility and of 'professional independence', understood as the effective control of services and their delivery, was the genesis of what the Americans termed 'Judicare', one of the two major models of legal aid debated in western nations in the 1960s and 1970s.

Despite this change, the new civil scheme had limited finance, narrow eligibility requirements, and little provision for appeals against any refusal of help, such that Abel-Smith and Stevens were drawn to comment in 1967, that the scheme still smacked of a Victorian charitable institution more than any other social service.[32] Furthermore, it was developed in a piecemeal way. A system for advice by private lawyers was delayed until 1960. Similarly, a substantial rise in the numbers of assisted persons only followed from the extension of aid to magistrates' courts in 1961.

Criminal legal aid remained even worse. The Widgery Committee recommended the development of a state-financed scheme to provide representation in criminal proceedings in commitals and in higher court trials in 1966. This was embodied in legislation enacted in the following year, but in which the courts were given the wide discretionary power to grant or refuse assistance. As the Committee regarded aid in magistrates courts as unnecessary, the majority of defendants in British criminal cases were left undefended with the adverse consequences for their outcome that was recorded by social researchers.[33]

Australian developments

In Australia, reforms initiated by wartime Labor governments, including Curtin's establishment of a salaried legal aid and advice service for members of the armed forces. First announced in 1942 by Attorney-General Evatt, the

Commonwealth Legal Service Bureaux quickly peaked in size that decade and had shrunk considerably by 1973 when it was used as the administrative basis for the new Australian Legal Aid Office (ALAO).[34]

A historically more significant move was the foundation of the Public Solicitor's Office and the Public Defender's Office in New South Wales in 1943. The latter office provided representation in serious criminal trials only. The Public Solicitor's Office remained as the only sizeable salaried scheme in Australia until the development of the ALAO and various Aboriginal Legal Services (ALS) in the 1970s, by 1973 employing thirty-three legal staff.[35] It offered help in both civil and criminal matters, and as conceived by Attorney-General Martin, it was intended to cover the legal requirements of most of the states' working class; the stated ambitious final goal was to cover at least three-quarters of the population of New South Wales.[36]

This development was strongly attacked by lawyers, both locally and overseas, as a radical socialist initiative which, in the words of one opposing parliamentarian, was fully 'a step towards the complete nationalisation of the profession ...'.[37] However, taking heed of such dire warnings about the destruction of the profession's independence and the encouragement of the litigious, and so as to prevent the scheme's administrative and financial overload, it was 'initially' limited to matters in superior courts. As this modification remained until the 1970s, and the means test was irregularly corrected for inflation, its scope - though comparatively wide - narrowed with time. By 1973 the upper family income level for assistance was less than the Henderson poverty line.[38]

With a domination of Australian politics by conservative parties in the years of the post-war capitalist long-boom, the suspicious regard of extensive state involvement in welfare services during the 'Menzies era' blocked any proposals for substantial changes to public legal aid. This was reinforced by the ongoing hostility of most of the profession, and the incumbents of official

positions to such changes, and the perceived threat to the profession's business, its organizational independence, the adversarial system, and the 'free choice' of clients in the legal market place.[39]

Despite this attitude to public schemes, proposals for the development of state financed schemes on the English model were also made throughout the 1950s and 1960s. These included the politically astute warning of Davidson, a New South Wales private solicitor, to the profession in his state that it ought further develop civil legal aid so as to ensure the long-term control of it.

> With the inexorable progress of civilization towards the 'welfare state', it is inevitable that a legal aid system of some type will ultimately be introduced in N.S.W. ... [it is necessary] to create an awareness of the necessity for an initiative from within the legal profession itself for the adoption of such a system. If this move is not made by the profession, then undoubtedly the State will eventually do so, and having done so, the Government is not likely to voluntarily part with the administration thereof. The profession will then find that not only has it lost a measure of autonomy, but also that the Executive has obtained, to some degree, the power to control litigation.[40]

Following the South Australian lead, and with the assent of conservative governments in all states except Tasmania, Law Society schemes were established in most states in the 1950s and 1960s, and finally in New South Wales in 1971. The limitations of these schemes which eluded thorough criticisms until the 1970s were many. These changes produced a hotchpotch of measures with complex state variations and other gaps and anomalies, alongside uneven state government efforts to provide representation in serious criminal trials.[41] The provision of assistance in civil matters was controlled by Law Society schemes in all states except New South Wales, where the Public Solicitor offered aid in both civil and criminal matters until its civil jurisdiction was substantially lost to the state Law Society scheme in 1974.

Despite state differences, the shortcomings of these various schemes followed a common pattern. The continuing force of the charity model was reflected in all of them. Assistance was nowhere given as of right. Harsh

eligibility requirements included rigid and generally low means tests, and the possible demand for financial contributions and security. In New South Wales, contributions were compulsory under the 1970 Act, and were set at a higher rate when an applicant was regarded as having a 'weak case'.[42]

The test of merit adopted in civil matters comprised two elements. An applicant was required to have both a 'reasonable cause' of action, and also, there ought to be a reasonable chance of its success. This requirement was interpreted with the English rule that help was to be offered only if the case was one likely to be followed reasonably by a prudent unassisted party with adequate though not overabundant means.[43] The resulting individualization of grievances effectively excluded the possibility of test cases. This was particularly so in such undeveloped areas of Australian law as welfare, consumer and environmental law, where the likely outcome was frequently uncertain and often of no immediate obvious benefit to any individual litigant, and therefore, would probably not be pursued by a hypothetical prudent person.[44]

Little is known of the subjective criteria used in the partial prejudging of a cause of action which this entailed. But their erratic application is suggested in the considerable variation between states of causes rejected for lack of merit. In 1973-74, 5% of applications were rejected by the South Australian scheme, in New South Wales the Public Solicitor rejected 35% of applications for assistance in civil matters in the same year.[45]

A further key factor in the conservative pattern of litigation assisted under these schemes, was their effective control in most states by the private profession. In a majority of states, policy and administration was directly controlled by either a specially composed Law Society Council or Committee. Under the Queensland and Victorian legislation, schemes were directed by separate statutory committees, but actual power was held by the clear majorities of private lawyers on the committees and their monopoly over key administrative positions.[46]

This professional control and the lack of any obligation to provide help, were reflected in the broad discretionary power of committees in granting assistance, and the lack of provisions for external appeals against a refusal to grant aid. In some states this power derived from the scheme's enabling legislation. Under the New South Wales Legal Aid Act of 1970, a certificate granting aid could be made subject to imposed terms and conditions, and amended or revoked at any time as the committee saw fit, and no appeal to any court or other authority was available to challenge such a decision.[47] This arbitrary power was not confined to private schemes; no provisions were made for appeals against a decision of the Public Solicitor's Office. Not surprisingly, in all states appeals were uncommon.

The conservative character of these civil schemes was also evident in a general lack of interest in preventive law. Legal advice was provided by a variety of charitable and other private groups often directed towards a specific clientele or area of law. These included trade unions, the Council for Civil Liberties, the Divorce Law Reform Association, motor vehicle associations and the Brotherhood of St. Laurence. In New South Wales, a unique, widespread and free advice service was provided by chamber magistrates as local court officials in Courts of Petty Sessions. However, the Law Society schemes did not usually give legal advice if it was unrelated to a litigious matter. In Queensland it was given subject to a means test.

Assistance could not be gotten for certain classes of action either because of declared policy or statutory fiat. This included 'luxury litigation' like defamation, but also, in New South Wales, the simple divorces for which there was a widespread demand.[48] Actions were also limited to certain jurisdictions. Some narrow assistance in lower court matters was available in Western Australia, but not in any other state. Similarly, there was no help offered for actions before tribunals, and it was generally unavailable for matters on appeal.[49]

All schemes in this period survived on limited funds. The budget figures for as recently as 1972-73 collected by Armstrong, indicated that total amount expended by all six state schemes was less than $2.7 million in that year.[50] No state money was received by schemes in the eastern states until the 1970s, and a low degree of government support was given in South Australia, Western Australia and Tasmania. The total figure for state funding in the latter three states did not even exceed $0.3 million in 1972-73.[51] Apart from this source, finance was procured through contributions, recovered costs, or, in all states except Tasmania, through a levy imposed upon the interest received on the trust accounts deposited with the Law Society by member solicitors. This overall lack of resources had resulted in financial crises for schemes in at least three states.[52] Its effect was very obvious in their narrow capacity.

In criminal matters, the situation was equally dismal. In these cases, assistance was obtainable through either the Law Society schemes, or, in the eastern states, through a state department employing its own legal staff. In most states it was given only for serious criminal trials in superior courts. No scheme gave help on arrest or in bail hearings; despite local and overseas evidence that this produced a highly prejudicial effect on the outcome of many cases.[53] It was specifically limited for appeals from magistrates courts in Victoria and New South Wales, and was in other states hard to obtain. It was mostly unavailable for committal hearings for indictable offences, or restricted, as in New South Wales. Similarly, except in indictable matters, assistance was not commonly given to juvenile defendants in children's courts.[54]

Help in lower court proceedings was theoretically possible in some states, but due to limited resources and a fear of overloading schemes it was not often granted. This major omission applied in all states prior to the 1970s regardless of the results of this policy for the individual defendants who went unrepresented in these so-called 'minor' cases which comprise the vast bulk of criminal matters dealt with in Australian courts.

The importance of representation in lower court criminal matters was illustrated in a study by Vinson and Homel of statistics for cases heard in Courts of Petty Sessions in New South Wales in 1972, as they first became available.[55] In that year, of some 30,000 defendants, less than a third had some form of representation.[56] Even allowing for the likely magisterial bias in favour of non-working class defendants, the figures suggested that there was a strong relationship between representation and a positive case outcome. A represented defendant was shown to have a sixfold better chance of securing a favourable verdict and a threefold better chance of obtaining a light penalty in the form of a dismissal without conviction despite a finding of guilt.[57]

This same benefit of counsel was also hard to come by for most defendants in all states. The figures collected by Armstrong for 1971, suggested that legal aid schemes - private and public - did little to mitigate this situation. The proportion of applications for assistance in all states in that year was strikingly low, comprising less than 0.6 per cent of the overall figure for criminal cases prosecuted in Australia.[58]

In addition to restrictive means tests, the number of persons defended was restricted, as in civil cases, by a test of merit. In criminal matters this comprised the subjective requirement that a grant of assistance was, in the opinion of the controlling committee, 'in the interest of justice'. This test was generally applied privately and with unstated criteria. It also seems to have been applied in a moralistic fashion categorising the poor through the dichotomy between the 'deserving' and 'undeserving' applicant. Past offenders and 'unsavoury characters' were regularly excluded by the test, although they comprised a group possibly more in need of aid than any other. In Victoria, the Public Solicitor rejected a large proportion of former offenders as 'habitual criminals'.[59] In New South Wales, aid was usually given automatically for defences in capital cases. But the 1971 figures suggest that less than half of

the defendants in quarter sessions trials applied for assistance from the Public Defender, and of these, one-third were rejected for lack of merit.[60]

A low level of funding also hindered state salaried schemes which mostly covered criminal matters. The figures compiled by Keenan for the year 1970-71, indicated that the total budget for the Public Solicitor and Public Defender schemes in the eastern states totalled under $0.75 million, a sum far less than the low amounts spent by Law Society schemes in the same states.[61]

This limited support for even government bodies suggests that the low resources and narrow scope of operation of all schemes in this period was a consequence of historical factors other than just private control. These included factors internal to the state itself; political complacency, a low estimate of public needs, and a general lack of an ideological commitment among public officials to assume a more full responsibility for legal aid, particularly in a nation where 'the state' of political theory comprised 'the states' of a divided Federal system of government and a commonwealth government with a still narrow interest in the provision or funding of legal services. Such was the tentative form of intervention to secure the 'right' of individual citizens to legal assistance, that as late as 1972, Cranston and Adams could fairly comment that there was still no widespread regard of legal aid in Australia as a social service.[62]

However, this official or 'state' reluctance to recognise and extend the right to aid cannot be understood separately from the legal profession's general opposition to the development of services in a non-charitable form. The reasons for this opposition and the slowness with which Australian lawyers have come to acknowledge the class basis of access to the Australian legal system, require explanation. As already noted, the profession perceived a threat to both its work base and free market 'independence' in proposals for extended government assistance. The claim that the public need for legal services was being met

would have seemed more plausible in a country where the profession has had mostly middle-class and smaller propertied clients, and only recently has substantially expanded its level of work on behalf of corporate capital.[63] But this claim was also reinforced by the high level of conservatism and ideological conformity within the profession. It is argued below, that the original ideological strength of this claim and its gradual erosion, must be understood in terms of the changing material conditions of the profession and a general restructuring of its relations with the state in a period of deepening occupational fragmentation.

The Legal Services movement

State moves to provide legal services and the further pursuit of substantive legal equality on an international scale, were prompted and reinforced by rapid changes in the United States. Historical factors in the 1960s created an atmosphere ripe for a liberal expansion of services. These included the new prominence of a professional concern for the underprivileged. In criminal law, this was evident in the 1963 report of the Allen Committee to the Federal Attorney-General, which studied representation nationally and attacked the paucity of existing measures at all levels in proceedings both within and outside actual trials.[64]

This concern also expressed itself, in civil law, in a series of positive Supreme Court decisions on representation of poor clients which led one dissenting judge to bemoan the 'new fetish for indigency' which gripped the minds of his brother judges.[65] This culminated in the decision in 1963 in Gideon v Wainwright, in which a majority of the court overruled earlier narrow constructions of the constitutional guarantee of due process and access to the courts, obliging the states to provide representation in all serious criminal trials.[66] In the same year, the right of access to group legal services, even in a

context of radical political organising for civil rights, was established in N.A.A.C.P. v Button.[67] The right of such group services to employ their own counsel was affirmed in 1964 in Brotherhood of Railroad Trainmen v Virginia State Bar.[68]

These decisions coincided with what has been called the 'rediscovery of poverty' by American social researchers and the expanding social work and helping professions.[69] Similarly, there was a growing concern of political scientists with a political 'alienation' of the underprivileged in a representative democracy. In Daniel Bell's celebrated vision of the end of ideology in an increasingly affluent society, mass alienation comprised indifference to a society administered by technocrats.[70] But alienation was not all quiet. The black civil rights movement and the growing unrest in the poor areas and ghettos of many American cities which peaked in nationwide rioting within a few years, invigorated calls for further channels of redress for groups excluded from participation in political decision-making.

In 1964, the Johnson administration made a historic decision to initiate the largest expansion of welfare services since the New Deal. A major development of health, education and urban renewal programmes were begun with funds allocated under the Economic Opportunity Act. The various programmes of the 'war on poverty' included Operation Headstart, the Job Corps, and the Community Action Program.

Early attempts to develop 'neighbourhood legal services with greater accessibility to the poor, had been made in Manhattan, Washington D.C., and in New Haven in the early 1960s.[71] Lawyers from these projects approached the Community Action Program for funds to fill a more ambitious goal. A broad national network of law firms was planned to satisfy the legal needs of the poor.[72] This proposal met the hostility of established legal aid organisations, the American Trial Lawyers, and local bar groups in several states. But with

the support of prominent figures in government and the American Bar Association, the Legal Services Program was founded as part of the Community Action Program in 1965.[73]

The increased scale of legal aid programmes for the poor which drew on this new source of finance was immense. Johnson notes that in 1965 the total national expenditure on civil legal aid by existing organisations totalled $5 million.[74] In 1971, the budget for the Legal Services Program was at least ten times this figure. The Federal government's commitment increased eightfold between 1966 and 1967, and by 1969 it provided more than 80 per cent of all funds for civil legal aid nationally.[75] By 1972, the programme employed 2,600 full-time salaried lawyers in 850 offices throughout the country, 1.2 million people were being assisted annually and 219 cases had been taken to the Supreme Court whereas none had ever been previously fought there by legal aid attorneys.[76] The programme was soon by far the largest salaried legal service in the capitalist world.

The programme's aim was that this increased quantity in resources would accompany a qualitative change in the form and object of service. The status and scope of legal aid work was to be raised and, with varying levels of success, decentralised neighbourhood firms were to encourage the 'maximum feasible participation of the poor' required by the Act. Legal service lawyers sought to differentiate themselves from other legal professionals and to distinguish their efforts from the individual caseload stress of earlier legal aid organisations. This meant the rejection of the 'reactive model' of delivery to individual clients who were relatively aware of their legal rights and services. The ideological primacy of the greater goals of 'social change' and the ending of poverty devalued individual caseloads and made the selectivity of aid offered into a policy issue.[77] This outlook was reflected in the view of the programmes' director, Clinton Bamberger, that,

> We cannot be content with the creation of systems of rendering free legal assistance to all people who need but cannot afford a lawyer's advice. This program must contribute to the success of the war on poverty. Lawyers must uncover the legal and political tools and vehicles to move poor people from deprivation, depression and despair to opportunity, hope and ambition.[78]

This politicisation of services and the pro-active stance were manifested in the growth of strategic advocacy with the local organising of underprivileged communities by legal service lawyers. This also entailed a stress on the value of law reform through test cases to remedy the ongoing plight of the poor.

The broad aim of combatting poverty through organisation, reform and education, stood alongside calls for a pluralist integration of the politically alienated, and a reassertion of the value of lawyers and legal services in that process. American lawyers were viewed as the primary agents of democratic order.[79] Thus, Albert and Weiss contended that:

> In essence, the neighbourhood law office operated as a two-way lightening rod; on the one hand, communicating grievances of the poor, helping a group of disadvantaged people working together towards legal solutions, and on the other, communicating to the poor the value of legal institutions and how the law functions to bring order and justice. Many times local lawyers have spoken to angry people and shown them concrete things they could do; answered outrages with positive legal action; channelled disparate hostility and frustration into peaceful legal and community action.[80]

Apart from declaring the existence of vast unmet legal needs in old areas of law, this professional intervention rejected narrow, traditional conceptions of what comprised a legal matter or 'need' as determined by the wants recorded by the purchases of individual consumers and the flow of forces in the legal marketplace. This redefinition of legal needs was linked to the growing government largesse that gave rise to hitherto unprotected legal 'rights'. The best known expression of this argument was Charles Reich's contention that these benefits were a new form of property.[81] Lawyers were exhorted to protect these new 'rights' through the development of new spheres of public law,

particularly welfare and poverty law, which were generally neglected in the private delivery of legal services.[82] This redefinition of the legal domain, and of legal rights and needs, thus provided the political justification for such public legal services as the Legal Services Program. Their unique concentration in one sector of the population, the poor, reinforced the separate existence of those services as specialising in a distinct area of unmet needs.

Calls for an extension of legal procedures were prompted by warnings from the political left and right of the bureaucratic domination of life in the corporate welfare state of late capitalist societies, and the wide discretionary powers and lack of accountability of state officials and experts.[83] The advocates of public legal services saw the expansion of legal representation and advice as an external and opposed historical force. The pernicious growth of welfare officialdom could be countered by the skills of legal professionals enlightened to the needs of the poor and underprivileged.[84]

This development inspired the further expansion of legal services for the poor in advanced western nations in the 1960s and 1970s. In Britain, a growing criticism of existing schemes that was reflected in the publication of Justice for All by Labour lawyers and Rough Justice by Conservative lawyers in 1968, led the Law Society to grant waivers for the establishment of local law centres.[85] The first of these centres was founded in North Kensington in London in 1970.[86] State finance was significantly increased in this period, and a simplified fixed-fee private advice scheme commended under the Legal Aid and Advice Act of 1972.[87]

This new mood of expansion in the last years of the post-war economic boom, was also reflected in what Cappelletti described as a 'turmoil' of reform in the European nations.[88] In 1972, new schemes were adopted in France and Sweden. In the same year, state financing was increased in West Germany, Austria and the Netherlands. A new Italian system was enacted in 1973.

Elsewhere, the pattern was similar. A 'Judicare' private scheme had been set up in the Canadian province of Ontario in 1967. In 1972, a rival salaried programme on the American model began in Quebec. At the same time, Australian legal aid underwent a sudden innovative expansion. The Australian Legal Aid Office and Australia's first community legal centre in Fitzroy, Melbourne both commenced operation in 1972, and the new Aboriginal Legal Services were broadened in scope and size.

In Australia and internationally these reforms and initiatives and the extension of legal services at many levels into areas of social policy in this period were, as Blankenburg notes, legitimised by the growing number of empirical studies of legal needs.[89]

Studies of Legal Needs

There had been several studies of the use of legal services conducted in the United States prior to the 1960s, though as Stolz claimed in his plea for further research, they all gave little information about legal needs of any comparative value.[90] In 1938, two Yale academics, Clark and Corstvet, published a study of the use of services which stemmed from a growing concern about the depressed state of the bar in that decade.[91] This first indicated the considerable gap between problem recognition by citizens and actually seeking help from a lawyer. Studies conducted by the California Bar in 1940, the Iowa Bar in 1949, and the national survey of 2000 'middle class' and an equal number of 'working class' families carried out by Koos in 1949, all indicated class variations in consumption; the use of lawyers decreased consistently with a lowered class position.[92] In all of these surveys no indication was given of how the class position of the respondents was determined.

A study of the lawyer use rates of culinary workers in Los Angeles, directed towards establishing a union group legal service, was conducted in 1957.

Although it was found that 36% of workers had used a lawyer in the preceding two years, not much could be extrapolated from this figure regarding unmet need or legal use in other groups.[93] Similarly, a superficial treatment of the issue of legal needs, was given in the 1960 study conducted by Prentice-Hall for the Missouri Bar in an atmosphere of concern about the low rate of increase in lawyers' incomes as against other professionals. This survey of a cross-section of Missouri people produced the unremarkable finding that most people had at some time had reason to contact a lawyer.[94]

The first major contemporary discussion of the unmet legal needs of the poor coincided with the strong criticisms of existing legal aid and the assertion of a state responsibility therefore in the 1960s. In 1965, Carlin and Howard published a paper provocatively titled 'Legal representation and class justice'.[95] This work sought to displace the explanation of the underuse of legal services by the poor through a simple economic model stressing their relative lack of financial resources, with a more sophisticated account appropriating concepts from the discipline of social psychology. In noting that the above surveys suggested a greater use of lawyers by the 'middle class' in the United States, they concluded that the legal system discriminated massively against the poor and underprivileged in a general denial of access to services.

This denial, they argued, occurred at two levels. More complex factors than the mere lack of wealth, including the physical inaccessibility of services to the poor, the middle class demeanour and aloofness of lawyers and the cultural gap between them and many clients, all blocked the ready availability of services. But also, Carlin and Howard explained this limited access by challenging given conceptions of the legal. Rejecting the claim that the poor consume less legal services because they actually have fewer legal problems, they argued that the poor fail to recognise many of their 'legal' problems and that narrow conceptions of law were reproduced by both private lawyers and

traditional legal aid organisations.[96] The poor were said to have widespread unmet needs for legal assistance in areas of law that were virtually untouched. These included parts of the criminal law, domestic relations and tenancy matters, as well as newer areas of law relating to welfare, social security, consumer goods and discrimination. This dilemma was compounded by the low level of the skills, remuneration and status, and limited professional influence of the minority of lawyers who had a predominantly poor or near-poor clientele.[97]

Thus, the historical underconsumption of legal services by poor groups was to be understood by what they termed a lack of 'legal competence'.[98] The poor were without sufficient knowledge of legal rights and remedies, failed to recognise that their experience of hardship could be resolved by lawyers, or otherwise, they exhibited a marked psychic reluctance to take any action thereon. Carlin and Howard insisted that the poor could only match liberal notions of full citizenship if they overcame this lack of willingness to take legal action. Their legal incompetence could be countered by rudimentary legal education teaching the ethic of 'self-help', and by participation in community organising activities like those of the Legal Services Program.

In common with other advocates of expanded legal services, they stressed the importance of a 'multi-disciplinary' approach in treating the problems of the poor, variously immersed in a stultifying 'culture of poverty'.[99] However, they were finally led to reject the notion that the problems encountered by the poor are in fact social problems remediable by other helping occupations. Intervention by a new breed of poverty lawyers is also ironically viewed as an anodyne for the disarming paternalism of the developing welfare state. Thus, they contended that:

> ... the argument that the poor have fewer legal problems than the rich and therefore less need for lawyers, often merges into the welfare oriented idea that the problems of the poor are inherently non-legal. This view entails the risk of misconceiving the individual in such a way as to rob him of the dignity of citizenship. Those who argue that the problems of the poor are essentially social or psychological rather than legal tend to conceive of the poor as incapable of comprehending, let alone altering, their predicament. The poor are thus seen as 'human material that will be worked on, helped, and hopefully transformed, as objects to be manipulated or treated by those who claim to know what is good for them - i.e., social workers, psychiatrists, probation officers or marriage counsellors.[100]

Carlin and Howard reinforced this critique with an extreme form of legal fetishism. Lawyering and the consumption of legal services were reified as an essential element of civic life in a democratic society, and as the pathway to the liberal pluralist ideal of diffuse power and an equal participation in political decision-making. In this vein, they argued that,

> ... a distinctive characteristic of the poor, and an essential condition of their predicament, is their lack of participation in the legal and governmental process. Thus the answer to the question of whether the poor have legal problems and need lawyers turns ultimately on the strength of our commitment to the extension of citizenship, for enfranchisement necessarily rests on the capacity to participate in and make effective use of the legal order - in our legal system, this means access to competent legal representation.[101]

It is unlikely that the diluted experience of 'citizenship' as a legal client could counter the lack of any developed political participation for a majority of the population in a bourgeois representative democracy. Furthermore, although it is possible that less social stigma attaches to approaching a lawyer for assistance instead of welfare professionals, this account is void of an adequate reflexivity regarding the place of legal service lawyers in this development and of their own professional interests. Carlin and Howard refer to the current bias of the development of legal remedies in favour of the wealthy and privileged and note the importance of law reform to alleviate this. But despite their reference to the 'class system' of justice, they lack a sufficient structural

account of the skewed reproduction and distribution of legal services in a class divided society. Thus, the class position and class relations of the absent subject of this progressive lawyering, the legal service lawyers and their own relations to the much derided welfare state, are never theorised. Similarly, this perspective is reflected in an essentially empiricist conception of poverty as the result of a subjective stratification of psychological resources. The problem of 'access' is reduced to a matter of transcending the condition of poverty by the alteration of individual consciousness.[102]

This well-known account of legal needs set the pattern of the growing number of studies which soon followed it. In 1969, Sykes examined the use of lawyers by 400 poor households in the city of Denver, with a checklist of predefined legal problems. This revealed that 43% of the households had experienced some legal problem in the preceding five years.[103] It was also found that a considerable divergence existed between the researchers' characterising of problems as 'legal' and how they were often regarded by the people studied. In the researchers' view, this was probably because,

> people are frequently ignorant of their rights and duties, and they do not recognize the legal implications of a variety of situations or the fact that legal remedies are available for many of their problems.[104]

A similar survey was commenced by the American Bar Foundation in 1967 of 1,496 adults in the poor districts of Miami, St. Louis and San Francisco. As reported by Marks, this also found a widespread reluctance to recognise the legal dimension of many problems experienced by the poor. Furthermore, even those who were aware in some way that they faced a 'legal problem' often did not seek a legal remedy; only fifty per cent of this group ever approached a lawyer.[105]

Another study from this period was the examination of the use of attitudes to lawyers by 300 mostly black labourers in Shreveport, Louisiana. This

was conducted in 1970-1972; both before and after the introduction of a union plan for prepaid legal insurance. Use rates were found to be quite low, but they did increase in the period studied. The proportion of respondents using a lawyer at least once per year grew from 10% to 16%.[106] But this increase was overwhelmingly in the use of services in highly traditional areas of law where the labourers saw a more obvious use for lawyers. These included real estate, domestic relations, criminal and worker's compensation matters.[107] Hallauer notes that more than one-third of them believed that a lawyer's help would be of no avail in such other matters as racial discrimination.[108]

These and other accounts of the lawyer use and need patterns of the poor and working class in the United States, were paralleled by an expanding interest in the requirements for legal assistance and current consumption patterns of the 'middle class' and people of 'moderate means'.[109] Additionally, more general studies allowed for a comparative analysis between social classes or other demographic groupings.

In 1971, to forestall increasing criticism of private services, a special committee was begun by the American Bar Association to undertake a general study of lawyer usage in the United States, and to 'ascertain the extent to which the public recognizes the need for and uses of legal services'.[110] The ensuing research was published in its final form by Curran in 1978, and comprised the most wideranging study of all.[111] Curran surveyed a cross-section of 2064 American adults in 1973 and 1974 to ascertain the reasons for the reluctance of people from various social groups to contact lawyers. The results indicated that use rates did not decrease with lowered personal income in a simple relationship of cause and effect. Different groups of people had a highly variable use for lawyers according to specific types of problems. Factors such as social class, race, ethnicity, gender and age all had some effect on this pattern, but Curran isolated level of education as the most important variable

affecting consumption.[112] The overall figures revealed a generally conservative pattern of use. The propensity to use legal help was highest for estate planning (73% of cases), marital problems (72% of cases), and real property (36% of cases).[113] There was an intermediate level of use for torts including matters of personal injury and property damage, and a relatively low usage for criminal, employment and consumer matters, problems with government agencies and discrimination.[114]

In this survey, Curran acknowledged the difficulty of defining legal needs and sought only to objectively quantify the incidence of lawyer-seeking behaviour. However, the proposition of extensive unmet needs was implied in the research and results of this study. Lawyers were consulted in less than one-third of all legal matters and less than 15% of the estimated requirements of the poor were being met by the profession.[115]

These various American accounts were paralleled by surveys in other advanced capitalist nations including Britain, Holland, Canada and Australia, where they were initiated through the growing lobbies demanding reforms to legal aid.[116] The major and and most influential study in Britain was published by Abel-Smith, Zander and Brooke in 1973. This was a study of the use of and need for legal services by 1651 adults in three poor London boroughs, conducted with the researchers' suspicion that,

> there was a considerable amount of need for legal services which went unmet, and that unmet need was particularly likely to be found among poorer people.[117]

This study also conceded the subjectivism of definitions of legal need, but took as 'legal problems' both matters pre-defined as such and other 'quasi-legal' problems encountered by the poor like troubles with social security. Thus, the researchers finally opted for a legal fiction familiar to students of the civil law; any problem was a legal problem if it would be so regarded by a 'reasonable man'.[118] The poor studied were found also to have a low use of lawyers, a

limited knowledge of existing legal aid schemes, and a further need for help in many matters judged to require resolution through professional intervention. It was noted that,

> In total our 1,651 respondents told us of 1,022 cases where, in our view, legal advice was needed. Advice of any kind had been taken in only 450 cases and in only 270 cases was a lawyer the main adviser: lawyers in private practice dealt with 253 cases and lawyers at legal advice centres with 17. The main adviser in 48 cases was the local authority (mainly cases of housing repair). In 30 cases the main adviser was a citizen's advice bureau.[119]

The researchers also contended that an existing need was unmet in many matters which were commonly dealt with by lawyers, including personal injury, matrimonial and criminal matters, and other matters involving court proceedings where legal advice and representation would be helpful. They thus concluded that,

> The extent of unmet legal need, even by the crude standard of advice from anyone, was therefore substantial despite the number of available services ... not much more than a quarter of the cases which in our mind needed an independent lawyer's attention received it.[120]

The force of this study and other academic criticisms of legal aid schemes including the research commissioned by the Nuffield Foundation, as well as political agitation by the Legal Action Group and solicitors drawn to the growing number of community law centres, moved the British government to establish a Royal Commission into Legal Services which reported in 1979.[121] This had a broader basis in interviewing a cross section of 7,941 adults regarding their use of legal services.[122] This was found to vary regularly among different socio-economic groups, with gradations of use according to an individual's place in the occupational hierarchy. The most contact with lawyers occurred among the professional and employer groups. A wide distinction was also found between blue and white collar strata, with a higher level of contact among the latter.[123]

Similarly, figures for the problems for which lawyers were mostly

consulted conformed with the results of earlier studies. Probate matters, wills, divorce, traffic offences and personal injuries all rated a high frequency, but the most common of all were real property matters. The latter accounted for 30% of all contacts and 'no other type of matter accounted for anything like this proportion of all consultations.'[124]

Australian accounts

As noted above, a wide acceptance of the inadequacy of existing legal aid schemes by politicians, state officials, or even a sizeable proportion of the legal profession, developed late in Australia. An article published by Spigelman in 1969, is the earliest account of poverty and legal aid, which referred at length to the development of poverty law and experiments in alternate services in the United States, and adopted the paradigm of 'unmet legal needs' from overseas research to call for pro-active lawyering directed towards attaining broad social reform.[125]

The general air of complacency was partly countered by important developments in 1971 and 1972. As a direct result of police harassment of aborigines in Redfern, Sydney in 1971 the first aboriginal legal service was established as a salaried centre in that area, by a group of young black activists allied with a number of sympathetic academics and students from the new law faculty of the University of New South Wales.[126] The support for this and similar services for aborigines was justified by an increasing amount of research which suggested their discriminatory treatment in the legal system, especially in criminal matters.[127] In 1972, a group of radical lawyers who had defended people arrested in demonstrations against Australia's involvement in the Vietnam war combined with youth workers to establish Australia's first white community legal centre in Fitzroy, Melbourne.[128] This and subsequent legal centres and, in time, the widening circulation of the Legal Service Bulletin from Fitzroy,

developed an organisational base for a 'radical' segment of the profession that was highly critical of established legal aid schemes and their failure to satisfy the legal needs of many poor and underprivileged Australians.[129]

This period was also marked by an expansion of social research which led to a 'discovery' of poverty in Australia paralleling developments in other advanced capitalist nations.[130] This further official scrutiny, definition and characterisation of 'the poor', and a widening concern for their plight, led the Federal Liberal government to establish a government inquiry into poverty in 1972.[131] With the election of the Whitlam Labor government later in that year, and its stronger commitment to welfare expansion and social reform, the scope of the inquiry was broadened to include a separate study of law and poverty.[132] The latter was empowered to investigate the effects of the law upon poor and disadvantaged groups, barriers to their use of legal services, and possible alternative forms of legal assistance and their delivery as these might meet 'the perceived needs of the poor'.[133]

An important area of the commission's work was a study of the extent to which the poor are exposed to 'legal situations' and the ways in which they solve them. With methodological borrowings from Sykes and Abel-Smith, Zander and Brooke, a survey of 500 adults in three working class areas of Sydney was conducted in 1973, and published by Cass and Sackville as Legal Needs of the Poor in 1975.[134] This report commenced with an admission of the difficulty of assessing a 'legal situation', but then settled for a mode of definition similar to that adopted in other studies. Essentially, a legal problem was finally that which was so designated by the researchers in the guise of the 'informed outside observer'.[135] This was because,

> Since a fundamental goal of the survey was to detect situations in which the respondents experienced problems of a legal kind, regardless of their own perception or categorisation of those problems, there was no point in confining questions to cases in which respondents actually had sought

> legal advice or realised the need for such advice. Consequently, it was decided to ask respondents whether they had experienced particular problems or situations that might be expected to have created a need for legal assistance.[136]

The poor were studied in respect of their difficulties as they were judged to fall, within the major problem areas of accommodation, accidents, consumer, money, marriage and family, and police problems. The researchers found a generally low awareness of available legal aid schemes, particularly among non-British migrant groups.[137] This was compounded by aspects of physical inaccessibility; services were poorly advertised and open only in working hours. As Vinson's separate research also suggested, legal services and the larger number of solicitors were heavily concentrated in the financial districts of large Australian cities away from the homes of most people, particularly the poor.[138]

Cass and Sackville found that although 44% of their respondents had consulted a lawyer in the preceding five years, there was little use of legal services for such matters as consumer problems, debts, tenancy disputes and troubles with social security.[139] They also cited several cases of failure to find legal help in criminal court appearances and with work-injuries, with adverse consequences.[140] Accordingly, the respondents were found, as in such other surveys of needs as Tomasic's 1975 study, to have a disturbingly 'traditional and narrow conception of the role that lawyers can perform', which inhibited the possible development of 'preventive' law.[141] The figures indicated that property and wills comprised 56% of all consultations in the preceding five years, and that there was a much higher propensity to use lawyers in such matters as conveyancing and matrimonial disputes.[142] Overall, the results suggested that legal help was sought in only 34% of cases which required assistance, or, excluding home purchases, in only 25% of them.[143]

Cass and Sackville argued that the combined barriers of cost, physical inaccessibility, as well as ignorance of services and fear of lawyers deterred the poor as potential clients.[144] But a divergence between the researchers' notion

of legal needs, and that of the researched, was evident in several parts of the report. Although only 12% of the people studied thought there was a time when they should not have failed to see a lawyer, and only 3% of them cited ignorance as a reason for non-consultation, and even though the social profile of the 'multiple-problems group' was probably an unexpected one, these results were construed to prove a substantial unmet need for legal intervention among the poor.[145] Thus, Sackville in his main report concluded that,

> If the results of the Legal Needs of the Poor survey reflect the situation in other poorer areas in Australia, it would seem clear that the system of legal aid has a great deal to accomplish if the orthodox legal needs of poorer people are to be met and if their ignorance of their rights and obligations is to be overcome.[146]

The commission's main report supported this claim with a more broad discussion of the effects of law upon given disadvantaged groups.[147] Some of them, like Aborigines, juveniles, and unrepresented defendants in criminal trials, had a more readily demonstrated requirement for legal assistance. It was also noted that changes in the substantive law - relating to such areas as consumer credit, debts, landlord and tenant and social security, could improve the lot of many individuals subjected to its force. But despite these structural elements and the claim that poverty is 'entrenched in the social structure', many of the reports' conclusions and the conceptualisation of legal needs inscribed in it, suggest that it is underlay with the individualist paradigm of the preceding tradition of legal needs research.

The law, it was argued with a strong optimism later conceded by Sackville, could be a tool of progressive change combatting social inequality in Australia, although firstly 'the elimination of poverty requires the law to overcome its bias against poor people'.[148] In this view the powerlessness of the poor can be transcended in community participation in alternate legal services and through intervention by legal professionals. But as poverty is here mostly

understood as a lack of 'access' to welfare services, or 'the poor' considered as the aggregate of deprived individual consumers who do not sustain high patterns of consumption for such services, the symptom defines the disease.[149] As Fraser contends in his critique of the Sackville report, poverty must be further conceived as the deep-rooted consequence of exploitative social relations, especially on class lines, which limit the human potentialities of an array of groups in welfare capitalism.[150]

A general critique of needs studies must again refer to the lack of a developed structural dimension. The most simple use of the resources and legal competence models falls flat with the growing empirical evidence, including the figures from Cass and Sackville, that rates of use of lawyers among social groups and classes vary greatly according to types of problems.[151] That is, it has to be explained why the poor go to lawyers in substantial numbers in relation to some matters, and not others. Furthermore, it is apparent that the chief reason the poor have lower overall use rates than other groups, is the general historical organisation of the law around the protection of private property. In this respect, needs studies have consistently indicated that the highest use rates are for property matters, particularly real property transfers and estate planning.

This important factor underlying the structure of the legal market and the contemporary distribution of private legal services, was more obviously stated in one of the early studies of needs and use rates. Mayhew and Reiss concluded their 1969 Detroit study of lawyer contacts by 780 adults of diverse social backgrounds, with a critique of the resources model.[152] Contact with legal professionals, they argued, was not reducible to individual variables like ignorance or incompetence, but was a consequence of factors extrinsic to legal clients; in particular, the maldistribution of private property in American society. The strong orientation of the legal market to the guardianship of property was found to be such that,

> ... the association between income and legal contacts is an organisational effect. The legal profession is organised to service business and property interests. The social organisation of business and property is highly legalized. Out of this convergence emerges a pattern of citizen contact with attorneys that is heavily oriented to property.[153]

The view fits Cain's conclusion from her above-mentioned study of British lawyers, that the profession's work has been built around serving the requirements of the propertied and this has structured the whole pattern of evolved legal services and remedies.[154]

Sackville's claim that extensive legal needs were currently unmet, was apparently reinforced by Fitzgerald's 1974 survey of work done on behalf of the poor by Victorian lawyers. This study concluded that only 10% of lawyers' time was spent relieving the problems of the poorest 16% of Melbourne's population, and that this demonstrated that needs were being met on an unequal basis and some new mode of delivery, probably a salaried service, was required to meet them.[155] In particular, these results and the insistence upon the special needs of the poor within the distinctive specialisation of 'poverty law', appeared to vindicate the development of the ALAO in the form of more accessible 'shop front' offices in many cities and regional centres.

The effect of this research also echoed in the direction and findings of the Australian Legal Aid Review (Turner) Committee, founded by Attorney-General Murphy at the same time as the ALAO, to investigate matters including,

> the areas of need for the provision of legal assistance and advice and, in particular, the areas of need not covered by existing schemes.[156]

In both its 1974 and 1975 reports the Committee accepted the view that there was a broad unmet need for legal services necessitating new forms of delivery.[157]

The acceptance of the uniqueness of the poor's needs and the rejection of traditional private modes of delivery to meet them, was reflected in later

commentaries on the discrete importance of poverty law, and has been a key element of the beliefs motivating the legal centres movement in Australia. Similarly, this view justified the separate establishment of the Aboriginal Legal Service, and its persuasive force protected them, in part, from conservative criticism and financial cutbacks in the late 1970s and 1980s. This was evident in the findings of the Inquiry into Aboriginal Legal Aid conducted by the House of Representatives Standing (Ruddock) Committee on Aboriginal Affairs, in which members of both major parties endorsed their existence to satisfy the 'special' needs of aboriginal people, and the use of legal aid services for under-privileged groups in law reforming activities.[158]

This stress upon the special needs of distinctive social groups was already reflected in the Sackville report and characterised much subsequent debate regarding legal needs.[159] These 'disadvantaged' groups, or groups 'at risk', were seen to include the poor and non-poor as well.[160] This shift to a more specific focus as the object of legal intervention, appeared as an increased and ongoing concern for institutionalised groups including juvenile offenders, prisoners and the mentally ill in the 1970s and after. But the terrain of much ideological struggle for the advocates of alternative and expanded services remained, even in the case of these more narrow interventions, as that struggle to define the public or community interest which Laclau argues has a political pre-eminence in contemporary bourgeois democracies.[161]

Client interest and the construction of needs

As many writers have noted the definition of 'needs' is always normative and culturally variable.[162] They are not pre-given. This is most evident in structural accounts of the processing of social disputes through what Galanter termed, 'an institutionally and ideologically contingent selection from a vast pool of amorphous 'proto-claims'.[163] These have noted the primacy of the

general ordering of legal institutions, including the imperfect market for legal services, other delivery systems, and the historical forms of organisation and regulation of the legal profession and the effect of its professional rules, ethics and norms, upon patterns of distribution and use.[164] This broader view also suggests the anthropological study of the alternative means of dispute avoidance, definition, mediation and legal or non-legal resolution in different cultures. In particular, this analysis rejects studies of legal needs built upon surveys of individual patterns of consumption. Thus, Mayhew has contended that,

> Neither surveys of the experiences of the public nor the pattern of cases brought to legal agencies produce a particularly valid measure of the legal needs of the citizenry. Needs for legal services and opportunities for beneficial legal action cannot be enumerated as if they were so many diseases or injuries in need of treatment. Rather, we have a vast array of disputes, disorders, vulnerabilities, and wrongs, which contain an enormous potential for the generation of legal actions. Whether any given situation becomes defined as a 'legal' problem, or even if so defined, makes its way to an attorney or other agency for possible aid or redress, is a consequence of the social organization of the legal system and the organization of the larger society - including shifting currents of social ideology, the available legal machinery, and the channels for bringing perceived injustices to legal agencies.[165]

Thus, the mobilisation of the law to develop legal needs is seen as comparable to the production of criminality and deviance within the net of the legal system according to its internal structure and occupational ordering.[166] The resulting view of the dynamic role of lawyers in defining certain problems as 'legal' may overcome the reification of legal solutions (and within these, of consulting a lawyer) as the most appropriate resolution of social disputes.

With the notion that the definition of legal needs is not to be left to determination by market forces - that is, a 'legal need' is what people are willing to pay for - the difficulty of the subjective measurement of 'felt need' usually means that externally constructed ideas of needs are projected onto the underprivileged. As Griffiths notes, in needs research that has taken the form of a patronising approach which imputes the 'proper' needs of subjects according

to 'an idealized version of a middle-class consumption pattern'.[167]

These accounts are open to an epistemological critique which points to the discursive construction of needs. The general implication of defining a dispute or social problem as 'legal' is that it is remediable by a lawyer and the appropriate course of action is to consult one. The social construction of such needs is not a diffuse, chance process, but takes place in a context of unequally distributed social power, in this case, professional power. The definition of need adopted will, as Morris argues, 'reflect the power and status of those providing the service, rather than the definition of those receiving it.'[168] Furthermore, the professional interest in this legalisation of social problems is not merely an economic one. Their redefinition as legal needs can ideologically enhance a flattering self-image of lawyers and the law as the gateway to social justice and further legitimise the status and rewards of the profession.

The acknowledgment of this professional self-interest in the reformulation of certain needs, ought to avoid moving towards an ultra-critical position which overlaps with conservative criticisms of legal aid. Legal aid lawyers have provided substantial assistance of real benefit to many recipients. The view that these professionals service induced needs only, cannot account for the fact that traditional organisations have often been inundated with inquiries unless they apply narrow eligibility requirements, or else reproduce an attitude to clients which is, in Hazard's words, 'positively repugnant'.[169]

The definition of 'legal needs' may always be subjective but the search for them is not wholly idealist and never irrelevant. This search is closely tied to the general political issue of the possibility of perceiving and expressing genuine human needs in a more democratic political order, which has been the focus of a recent body of left social theory.[170] Despite its highly abstract presentation, this has suggested the importance of seeking ways of minimising the level of the construction and distortion of the interests of the poor and underprivileged by

professionals, experts and state officials and of increasing their accountability to these groups.

But an analysis of the 'needs' of the privileged in this relation is also necessary. In the historical context of the recent major expansion of public legal services in advanced capitalist nations, this discursive construction of needs suggests questions regarding political agency and a politics of representation in a struggle to define the interests of the poor and underprivileged. A tendency towards the symbolic representation of interests is also likely given that liberal and radical advocates of alternative services express frequent irritation with the highly traditional use for legal services - such as assistance in criminal and matrimonial matters - which the poor express the greatest demand for. Involvement in these areas of work with the large individual caseloads they develop has been contrasted from the pursuit of test cases, law reform, or the growing sphere of 'public interest law', often with a broader goal of social reform in mind.[171] It is also likely that this representation of interests gives rise to a form of 'agenda setting' for the definition and pursuit of certain needs. The conscious or unconscious development of hierarchies of needs would mean that some claims are written in and others out of the legal system as legitimate grievances. An essential factor here would not just be the apparent worthiness of any claim but its sponsorship or non-sponsorship according to the subjective elements deriving from the work location, the career patterns, education and training and ideological outlook of different groups of legal professionals.

Beyond this issue of agency some historical explanation of the strength of this discourse of legal needs, and its sudden apparent legitimacy and success in reinforcing a state subsidised legal intervention into new areas in the 1960s and 1970s is required. This period was characterised by a general restructuring of the relations, form and markets for both the traditional and new welfare or

'state' professions in corporate capitalist societies. In Australia, the combined force of factors including the Whitlamite expansion of the welfare state and a sudden growth in the number of tertiary educated professional graduates affirmed this tendency. The further segmentation of the legal profession in the growth of a substantial salaried sector created a body of lawyers more receptive to the notion of unmet needs. The definition of needs as legal problems has reflected the occupational struggles of such potentially rival professional groups as lawyers, psychiatrists and social workers. But as Geerts notes, this debate about needs emanates most strongly from within the legal profession where it suggests a contest between factions and segments of the legal profession with separate ideologies and divided ideas about its appropriate structure.[172] This struggle, and the legitimation crisis experienced by the conservative professional elites in calls for due process and legality in more and more areas of public administration, suggest the rise and influence of new groups of lawyers.

Notes to Chapter Two

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See also D. Leat, 'The rise and role of the poor man's lawyer', British Journal of Law and Society 2 (1975), 166.

8. D. Leat, ibid., p.169.

9. R. Egerton, op. cit., p.14.

10. ibid., p.11.

11. Quoted in A. Goodhart, 'Preface' to R. Egerton, ibid., p.xi.

12. B. Abel-Smith and R. Stevens, op. cit., p.141.

13. R. Egerton, op. cit., p.15.

14. J. Macquire, 'Poverty and civil litigation', Harvard Law Review 36 (1923), 381.

15. R. Pipkin, 'Introductory essay: legal aid and elitism in the American legal profession', in R.H. Smith, Justice and the Poor, Montclair, Patterson Smith, 1972, p.20.

16. Quoted in R. Pipkin, ibid., p.21.

17. R.H. Smith, op. cit.

18. In a succinct expression of the liberal conceit that the equal application of formally impersonal, objective law ensures equal justice, even in class divided societies, Smith argued that, 'The body of substantive law, as a whole, is remarkably free from any taint of partiality. It is democratic to the core. Its rights are conferred and its liabilities imposed without respect of persons', ibid., p.13.

19. ibid., p.217.

20. ibid., p.10.

21. The term has been used by American commentators to distinguish traditional models of individual delivery deployed by early charitable organisations, from the activist ideal, group work and law reforming efforts of the Legal Services Program and 'legal service lawyers' from the 1960s, which the earlier 'legal aid lawyers' were first opposed to. See L. Silverstein, 'Thoughts on the legal aid movement', Social Service Review 40(2) (1966), 135, and E. Johnson, Justice and Reform, New York, Russell Sage, 1974, p.12.

22. E. Brownell, Legal Aid in the United States, Rochester, Lawyers Co-op., 1951, p.33.

23. An account of the narrow judicial interpretations in England and Australia, is given in R. Stonham, 'In forma pauperis', ALJ 15 (1942), 379. See also C. Weigall, 'Poor prisoner's defence', ALJ 15 (1941), 72.

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25. D. Ross, 'A legal assistance scheme', ALJ 22 (1948), 54.

26. G. Parker, W. Cornish and A. Castles, 'The crisis of legal aid in South Australia', The Adelaide Law Review 1(2) (1960), 59.

27. 'Public Solicitor's Office', republished in LIJ (Nov. 1970), 438.

28. N. Blake and H. Rajak, Wigs and Workers - A History of the Haldane Society of Socialist Lawyers, 1930-80, London, Haldane Society, 1980, p.21.

29. Egerton argued that this inequity of access '... inevitably causes suffering and hardship to the poor and, accompanied by a sense of injustice, it breeds bitterness and contempt for democratic institutions and for the law', Egerton, op. cit., p.4.

30. E.J. Cohn, 'Legal aid to the poor and the Rushcliffe Report', Modern Law Review 9 (1946), 58.

31. C.P. Harvey, 'Law reform after the war', Modern Law Review, (Dec. 1942), 39.
L. Gower, 'The future of the English legal profession', Modern Law Review 9 (1946), 15.

32. B. Abel-Smith and R. Stevens, op. cit., p.345.

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35. Armstrong, op. cit., p.80.

36. ibid., p.78.

37. ibid.
Cohn referred to the reform in New South Wales as introducing, 'an official and bureaucratic element, which is fortunately utterly alien to the traditions of the English legal profession'. Cohn, op. cit., p.65.

38. Armstrong, op. cit., p.79.

39. See, for example, the Queensland Bar Association's reaction to a proposed extension of the Public Defender scheme in that state. 'Legal aid in criminal cases', The Australian Bar Gazette 2(2) (1967), 6.

40. G. Parker et al., op. cit.
J. Kerr, 'A modern approach to legal aid', Australian Lawyer 5 (1964), 172.
B. Davidson, 'Legal aid in civil cases', Law Society Journal 2(1) (1964), 78.

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43. ibid., p.11.

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45. Armstrong, op. cit., p.129.

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52. G. Parker et al., 'The crisis of legal aid in South Australia', op. cit.
Report of the Legal Aid Committee (Victoria), LIJ 40 (1966), 441.

53. S. Armstrong, 'Unconvicted prisoners: the problem of bail', in S. Armstrong et al., Essays on Law and Poverty: Bail and Social Security, Canberra, AGPS, 1977, p.41.
See generally D. Adams and R. Cranston, 'Legal aid in criminal matters in Australia', in D. Chappell and P. Wilson (eds.), The Australian Criminal Justice System, Sydney, Butterworths, 1972.

54. Armstrong, Legal Aid in Australia, op. cit., p.119.

55. T. Vinson and R. Homel, 'Legal representation and outcome', ALJ 47 (1973), 132.
See also P. Cashman, 'Legal representation in criminal proceedings: a study of the relationship between legal representation and outcome', Law Soc. Jnl. 18 (1980), 41;

S. Armstrong, 'The expansion of legal aid services - the effects on courts of summary jurisdiction', in J. Newton (ed.), The Magistrates Court: 1975 and Beyond, Canberra, AIC, 1975.

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118. 'One possible definition of need for advice on a legal problem is where a prudent person of moderate means would take advice from a lawyer or some other competent person', ibid., p.110.

119. ibid., p.219.

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CHAPTER THREE

THE STATE AND LEGAL AID: THE WHITLAM YEARS

Introduction: The Whitlam Government and Legal Aid

State involvement in the provision of legal services in Australia underwent a rapid expansion with the election of a Commonwealth Labor government - the first in two decades - in late 1972. In keeping with its social reform and welfarist policies, the Whitlam government's brief three years in office were marked by a substantial increase in Federal legal aid expenditure.[1] With political reinforcement from the growing claims of vast unmet legal needs and the necessity for a state-derived solution to them, this spending was increased at various levels. This included support for Law Society schemes and Australia's first independent community legal centre in Fitzroy, Melbourne.

In more controversial developments, the Federal government expanded its own direct provision of services and this greatly enlarged the size of the public legal aid sector in Australia. With commonwealth support Aboriginal Legal Services (ALS's) were founded in all states from 1973. But the largest and most controversial initiative of the Whitlam government in this area was the establishment of the Australian Legal Aid Office (ALAO) in the same year.

The rapid expansion and large size of this salaried service led to a heightened politicisation of legal aid in the Whitlam years. This developed with the mobilisation of new non-traditional professional groups in the 'public' arena, which joined the political struggle to define the community 'need' for legal aid and the 'public interest' in given types of service. Its establishment quickly generated heated debate regarding the appropriate role of 'the state' (in its temporal manifestation as Federal and State governments, public service bureaucracies and semi-autonomous agencies) in the provision of legal assistance. This

was closely tied to arguments regarding the appropriate model of legal aid delivery, and the threat posed to professional independence by the state regulation and control of legal work.

The development of legal aid services in this period would suggest the historically contingent, frequently contradictory and divided nature of state efforts to expand services as a means to the attainment of substantive legal equality. Their history also illustrates the growing complex interrelation of state activities and forms to the internal politics of an increasingly divided legal profession.

The ALAO: Foundation and Development

Foundation

The conservative coalition governments which held power till 1972 had rebuffed approaches by the legal profession, represented nationally by the Law Council of Australia, seeking a greater Federal interest in legal aid.[2] This interest was favoured in the form of money for profession-controlled schemes, not as a direct involvement in either policy-making or the provision of assistance. Federal government participation remained at a low level, with grants of aid for the shrinking clientele of the Legal Service Bureaux and the rendering of help in special Federal courts.

The incoming Labor government quickly demonstrated its commitment to legal aid with the provision of $2 million for Law Society schemes in April, 1973.[3] In the same month grants were provided by the Department of Aboriginal Affairs for the establishment of various Aboriginal Legal Services modelled on that founded by activists in Redfern, Sydney, in 1971. An initial allocation of $7 million was approved for this purpose.[4] The most extensive Commonwealth involvement followed the sudden announcement of a planned national salaried legal aid service by Attorney-General, Senator Lionel Murphy

on the 25th June, 1973, and its creation by a special ministerial directive issued on the 6th September, 1973.[5]

It is important to note the personal role of the Attorney-General in this. Although expanded funding and services were part of general ALP policy, it did not include plans for a national service. Similarly, this was not mentioned in the 1972 policy speech.[6] The suddenness of its conception and development caught the private profession by surprise. Aspects of the policy and form of the office only became public in a series of parliamentary and official speeches delivered by the Attorney-General before his departure to the High Court in early 1975. Thus, as Hawker observes,

> ... the development of the office cannot be easily fitted to the sequential steps of the abstract and generalized model of decision-making commonly found in the texts. It was established in haste largely by an individual who was not long associated with it; his intentions always contained a touch of ambiguity and were not communicated thoroughly to his colleagues or perhaps accepted by them ... The short story of the ALAO ... is accordingly a reminder that decision-making can be confused, incomplete and contradictory.[7]

Murphy had a strong reputation as a civil libertarian and a commitment to the goal of legal equality through reforms to the legal system which would expand access to it.[8] He was also aware of and impressed by the neighbourhood law offices founded in the United States in the 1960s. Referring admiringly to these, he argued that legal assistance for the disadvantaged 'can most effectively be provided through a salaried legal service'.[9]

Accordingly, in December, 1973, he announced a programme of accessible local 'storefront' offices to be staffed by salaried lawyers with a 'social conscience' and including many women lawyers 'who have a talent for this kind of work'.[10] These lawyers were expected to specialise in those areas of law adversely affecting the poor and disadvantaged, and to work in close co-operation with local welfare and community organisations.

> I see the role of the Australian Legal Aid Office as taking the law to the people who most need it. I want to see small unpretentious 'storefront' offices opened in the suburbs of the cities and in country centres. I want them to be the kind of offices to which the ordinary man or woman faced with a legal problem will go as readily as he or she would go to the garage with an ailing motor car ... I believe that there is not only scope but a clear need for legal aid offices that are spread throughout Australia where need is greatest; offices that are staffed by salaried lawyers and that serve as a centre of legal aid activity.[11]

In this speech Murphy also noted what he saw as the main flaws in the provision of legal aid by existing schemes. These were the unmet need for the provision of general legal advice apart from litigation, the insufficient rendering of help in divorce and ancillary proceedings, and the wide absence of representation in the thousands of matters heard daily in magistrates courts throughout the country.[12] This latter omission was to be redressed by a model duty solicitor scheme in some lower courts, using ALAO staff but with paid private practitioners handling defended matters. Murphy also gave warning - in a phrase ironically later borrowed by critics of the ALAO and extended Commonwealth involvement in legal aid - of the need to avoid the 'bottomless pit' of increasing legal aid costs which beset other schemes.[13]

Murphy set the ambitious goal for the office of satisfying the requirements of all underprivileged Australians in need of legal help. But it was hindered from the beginning by matters of constitutional law. Although the Commonwealth had clear constitutional power to provide legal services in the ACT and Northern Territory, its involvement in other areas had an uncertain validity. Thus, despite the wider experimentation of the Whitlam government in relying upon such hitherto undeveloped heads of power as the appropriation power to institute programmes of social reform, a full system of legal assistance for all citizens in need was not attempted.

With the wider legislative ambit of the states, hostile states' rights within conservative state governments might see a usurpation of their role in

legal aid delivery and mount a legal challenge to the office. Partly because of this hostility the ALAO was founded by executive action. This would be more difficult to challenge than the specific provisions of a Commonwealth statute. Furthermore, it was difficult to place the office on a clear statutory basis with an opposition-controlled Senate which increasingly saw itself as having a key role in countering 'Whitlamite centralism'.

Eligibility for assistance was restricted within this political framework. The ALAO was to provide advice and assistance under matters of Federal law to all in need, and in other matters, to parties to whom the Commonwealth had a special responsibility under the Australian constitution, such as migrants, pensioners, aborigines and assisted students.[14] In practice advice was generally offered to all comers, but more complex matters were referred to other agencies or private lawyers.[15]

Despite the apparent parallel with neighbourhood law firms in other countries, the ALAO was conceived as having a limited role in delivery and was to be heavily reliant upon the private profession for its operation. In announcing the office, Murphy emphasised the need for an expanded salaried legal aid sector. But he hastened to add that he intended no rivalry with existing schemes. The office would work 'alongside and in co-operation with' the profession.[16] Restating the common professional ideology that an 'independent' profession structured around a free legal market is a key element of democracy, he stressed the need for a private profession,

> ... that can stand between the Government and the citizen, not least in the field of human rights, civil liberties and criminal matters generally.[17]

Furthermore, the Attorney-General reassured private lawyers that the office would provide economic advantages, and there would be no disruption to their monopoly over the vast bulk of legal matters. The office would operate,

> ... with the Law Societies and Legal Aid Committees through which the private legal profession would continue to handle the greater part of litigation in the courts. The role of the office will be complementary to the role of the private practitioner and, indeed, be an advantage to him in providing continuity and proper preparation of legal aid matters referred.[18]

The role planned for the ALAO within this 'co-operative' venture was a preventive one of offering legal advice, the preparation of letters and simple documents, and some inhouse litigation in Federal areas including uncontested divorces and other family law matters under Federal legislation.[19] Murphy confidently claimed that advice alone would solve most legal problems and relieve the overall workload in legal aid, particularly in matters under the simplified procedures of the incoming Commonwealth Family Law Act which dispensed with the concept of fault in matrimonial breakdown.[20] Beyond this, the office was to administer the operation of a large referral scheme under which private practitioners accepted work for 90% of their usual fees.[21]

This referral function was a prominent feature of the work of the office from its establishment. But it also expanded in time. Although the Whitlam government felt it had opted for the political compromise of a 'mixed model' of legal aid delivery, the growing imbalance was towards a stronger 'judicare' element in a high rate of referrals.

Development

The ALAO began operations from 6/9/73 with a change of name for the Commonwealth Legal Service Bureaux.[22] This meant it had an initial staff of only 13 lawyers, 8 lay advocates (who did limited tribunal work for the Bureaux) and 10 supporting staff.[23] The August 1974 budget set aside $13.7 million of Commonwealth funds for legal aid, a more than tenfold increase on expenditure by the previous government.[24] Of this money, $1.3 million was provided for Law Society schemes and $2 million for the expanding Aboriginal Legal

Services.[25] The amount of $8.8 million was allocated for the first year of operation of the ALAO; but of this $3.7 million was to be paid to private lawyers for referral work.[26]

Further increases were made in the following year. Commonwealth funds for legal aid more than tripled from 1973 to 1975, since the first Labor government grant to state schemes.[27] Even the August 1975 budget, generally viewed as a tightening of the Labor belt, provided ~~another~~ $16.7 million for legal aid throughout Australia.[28] Of this, $3 million went to the ALS, $1 million to Law Society schemes, and the ALAO was allocated $12.5 million including $7 million for the referral bill.[29]

With this level of commitment the office expanded rapidly in 1974. The Commonwealth Deputy-Crown Solicitor, Joe Harkins, was appointed as the first national director in March, and the recruitment of state deputy directors began. The first lawyer recruited from outside the public service commenced work on 8th April.[30] Branch offices were soon opened in all state capitals, Canberra and Darwin.

The service was to be made accessible to the public by the opening of smaller regional offices. These were placed in areas with a high concentration of population and adverse socio-economic conditions.[31] The first regional office was opened in Ipswich (Queensland) on 26th April, 1974, and others opened in the next two months in Burnie (Tasmania), Sunshine (Victoria), Fremantle (Western Australia), Elizabeth (South Australia) and Blacktown (New South Wales).[32] Government approval was given for a further 56 regional offices (to equal 62). However, by mid-1975 only another 15 had opened when budget cuts froze their numbers at a national total of 21.[33]

From the initial small staff inherited from the Legal Service Bureaux employee numbers grew rapidly. By mid-1974 the office employed eighty staff, including forty-four lawyers.[34] At the end of that year 227 staff, including 95

lawyers, had been engaged and a ceiling of 632 was allocated.[35] In mid-1975 the office peaked in size with a total of 376 employees, including 153 lawyers; but its staff ceiling was lowered with general budget cutbacks.[36] Although this ceiling figure was raised again in September, the expansion of the office - in Harkins' own view - effectively ended at this time, six months prior to the appointment of a hostile caretaker government.[37] Despite these drawbacks, the ALAO very quickly became the largest salaried legal aid scheme in Australia.

The scale of this development, and the demand for services stimulated by a brief though controversial advertising campaign, were such that by June, 1975 the office was conducting 10,800 interviews nationwide each month, and this figure was increasing steadily.[38] Approximately 200,000 people contacted the office in 1975 to make some inquiry.[39]

Eligibility for assistance from the office was comparatively openly defined. A test of reasonableness applied, but to avoid the injustices deriving from the strict requirements of other schemes no formal means test was set. Each application was to be decided on its merits within the general requirement of evident inability to afford litigation in a reasonable case,

> ... the intention being that there should be some financial need and that the service should not be provided to a person who is clearly able to afford the services of a private legal practitioner.[40]

This informal test was waived in the case of applicants falling within 'Federal' categories. These included aborigines, assisted students, pensioners, servicemen and ex-servicemen and their dependents in war-related matters including repatriation.[41]

However, with budget cutbacks and rising workloads income 'guidelines' for eligibility were circulated to ALAO solicitors in August, 1975.[42] Under these guidelines an individual was ineligible for assistance if, where the estimated cost of a matter was less than $300, net weekly income exceeded $50

or personal assets exceeded $500.[43] If the cost of the matter exceeded $300, personal net weekly income and assets could not exceed $60 and $1000 respectively.[44] Some allowance was made for higher income and assets according to the number of the applicant's dependents.[45]

Details of these income guidelines were not made public. This caused confusion for private practitioners who were unsure as to whether a client qualified for assistance, and resentment from members of the public who might not know clearly on what basis assistance had been refused. This initiative was intended to avoid cases of arbitrary injustice, but came to be criticised as a secret discretionary power.

As well as these guidelines, a system of contributions which suggested the 'charitable' quality of private schemes was introduced. Contributions were calculated according to the level of individual assets and disposable annual income of applicants.[46] A minimum amount of $50 was required in family law matters, and at least $25 in others.[47] These measures were applied liberally by the office. But their implementation set up mechanisms partly through which the scope of the work of the office was eventually narrowed with increasingly harsh and arbitrary tests of eligibility for assistance.

Bureaucratic relations and staffing

Many of the failings of the ALAO derived from its hurried foundation and disordered development. The office had external enemies in the private profession and conservative political parties. But the divided and contradictory form of state efforts to secure legal equality was evident in internal opposition to the scheme.[48]

The decision to establish the office rapidly by a change of name for the Legal Service Bureaux, meant the inheritance of staff in this way 'recruited' - either willingly or unwillingly - into what some hoped would become an

innovative and activist legal service. This led to the senior appointment of an entrenched group of officers - from what Murphy even later admitted was a 'hopeless' service with unexceptional staff - often with little appreciation of the office's objectives.[49]

The office was also hindered by the lack of autonomy from the Attorney-General's Department. As a parent department, the Attorney-General's office was noted for its centralised, hierarchical and conservative administration and policy-making. Senior officers resented the sudden establishment of the ALAO in which they felt they were insufficiently consulted. The rapidly increasing size of the service placed administrative demands upon a department already overworked with the onrush of legislative activity from the Whitlam government. In Sexton's words, this increased activity was

> ... a violent shock for the Attorney-General's Department which had been, under Liberal governments, an essentially low-profile supplier of conservative legal opinions on the validity of actions of other departments.[50]

The ALAO's growing importance and high public profile, as well as the different ideology of welfarism, social reform and committed advocacy which permeated its lower ranks, made it an often unwanted offshoot of the 'government's lawyers'.

Although there is no evidence of any undue interference by the Department in any legal matter handled by the office, it remained generally unsympathetic and sometimes hostile to its needs. On one occasion, the Department blocked the appointment of new officers to the approved staff ceiling level. Furthermore, it exercised a level of control over the policy and structure of the service. In 1975 the Department drew upon the draft Legal Aid Bill which if passed into law would have given it a strong influence over ALAO policy and management. The Department's original insistence that lawyers be employed under normal public service conditions with standard staff relations and facilities, and with guarantees of the confidentiality of relations with clients

and professional control of legal work, also limited the extent to which the ALAO could become an 'alternate' service with novel community, staff and inter-professional relations.

Rapid expansion and administrative control by the Department had negative outcomes on the acquisition of staff. The office embarked upon a national recruitment programme which resulted in an influx of young, liberal and pro-activist lawyers. But it had apparent difficulty in finding suitable adequately experienced staff for management positions.[51] Several of these were filled by senior conservative lawyers with no previous interest in legal aid work and a bureaucratic mentality - concerned with means and set rules and procedures, rather than organisational goals - that alienated lawyers in the lower ranks.[52]

The most important instance of this problem was the difficulty encountered in the appointment of State Deputy Directors, several of whom were temporaries. Harkins has explained this as a result of the unsympathetic attitude of the Commonwealth Public Service Board; these positions were classified and advertised at too low a scale and salary to attract outstanding applicants.[53] Armstrong suggests that with the exception of appointees in Tasmania and Western Australia, these key officers were unsuitable and excessively conservative in their view of the appropriate scope and form of legal aid, some apparently regarding the proper function of the office as little more than the operation of a referral service to private lawyers.[54]

Private referrals

This issue of the referral of work to private lawyers is central to an understanding of the failings of the ALAO. Early statements regarding the proposed organisation of the office appear contradictory. Both the Attorney-General and National Director stressed the need for a salaried service with an

expertise in poverty law built up through the completion of work 'inhouse'. Taking on court matters was also regarded as important to the public image of the office. In Harkins' words,

> The office itself will handle court cases. It is important that it have, and be seen to have, a role in handling cases affecting disadvantaged persons in the community.[55]

However, the Attorney-General also insisted that the office mostly keep to the role of rendering simple advice and referrals.[56] This partly derived from the belief that a 'referral back' principle whereby solicitors received the legal work resulting from their own referral of eligible people to the office, reflected a measure of the client's own free choice of a solicitor.[57] A stress upon advice and referrals had been the practice of the Legal Service Bureaux from which the office had evolved.[58] But it seems more likely that resource problems and the growing political and professional opposition to the office led to an imbalance in office work in favour of an expensive early growth in the number of referrals. The policy of providing access in an equal manner through serving all who qualified for assistance, rather than a deliberate selection of client groups in areas of the greatest 'need', reinforced this pressure.

The level of public demand uncovered in the first months of operation, and a haphazard and rapid expansion with staff shortages and imbalances, soon combined to result in a qualitative change in the work pattern of the office. As described by Harkins,

> By 31st December, 1974 ... Recruitment of administrative staff - as distinct from support staff - lagged behind and it had become clear that the initial administrative establishment provided was inadequate to cope with the large volume of legal aid work that was already beginning to come to the office. The office had been conceived as a legal office that provided assistance primarily through the services of its own lawyers. The volume of work however became so great that the office became involved in a large referral operation, the estimated cost of cases referred to the private profession in that financial year became some $6 million.[59]

This very high rate of referrals contrasts the preference for the full resolution of cases by salaried lawyers in such other schemes as the U.S. Legal Services Program. Its full scale is reflected in office annual figures. The number of referrals made annually to private practitioners by the ALAO doubled from 1974-5 to 1975-6, growing from 20,326 to 45,706 matters, with costs rising from $6 million to more than $11 million.[60] In the same period, the number of clients interviewed by staff increased by only one-third.[61] Thus, the number of cases referred grew from approximately one-fifth to one-third of matters for which the office conducted interviews. In Victoria, this referral rate reached almost one-half of the number of total interviews in that state in 1975-76.[62] Figures comparing the ratio of staff-completed work (not just interviews conducted) to referred work are generally unavailable. But it is known that in New South Wales by 1976-77, of 22,364 applications for help, 18,726 successful applications were referred privately and only 2,466 matters fully handled by ALAO staff.[63]

The situation had been made worse in 1976 with the new Commonwealth Family Law Act coming into force. This extended Commonwealth responsibility in this area to matters including custody and maintenance applications formerly dealt with under state law. As the statute effectively dispensed with the concept of matrimonial fault in marriage breakdowns, there was a subsequent rapid rise in divorce applications throughout Australia. Contrary to Attorney-General Murphy's expectations, the legislation led to an increased demand for assistance by the ALAO. Family law matters soon comprised its largest area of activity. By 1976, 40% of interviews conducted by the office, and 80% of referred matters were in this field.[64]

The ALAO's referral rate grew such that the Labor government imposed a $1 million per month limit for the expenditure in late 1975, in order to curtail the rising costs of the service.[65] Overall, in the two years between 1974/5 to

1976/7, the ALAO paid out $20 million of its allocated $38 million as payment for referrals.[66] This clearly illustrates that this expensive practice absorbed the bulk of the funds of the service in the critical early years of its development. This practice, described by Harkins as a 'nightmare' for staff, further demoralised its overworked and professionally isolated lawyers.[67] Their declining job satisfaction in functioning more and more as just referral clerks suggests an apparent case of that deskilling of the lower ranks which has been viewed by theorists discussed above as the most likely outcome of the increasing bureaucratic employment of professionals.[68] It also blocked the development of an extended specialisation in areas of poverty and public interest law, the promise of which had attracted the more idealistic recruits to the service.[69] Furthermore, this policy prevented continuity in the treatment of many client problems, either in the office or by duty court solicitors when defended matters were mostly referred. This made it more difficult to attain a close and ongoing contact with underprivileged and community groups which may have served as a defending constituency of clients during the eventual dismantlement of the office. Such extra-professional support was all the more important given that the ALAO and salaried government legal aid was viewed with hostility by Law Society officials in all states.

Reactive lawyering

The constitutional, administrative, financial and political pressures upon the office, all limited the possibility of experimentation with new forms of delivery and specialisation in neglected areas of law relating to the poor and disadvantaged. The ALAO was founded with reference to this need to enter those fields left undeveloped by the private legal market. This had overtones of some of the more sophisticated models of unmet needs which stress the historical structuring of available legal remedies in a manner favouring the

wealthy and privileged. But the actual work organisation of the office suggested its inscription with a more simple, generally unstated conceptualisation of legal needs directed towards a straightforward redressing of the physical denial of access. This manifested itself as a considerable satisfaction with the expanding numbers of regional offices in working class areas and the ready increase in the number of individuals assisted.

The office principally concentrated its efforts in traditional areas where a vast amount of untapped demand existed for more readily recognisable legal problems; a measure for which earlier schemes had been criticised by legal aid activists. This emphasis is reflected in the figures for interviews conducted by ALAO offices in New South Wales and Victoria for the month of June, 1975. In both states the two most common areas of work were family law and police matters. In Victoria they exceeded, and in New South Wales almost equalled, one-half of all interviews conducted.[70] The office did also conduct a fair degree of work in other areas dealing with the problems of working class clients. These included landlord and tenant (ranking fourth in the June, 1975 figures for New South Wales), social services, consumer law and hire purchase, and worker's compensation matters.[71] But civil matters were never afforded the priority given to criminal and family law work. This imbalance was accentuated after 1975 when a stringent means test effectively served to limit the type of work handled by the office, as only deserted wives and certain welfare recipients (and not other working class and disadvantaged people) thereafter usually qualified for assistance.[72]

If this work pattern was an intended one, it could be readily justified by reference to help rendered in these areas to many thousands of troubled people who would otherwise have been denied aid. But this reactive, traditional form of lawyering contrasts the activist, social reforming goal outlined by Murphy and often referred to in ALAO pamphlets and press releases as a key justification for its foundation and expansion.

Efforts were made, in such instances as the Green case, to handle test case litigation.[73] But despite some appropriation of NLF ideology and work strategy, ALAO officers mostly eschewed structural work and conservatively conceived their clients as the individually troubled.[74] Comparatively little was done to regularly engage in impact litigation or law reform work that might broadly alter the condition of groups of Australia's poor and disadvantaged. This may in part be explained by the limits of Australia's legal system, especially the requirement of locus standi and restrictions upon class actions. But it was also unsurprising given both heavy workloads and the high rate of referrals to private lawyers who mostly carried no interest in this type of legal work.

Other aspects of the work of the Service were highly conventional. An advertising campaign in April, 1975 had been cut back because of excessive workloads. This same pressure limited other experiments in 'preventive' law. Although occasional talks were arranged with schools and local groups, staff lawyers had little time for this activity. The office planned a larger programme of community legal education, and provision for this was made in the draft Legal Aid Bill in that year.[75] With the Bill unpassed and a new government appointed in November, this was never implemented.

The main exception to this orthodox lawyering was the ALAO's activities in environmental law.[76] The office was given power to grant aid in environmental suits that involved an issue affecting 'the national interest or such a substantial public interest as to be of national concern'.[77] Group representation was commonly allowed under this scheme. A demonstration of 'self-help' in the form of a financial contribution from the group assisted was usually required.[78] Twenty-eight matters had been handled in this field by June, 1976.[79] These included representation before the Ranger Uranium inquiry and aid for opponents of the Black Mountain Tower and the mining of Fraser Island.[80]

Community relations and professional control

The Australian Legal Aid Review Committee had been announced at the same time as the ALAO in July, 1973 and did not finish its reports until March, 1975.[81] The separate Law and Poverty Commission did not report fully until October, 1975.[82] Thus, although both of these important inquiries gave general approval to the establishment of the ALAO, they could not affect its important, early pattern of development. There was virtually no external input into the development, and it remained the province of Labor politicians and senior bureaucrats.

Murphy's highly individualised planning of the office and inter-departmental rivalry, excluded the possibility of linking the ALAO to any broader campaign of social reconstruction and the combatting of poverty along American lines. The office had no formal - and very little informal - connections with the Australian Assistance Plan (AAP); a programme to finance and foster local community activities and organisations through the Department of Social Security. In fact, there is some evidence that Murphy had originally rushed through plans for the ALAO on hearing that the Social Security minister Hayden, a party rival, was considering the possibility of a community legal programme under this scheme.[83] Accordingly, the internal 'welfare sector' of the state had a minor influence over the ALAO's development. Its style of work and lawyer-dominated administration much suggested a creature of the state's ideologically and formally distinct legal apparatus.

Despite the claims of the critics of the office, its work was organised upon strict professional lines. Lawyers were employed within the conditions and terms set by the Commonwealth Public Service Board, with a guarantee of the confidentiality of relationships with clients. This formally reinforced the lawyers' position of high occupational status deriving from their specialised cultural capital, their mastery of legal discourse and knowledge of the

intricacies of 'black-letter law'. The guarantee of professional 'confidentiality' was understood to mean the general direction and control of each legal office by qualified lawyers. Despite an extensive shared sense of common purpose among the early staff of the office, lawyers always retained their dominance in work and office decision making especially above subordinate (mostly female) clerical labour.

Although there is some evidence of a situation of staff deskilling resembling that offered by theorists of the 'proletarianisation' of contemporary bureaucratic professionals, this was not the general pattern with the ALAO.[84] In fact, as an organisation effectively dominated by lawyers at every level this legal service can be regarded as an example of the autonomous profession-controlled bodies such as hospitals, university departments, and research institutes, described by rival theorists of the entrenchment of professionals in contemporary bureaucracies.[85]

The ALAO was founded with the goal of a focus on law relating to the underprivileged and a new manner of delivery by socially aware professionals co-operating with other helping occupations. Harkins expressed the hope that,

> Lawyers in these offices will be able to practice the law in its true sense as one of the social sciences. They will be 'social scientists' concerned with bridging gaps in communication and understanding that are the hallmark of the socially disadvantaged. In solving peoples' problems they will enlist the aid of other social scientists ...[86]

Murphy made similar references to the need to complement lawyers' work with the preventive value of social worker and marriage counsellors, that echoed discussions of the 'socio-legal team' in the literature of the U.S. Legal Services movement.[87]

However, the level of lawyer dominance extended to the definition and remedy of 'legal' problems and to controlling work relations with other professionals. The occupational 'team' was not run on pluralist lines and the

lawyers insisted on being captain. The office and its founders felt ambivalent about intervention from any other potentially rival social 'scientists'. Murphy invited them to participate as 'volunteer workers' and the office did not employ social and community workers on a paid basis.[88] The guarantee of professional confidentiality was understood to mean their general exclusion from the diagnosis of legal problems and access to related information. This exclusion also extended to office decisions and to policy. If taken seriously, the claimed distinctiveness of socially aware staff lawyers seemed to suggest a lessened need for the involvement of these workers

Murphy had foreshadowed that ALAO offices would comprise 'administrative support bases for community advice centres and legal or welfare advice groups generally'.[89] In this regard, some voluntary groups were given limited access to ALAO premises in Victoria.[90] A scheme involving law students in the provision of aid was planned but never implemented.[91] 'Community involvement' was generally understood as the limited participation of welfare professionals in legal aid work. Their exclusion from real local decision-making power was affirmed in the draft Legal Aid Bill which provided only for their representation on local community committees limited to an advisory role.[92]

The representation of 'the community' in the more radical sense of client, not just non-lawyer, participation in decision-making fared worse. The various Aboriginal Legal Services developed in these years were unique in developing a system whereby a majority of Aboriginal people was required in each controlling Council.[93] Similarly, the first of Australia's independent white community legal centres in Fitzroy, Melbourne, was making a concerted effort to involve local poor and disadvantaged clients in its work and policy formulation.[94] But despite these examples and the frequent references to regional offices as 'community centres', their exclusion was even more complete than that of the welfare professionals who claimed to represent them.

In his 1980 survey of legal aid developments in several advanced western nations, Bryant Garth distinguishes the contemporary form of neighbourhood law firms from previous patterns of delivery.[95] Elements of this new movement comprise not only the assertion of vast unmet legal need, but also, efforts to alleviate the conditions of the poor and disadvantaged through activist strategies. These include law reform activities, community organising and legal education, and substantial efforts towards the participation of clients in the delivery and control of services.[96] In this model of delivery,

> The neighbourhood law firm ... was to be characterized by activist lawyers, located in poverty areas, and seeking to improve the position of the poor as a class; they were not to be just part of a system of decentralized salaried lawyers or law firms paid by the state.[97]

If this form of alternative delivery is regarded as an essential characteristic of neighbourhood law firms, it is difficult to view the structure and activities of the ALAO as fully part of this international trend. Garth's confident claim that the idea of neighbourhood law firms has no 'institutional embodiment' in Australia, is thus correct as far as it refers to the development of the ALAO in the 1970s.[98] ALAO lawyering generally reflected a simple model of access and an orthodox pattern of delivery in traditional areas of law. As Armstrong notes, the Fraser government did not proceed to undermine a dynamic and radical ALAO when it assumed power in November, 1975, but began to dismantle a very controversial though mostly conservative legal service.[99]

Notes to Chapter Three

1. R. Scotton, 'Public expenditures and social policy' in R. Scotton and H. Ferber (eds.), Public Expenditures and Social Policy in Australia V. 1. The Whitlam Years, 1972-75. Melbourne, Longmans, 1978.
On the brief history of the government, see generally M. Sexton, Illusions of Power, Sydney, George Allen and Unwin, 1979.

2. Sen. Everett, Senate Debates, 14/11/74, p.2391.

3. L. Jarman, 'The involvement of the Commonwealth government in the provision of legal aid', Law Society Jnl., April, 1976, p.69.

4. J. Harkins, 'Federal legal aid in Australia', paper to Intern. Colloq. on legal aid and the delivery of legal services, London, 1976, p.29.

5. Directive by Attorney-General Murphy, 'Establishment of the Australian Legal Aid Office', 6/9/73.

6. G. Hawker, 'The rise and fall of the Australian Legal Aid Office', in S. Encel et al. (eds.), Decisions, Melbourne, Longman Cheshire, 1981, p.62.

7. ibid., p.71.

8. For example, see 'Labor leader says needy denied justice', Australian, 18/10/71.

9. Senator L. Murphy, 'Ministerial statement on legal aid', Parliamentary Debates, 13/11/73, p.2801.

10. ibid.

11. ibid., p.2802.

12. ibid., p.2801.

13. ibid., p.2802.

14. Harkins, op. cit., p.8.

15. S. Armstrong, 'Labor's legal aid scheme: the light that failed', in R. Scotton and H. Ferber (eds.), Public Expenditure and Social Policy in Australia: V. II, The First Fraser Years 1976-8, Melbourne, Longmans, 1980, p.226.

16. Attorney-General Murphy, 'Ministerial statement on legal aid', op. cit., p.2802.

17. ibid.

18. ibid.

19. ibid., p.2801.

20. ibid.

21. ibid.
22. Harkins, op. cit., p.5.
23. ibid., p.11.
24. ibid.
25. ibid.
26. ibid.
27. Hawker, op. cit., p.63.
28. Harkins, op. cit., p.12.
29. ibid.
30. ibid., p.11 and p.10.
31. ibid., p.14.
32. ibid., p.10.
33. ibid., p.12.
34. ibid., p.11.
35. ibid.
36. ibid.
37. ibid.
38. ibid., p.12.
39. M. Sexton and L. Maher, The Legal Mystique, op. cit., p.175.
40. Directive, op. cit., p.4.
41. Armstrong, 'Labor's legal aid scheme ...', op. cit., p.227.
42. ibid.
43. L. Jarman, 'The involvement of the Commonwealth government in the provision of legal aid', Law Soc. Jnl., April 1976, p.73.
44. ibid.
45. ibid.
46. ibid.
47. ibid.

48. For a general account of Federal bureaucratic opposition to Labor's reforms, see P. Wilenski, 'Labor and the bureaucracy', in G. Duncan (ed.), Critical Essays in Australian Politics, Melbourne, Edward Arnold, 1978, and P. Wilenski, 'Reform and its implementation: the Whitlam years in retrospect', in G. Evans et al., Labor Essays, 1980, Blackburn, Dominion, 1980.

49. Justice Lionel Murphy, Interviews, 13/3/86.
See also Armstrong, 'Labor's legal aid scheme ...', op. cit.

50. Sexton, Illusions of Power, op. cit., p.71.

51. 'Storefront lawyers: government battle', Sun Herald, 20/7/74.

52. Armstrong, 'Labor's legal aid scheme ...', op. cit.

53. Joe Harkins, Interview, 17/10/86.

54. Armstrong, 'Labor's legal aid scheme ...', op. cit.

55. Harkins, 'The role of the Australian government in legal aid' (ALAO, November 1974), p.5.

56. Murphy later conceded that the office had an excessive referral rate, but again insisted that the main purpose of government legal aid agencies should be the provision of advice with only some supporting litigation. See Justice Murphy, Interview, 17/3/86.

57. Harkins, 'Federal legal aid in Australia', op. cit., p.9.

58. ibid., p.4.

59. ibid., p.11.

60. ibid., Attachment G, pp.2 and 3.

61. ibid.

62. ibid., p.1. Harkins claims that due to the time lag in payment of private referrals (12-18 months), these figures exaggerate the extent of this rise. He does admit, however, that the increase was quite excessive. Joe Harkins, Interview, 17/10/86.

63. 'Legal aid in N.S.W.', Attorney-General's Department, Canberra, 14/9/77.

64. Harkins, 'Federal legal aid in Australia', op. cit., p.15.

65. ibid., p.13.

66. 'ALAO - The future of legal aid' - ACOSS Statement, October 1976, p.1.

67. Joe Harkins, Interview, 17/10/86.

68. Chapter One, pp. [illegible]

69. Terry Murphy, Interview, 20/3/86.

70. See Hansard (Comm.) Representatives 27/8/75 p.571, 1/10/75 p.1553.

71. ibid.

72. Armstrong, 'Labor's legal aid scheme ...', op. cit., pp.229, 233.

73. Green v. Daniels, ALJR, 51 (1977), 463.
See also P. Hanks, 'School leavers, government policy and the High Court', LSB, June, 1977, p.251.

74. Armstrong, 'Labor's legal aid scheme ...', op. cit., p.235. This omission was later conceded by Murphy. Justice L. Murphy, Interview, 13/3/86.

75. The Federal Legal Aid Scheme, November 1975, p.9.
Draft (Comm.), Legal Aid Bill (1975), S. 8(2(b)).

76. In the late 1970s and early 1980s what remained of the ALAO greatly increased its involvement in administrative law matters, especially AAT appeals. T. Murphy, Interview, 20/3/86.

77. Harkins, 'Federal legal aid in Australia', op. cit., p.15.

78. ibid., p.17.

79. ibid., p.18.

80. ibid.

81. Australian Legal Aid Review Committee Report, February 1974, Canberra, AGPS: 2nd Report, March, 1975, Canberra, AGPS.

82. Aust. Govt. Commission of Inquiry into Poverty - Second main report, Law and Poverty in Australia, October 1975. Canberra, AGPS.

83. G. Negus, 'Two ministers ploughing the same ground', Aust. Fin. Review, 20/8/74.

84. Chapter I, pp. 20-21

85. Chapter I, pp. 7-8

86. Harkins, 'Role of the Australian government in legal aid', op. cit., p.8.

87. Attorney-General L. Murphy, Address at opening of ALAO, Blacktown, New South Wales, 15/5/74, p.7.

88. ibid.

89. Directive, op. cit., p.1.

90. Harkins, 'Federal legal aid in Australia', op. cit., p.14.

91. ibid., p.23.

92. Sackville, Law and Poverty in Australia, op. cit., p.40. Draft Cls. 37-40.

93. Harkins, 'Federal legal aid in Australia', op. cit., p.29.

94. R. Graycar, D. Neal and J. Basten, 'Legal centres in Australia'

95. B. Garth, Neighbourhood Law Firms for the Poor, Alphers aan den Rijn, Sijthoff and Noordhoff, 1980.

96. ibid., p.145.

97. ibid., p.15.

98. ibid., p.115.

99. Armstrong, 'Labor's legal aid scheme ...', op. cit., p.221.

CHAPTER FOUR

PROFESSIONAL REACTIONS

Response of the Law Societies

The high level of internal bureaucratic opposition to the development of the ALAO and other Labor initiatives in legal aid, was easily exceeded by the hostility of the organised private profession. This was unevenly distributed among different segments of the profession and among different states. But it grew steadily throughout the government's term of office, taking the form of a political mobilisation of the most conservative elements in the profession.

The initial general reaction to Murphy's announcement of the ALAO was one of surprise and suspicion. The profession's traditional organisations, the various state Law Societies and Bar Associations, as well as the more recent Law Council of Australia, felt that their central position in legal aid policy had been disturbed by a government which failed to consult with them in planning the service. This insult, and the strong element of bureaucratic secrecy surrounding Commonwealth developments, fuelled false rumours about the government's long-term intentions.

This resulted in a growing concern to ensure the retention of the established private monopoly over profitable areas of legal work, which was in fact not threatened by the real form and scope of the ALAO. This same confusion gave rise to fears among private lawyers that the expansion of salaried aid with too-lenient requirements for eligibility and a policy of offering advice to all-comers, would undermine the financial circumstances of many practitioners. The fear of unfair competition from the ALAO was heightened by the effect of the business downturn in 1974 and 1975 upon the legal market. This accompanied the belief of some Law Society officials that the ALAO would

eventually increase its level of inhouse work.[1]

Murphy set about reassuring the private profession by specifically excluding conveyancing and probate matters from ALAO work. Similarly, Harkins insisted that the service would not mean the loss of their share of the 'legal aid cake'.[2] But despite the sums given as federal assistance for Law Society schemes and the large amounts allocated for referrals from the ALAO, hostility to the service increased.

Despite these unwarranted fears and the limited scope of the ALAO, there were some real differences in government goals and professional interests, that were not just a consequence of the misunderstanding of Labor policy. The reaction to legal aid developments did not always derive from a simple concern about the amount of government money that was to go into private professional pockets. It was also a primary professional aim to ensure an effective control over the allocation of these funds and the form of any new legal aid schemes. Concern about the private lawyer's share of the 'legal aid cake' paralleled a growing professional interest in its ingredients and flavour.

Murphy's initial payment of $2 million to established Law Society schemes in 1973 to provide aid in Federal areas including family law not yet covered by the ALAO, was well justified in view of the hardship generated by their lack of finance.[3] But from another point of view, it was also a costly political error. This was the first time that substantial Commonwealth funds had been directed to these schemes and gave the [illegible] a fair measure of control over ~~their~~ allocation. This raised expectations and helped to inspire proposals for an expanded role for the professional schemes as an alternative to the ALAO. This expansion was to be achieved with the Commonwealth's funds, though not its direct involvement in legal aid delivery.

Commonwealth assistance was extended further to cover the costs of a pilot duty solicitor scheme in New South Wales in 1974.[4] But the Law Societies

were soon disappointed by a reduction of overall funds to $1.3 million in 1974-75, and then to only $1 million in the 1975-76 budget.[5] This reduction also meant the ALAO's assumption of responsibility in late 1974 for the New South Wales divorce work covered briefly by the Law Society scheme through a Federal grant in the previous year.[6]

The expansion of the ALAO and its policy of granting a high rate of private referrals rapidly increased public payments to private practitioners. But its development also meant that the private profession's Legal Aid Committees did lose amounts of more directly controlled public funds each year from 1973. Furthermore, it was impossible to obtain substantial funding from the state governments. Sackville has noted that in 1975 in New South Wales, Victoria and Queensland no money at all was received by Law Society schemes from that source.[7]

This financial dilemma was aggravated by the further effects of the business recession. A scandal surrounding Law Society money erupted in New South Wales in 1974 with the public disclosure that the Legal Aid Committee had so much limited its giving of assistance that it had been making a considerable annual profit.[8] But a general reduction in the total amounts deposited in solicitor's trust funds was experienced across the country in this period. Accordingly, less money was available in the form of interest on these funds for the profession's self-financing of either its current legal aid operations or for any expansion of activities intended to quell the growing criticism of their narrow scope.

This difficulty was felt most harshly in Tasmania, South Australia, and in Victoria, and further increased the resentment felt towards the better-funded ALAO in those states.[9] This problem was made worse by the several uses made of this money. One $6 million defalcation by a Victorian solicitor in 1975, the cost of which was to be met by the Law Institute, seriously depleted the amounts available for use by the Victorian Legal Aid Committee that year.[10]

Changes to Law Society schemes

In Public Legal Services, Jeremy Cooper has outlined how the English Law Society failed to substantially develop its legal aid scheme or even formulate coherent policy proposals in a period of increasing debate surrounding the delivery of legal services.[11] Thus, by the end of the 1970s the society had been pushed to the political periphery with a much diminished role in the formulation of future policy. Groups including a small minority of lawyers involved in community legal centres and various welfare organisations, had a suddenly stronger voice in the determination of legal aid developments.[12] By contrast, the prudent early involvement of the American bar in the Legal Services programme and similar developments in the 1960s, gave traditional lawyer organisations an important opportunity to direct the pattern of changes to legal aid in the United States.[13]

A similar threat was posed for Australia's Law Societies in the 1970s. The large scale and more direct form of state activities, and the involvement of formerly excluded groups including welfare bodies and academic and alternate lawyers in debates on legal aid, signalled warnings to these organisations. This threat probably motivated much of the internal reform and expansion of their own legal aid schemes in this decade. The dubious private professional claim to a right to control legal aid in Australia by virtue of having founded it, needed reinforcement by an illustration of the profession's commitment in this area.[14] Such reforms would make some reply to the indirect censure involved in the unearthing of a broad unmet demand for assistance by the ALAO, and might invalidate some of the harsh criticisms of the narrowness of private schemes made by the Turner Committee and the Poverty Commission. This protection of the private profession's public image and its claim to plausibly represent the 'public interest' in legal services, was politically most important in a period of heightened debate and development.

The major change initiated by the Law Societies was the establishment of several duty solicitor schemes at the same time as the ALAO developed its own service in special federal, family, and some summary courts. The Tasmanian society began a scheme in 1971.[15] In the Whitlam years, the other states followed suit. Pilot schemes were set up in three South Australian and two Victorian magistrates' courts in May 1974, and in three Queensland and two West Australian courts in July that year.[16] In only the last two states were private solicitors paid for their services; Victoria was actively seeking federal funds for the purpose.[17] The New South Wales Law Society was able to begin a larger scheme with funds from this source. By October 1975 this was operating in twelve courts of petty sessions in that state.[18]

In addition to these schemes, the Law Societies in all states except Tasmania experimented with the establishment of volunteer legal referral bureaux in 1973 and 1974. These were most extensive in New South Wales, numbering thirteen by June, 1974 and twenty-two by 1975.[19] These figures appeared impressive, and the bureaux were referred to as 'community legal referral centres' in an appropriation of the terminology of the critics of the profession's legal aid schemes. But their real scope was very restricted. They offered highly limited help in the form of advice in restricted hours and often from inadequate premises. They served principally to channel further business to private practitioners, rather than offer an effective legal aid service to poor clients. As they functioned on a voluntary basis only, they soon contracted in number with a lack of professional interest in them.

A more determined effort to develop a professional lead and greater control in legal aid was made by the Law Society of New South Wales. In this role, it was freshly invigorated by its victory in successfully lobbying the conservative Askin state government to grant it control of the civil legal aid jurisdiction of the New South Wales Public Solicitor through legislation in

1974.[20] This greatly widened the scope of matters to be dealt with under the scheme, but did not alter the conservative form of the administration of legal aid.

A more novel approach that would attract positive publicity was made in some areas. To quell criticism of the lack of client involvement in legal aid and the inaccessibility of services, the society established its own 'community legal centre' in Mt. Druitt, a working-class Sydney suburb, in April 1975.[21] Despite this title, 'community' involvement in the centre's running assumed the limited form of the use of local voluntary labour, and although salaried, employing one solicitor and one secretary full-time, it also functioned primarily as a referral service for private lawyers.

Other measures to expand services included the introduction of a duty solicitor service in New South Wales children's courts in May, 1975. This was implemented partly as a response to the growing criticism by a group of alternative lawyers of the lack of representation in these courts and their own plan to commence a scheme.[22] The society also sought to match the ALAO's advertising with its own more limited campaign in early 1976.[23]

The Law Society cited these various developments as evidence of the profession's proper place in controlling services and to support the claim that, 'there is no place for direct and widespread participation for government in the provision of legal aid'.[24] But these changes did too little, too late to stem the further involvement of the state and groups other than private lawyers in this field. Furthermore, as this expansion of Law Society schemes was uneven and disorganised between states, its national effects were minimised. American private lawyers in the 1960s had responded to the legal services challenge with inventive, large-scale developments in public interest law and group legal services. But a lack of resources, the far smaller scale of the legal market, and the more conservative character of the traditional leadership of the Australian

profession, inhibited the scope of any new scheme. The effort to control developments came to be expressed in more negative ways.

Public inquiry findings

The importance of this issue of the control of legal aid administration and delivery was reflected in the Law Societies' response to both the Australian Legal Aid Review Committee established by Murphy and the Law and Poverty inquiry added to the inquiry of the Poverty Commission inherited from the previous government. The actual influence of the reports of these two inquiries was limited by the prior establishment of the ALAO. But their conclusions and the various submissions made to them, crystallised the different arguments for and against the Commonwealth's intervention and the expansion of salaried services. These competing submissions also set the pattern for separate proposals regarding the composition and role of a planned national legal aid commission and the draft Legal Aid Bill in 1975.

The Legal Aid Review (Turner) Committee was announced by Murphy in 1973 with the probable aim of developing professional and political consensus in favour of the establishment of the ALAO.[25] The committee was chaired by Roy Turner, a private solicitor who was a member of the New South Wales Law Society Council and Vice-President of the Law Council of Australia. It also comprised other private lawyers, as well as representatives of the judiciary, the Commonwealth Attorney-General's Department, and the ALAO in the person of Harkins. Two influential academic lawyers from the University of New South Wales, Professor Wootten, the founding president of the ALS in that state, and Professor Sackville, chairman of the Law and Poverty inquiry, were also members. Some recognition was also given to the still nascent independent legal centres movement in the appointment of a member of Fitzroy Legal Service.

In addition to an examination of the extent of unmet legal needs in

Australia, the Committee was given terms of reference which went to the core of the legal aid debate. These were to inquire into,

- the means by which legal assistance and advice should be provided and in what areas they should be provided by a salaried legal service;
- the means by which finance for schemes and of legal assistance and advice should be provided.[26]

In its first report on legal aid services in February, 1974, the Committee claimed to reach 'no final decision about the appropriate model for Australia', and stopped short of a direct discussion of the relative merits of the private and salaried forms of delivery.[27] But it was highly critical of the inaccessibility and narrowness of profession-controlled schemes, and gave general approval to the concept of salaried local legal centres as a solution to unmet need.[28] This finding further disturbed the private profession as it was generally understood as an indirect approval of the development of the ALAO.

The Committee made several suggestions for the meeting of requirements for aid including the use of duty solicitor schemes, pilot community legal centres, clinical legal education, and the greater involvement of legal aid agencies in test cases and law reform.[29] The Committee also made proposals for a national legal aid commission with diverse representation and an advisory role.[30] But in its second report in March, 1975, it supported the development of a stronger commission with an active role in formulating legal aid policy though not (as suggested by both Sackville and the Law Council of Australia) directly delivering assistance.[31]

The Law and Poverty Report of the Commonwealth Commission of Inquiry into Poverty made proposals that were more far-reaching. A team of academic researchers under Professor Sackville produced extensive documentation of the lack of access of the poor and underprivileged groups to the legal system, as well as those areas of substantive law which discriminated against them.[32] The

nature of these findings took Commission staff right into the growing debate regarding Labor's legal aid initiatives.

The Law Societies claimed that it was in the public interest for it to control new legal aid schemes. But this sat uneasily against the Commission's thorough criticisms of Law Society schemes.[33] These were reinforced by the study conducted for the commission in Melbourne by Dr. Fitzgerald which found a very limited involvement or interest in poverty law by private practitioners in that city.[34]

The commission did also criticise the ALAO for its lack of organisational independence and community involvement.[35] But, to the further irritation of many private lawyers, it was not subjected to the same full critical assessment as the private schemes because of its newness.[36] Moreover, the claim that salaried services could be more efficient and better specialised than private ones, particularly in duty solicitor schemes, was also understood as a preference for the development of the ALAO above any large-scale expansion of the profession's schemes.[37]

The Commission regarded the ALAO as a basis on which to build a system of neighbourhood law firms, coordinated nationally by an independent Legal Services Commission with wide powers over policy and funding. This scheme was to entail much pro-active work, engaging in test cases, group advocacy, law reform and community organising.[38] Of course, this proposed form of radical lawyering had only a limited support among the conservative leaders of the private profession. But radical or not, a greatly expanded and separate salaried sector was perceived as a serious threat to the professional control of legal aid. The Law Societies were not reassured that the Commission recommended the continuation and expansion of the ALAO in a different, more independent form with neither direct state nor private professional control. It was not surprising that the Commission's proposals met a high degree of private professional hostility and resentment.

Law Society submissions

Despite this generally shared intention of containing the size and form of the salaried sector, the private profession made only limited submissions to these inquiries. This probably reflected a widespread mistrust of both the Labor government and any outside bodies in the legal aid field. But those submissions which were made, suggest a general lack of any organised strategy from the private profession at that time. The cracks in the wall of professional opposition were most obvious in the lack of uniformity in the perspectives of the various Law Societies. They were in open disagreement with each other about how wide was the extent of unmet needs, and the need for the ALAO and other major reforms.

The smaller states and territories in submissions to the Turner Committee mostly simply denied that there was any extensive unmet need requiring the organisation of legal aid in a new form; the only real requirement was more Federal funds.[39] On a platform of opposition to 'centralism' they viewed the new salaried services as an unnecessary duplication of services and a creation of the loathed Canberra bureaucracy, and so merged the legal aid issue with this aspect of state politics.[40]

By contrast, as Armstrong notes, in the larger eastern states where the ALAO's scale of work was much greater and the profession feared the loss of its lucrative monopoly over conveyancing, Labor's reforms were viewed more strongly as a potential economic threat.[41] But with the apparent seriousness of the government's determination to expand the ALAO, these Law Societies did not resort to the blanket denial of any need for new developments. They more realistically conceded that changes to the current organisation of legal aid were essential, and pushed for those reforms which they felt conformed most closely with their own interests.

However, even this strategy allowed for considerable variation between

states. The Victorian Law Institute adopted a conciliatory tone in a comparatively liberal submission which accepted the requirement of expanded aid and experimentation with such new forms of delivery as local legal centres involving welfare workers.[42] Although it argued that the ALAO ought to be established on an independent statutory basis, the Institute accepted the development of the service within its currently limited role of mostly handling legal referrals.

The Law Society of New South Wales also accepted the claim of extensive unmet needs, and had set about the internal reform and expansion of its own legal aid scheme. But it remained firm in its view that the solution to unmet need was not to be found in any form of salaried government legal aid.[43] Under the leadership of its conservative president Alan Loxton, a partner in the elite Sydney firm of Allen, Allen and Hemsley, the society became a key organisation in legal aid politics, voicing a continuous hardline opposition to the ALAO and related Labor reforms. Loxton disregarded reassurances from the Attorney-General that the professional independence and financial security of private lawyers would be preserved. The tacit approval of the establishment of the ALAO by both the Turner Committee and Poverty Commission was also rejected, together with,

> ... dogmatic, doctrinaire or jaundiced assumptions, that the profession cannot perform, in terms of public interest, as effectively as a salaried service.[44]

In this vein, the research staff of the Poverty Commission were accused of an ongoing academic bias and the deliberate tarnishment of the profession's public image in relation to this issue.[45]

The society's submission to the Turner Committee pressed for the replacement of the ALAO by a judicare scheme modelled on that introduced in Britain under the Legal Advice and Assistance Act, in 1972.[46] Under this scheme private lawyers were to be reimbursed from funds supplied by the Commonwealth government for work done up to a given amount in their own offices.

This was to be supplemented by a profession-controlled network of legal referral centres that the downgraded ALAO would become a part of. It was further proposed that legal aid would be provided wherever possible by private lawyers and controlled by the various Law Societies on state lines. Legal aid was to be placed back under private professional control, even though it was contradictorily argued that,

> The provision of legal aid is a responsibility of the whole community and, therefore, the cost of providing it should not fall on the profession which should be properly remunerated for the services it renders.[47]

Salaried versus private models

The divisions within the private profession in its reactions to new legal aid developments were obvious. But the elements of a common professional ideology underlay this diverse opposition and eventually served as a unifying factor in the professional mobilisation to counter the unwanted aspects of Labor's reforms. The most important elements of this shared system of beliefs derived from a fidelity to the traditional market model of the autonomous private professional. In this view, the interest of both individual clients and the general public rested upon the protection of the monopoly over legal work of private lawyers freely contracting their skills to different clients and remaining 'independent' in the conduct of their work. Furthermore, it was asserted that private practitioners were superior in their quality of work and efficiency as compared to salaried government lawyers. Thus, it was appropriate that they should control the administration of legal aid and always have the major role in its delivery.

This so-called 'salaried-judicare debate' has been argued with much heat by factions of the legal profession in all Western countries engaged in the reform of their legal aid schemes in the last two decades. It is still the most

politically sensitive issue in the whole field of legal services. This fact is probably partly reflected in the vague and timid findings of many of the studies of the issue, including those of the research commissioned by the Commonwealth Legal Aid Council.[48] Despite Harkins' claim that the debate was an 'irrelevant' one, it has remained an ongoing point of conflict reflecting fundamental divisions among groups of lawyers about the appropriate form of the delivery of legal services generally and legal aid in particular.[49] Even though there has been a growing professional and political consensus about the acceptability of a compromise 'mixed model' of delivery in Australia, this same debate resurfaces in the continuing arguments about the best and most economical 'mix' of private and salaried lawyers. This is especially so in the case of government financed duty solicitor schemes.

The greater cost-efficiency of salaried services in providing local legal aid for the poor was suggested by the Poverty Commission and argued most strongly in Armstrong's Legal Aid in Australia.[50] The latter cited numerous foreign sources to support this view. This claim can also find support in two Australian studies, that conducted by the New South Wales Public Solicitor's Office in 1978 and that made by the South Australian Legal Services Commission in 1980.[51] But the extensive international literature and numerous studies of this subject still remain divided and inconclusive.[52]

The claim of the superiority of private systems assistance was made by the Law Societies in submissions to the Turner Committee and Poverty Commission which selectively cited foreign material in support of this contention. It also reappeared regularly in the journals and other publications of the private profession in this period; particularly those deriving from the Law Council of Australia and the Law Society of New South Wales.[53] The latter argued this claim most strongly in seeking to justify its takeover of the civil legal aid jurisdiction of the New South Wales Public Solicitor in 1974. It was

indirectly supported in this by the arguments put against many of the Poverty Commission's findings including its favourable view of salaried schemes, by the Law Foundation of New South Wales, an 'independent' research organisation newly founded and financed through the Law Society.[54]

The ALAO was depicted by its critics as a needlessly expensive and cumbersome bureaucracy. But due to its close administrative ties with the Attorney-General's Department, real overhead figures are unavailable and it is difficult to draw conclusions about its cost-efficiency. This is especially so with regard to its early years in which the cost of establishing a network of new offices had to be met. But any claims that its relatively 'high' budget (in comparison with the previously meagre sums allocated by the Commonwealth for legal aid) alone suggested the greater cost of salaried aid were incorrect. This was because from its very beginning the ALAO was already part of the mixed model of delivery. It could be argued instead that its 'high' cost was a consequence of its very expensive private referral policy, which drained the bulk of the ALAO's funds in its early years.[55] The alleged costliness of the ALAO at that time, could as much suggest the high cost of the 'judicare' element of its operation as that of its salaried form.

The further claim that salaried services were generally of an inferior quality is equally as difficult to prove. Detailed information regarding recruits to the ALAO in the Whitlam years is unavailable.[56] But the commonly held view that legal staff were well educated though comparatively young and inexperienced, is supported by information obtained from the Commonwealth Public Service Board regarding staff appointed, promoted or transferred to the ALAO between early 1976 and mid-1985.[57] Of these one hundred and two staff, fifty-five (53.9%) had not reached thirty years of age.[58] But the level of education was evidently quite high, especially as compared with other groups of public service lawyers. Nine-five (93.1%) held a tertiary degree and sixty-seven

(65.6%) held a degree in law.[59]

It is quite correct that the most senior and impressive solicitors and barristers are overwhelmingly engaged in private work and are attracted by the high status and remuneration of such areas as commercial law, taxation, equity and corporate law. However, it does not follow that private lawyers are necessarily more talented than salaried ones, or that the most experienced and able of private practitioners would be attracted in substantial numbers to the low status work that is usually offered by legal aid schemes if they succumbed to private professional control. A fair degree of legal aid work is done by junior barristers.[60] But Tomasic and Bullard's 1978 survey of the New South Wales profession found little involvement by solicitors from elite city firms, 62.3% claiming they did none.[61] Hetherton's 1974 Victorian study also found that partners in high-status large firms did a negligible amount of legal aid and 'personal plight' matters.[62] Both confirm Fitzgerald's finding that the most skilled and experienced private practitioners tend to do the least work on behalf of low-status clients.[63]

The experience of some private schemes would also suggest that they may not attract the best private lawyers. For example, the Law Society of New South Wales established its children's court duty solicitor scheme with Commonwealth funds in 1975. This scheme was implemented at the same time as a recession in conveyancing work in Sydney. Abuse of the scheme by suburban private lawyers regarding it, in the director's words, as a 'rip-off' through which they could supplement their threatened incomes, soon followed.[64]

The Society was soon afterwards forced to reform this scheme and offer seminars in continuing legal education in relevant areas of juvenile and criminal law to counter criticism from a group of radical law students and lawyers of the inexperience of panel solicitors in these fields and the low standard of representation given.[65]

This episode suggests another important factor in the debate surrounding the relative quality of salaried legal aid lawyers.

Legal service activists in many countries have stressed that a high quality of service will result from a specialisation in those areas of law affecting the poor and underprivileged and from a close familiarity with these client groups.[66] It is not necessary to think of their legal needs as unique to appreciate this claim, or that a subjective though important element in the provision of service comprises a degree of commitment to oppressed groups. The recent history of such organisations as the independent community legal centres suggest that this same commitment exists among some groups of private lawyers in Australia. But it is by no means commonplace.

Salaried aid and professional 'independence'

The claim that private delivery of legal services is superior, was linked to the further assertion that the development of a large salaried sector would damage the independence of the profession. This went beyond the contention that the interest of individual clients depended upon the efficient and able service of autonomous private practitioners, who were either self-employed or working under the direction of a professional colleague. This client interest broadened into an alleged general public interest in this model of legal professionalism.

The independence of both private solicitors and barristers was viewed as a vital element in ensuring the impartiality of the courts and the legal system. It was also essential for adherence to the role of law in any liberal democratic society. In this guise, the profession was said to shield the weakest members of society from the arbitrary abuse of authority by the privileged and powerful.[67] This professional image was sketched largely around the adversary model of representation in which the rights of the individual citizen were defended from

inroads by the state. The result was a flattering self-image for a profession which increasingly serviced the needs of large private corporations, often against less powerful individuals, and in which the criminal law defence of largely underprivileged people against the charges of the state has generally been regarded as low-status work.[68]

Although this depiction of the political group role of lawyers was even more tendentious than the claim of superior quality and work efficiency, it was a potent ideology in mobilising the divided segments of the private profession in its conflict with the Labor government. Law Society leaders repeatedly referred to the lack of an independent statutory basis for either the ALAO or ALS; as well as to their administration from within public service departments. This was viewed as compromising the independence of the legal arm of the state and its classical distinction from the executive.[69] The expanding numbers of lawyers employed on a salaried basis and organised on bureaucratic lines, especially within the ALAO, was seen as politically pernicious. For example, the Law Society of the A.C.T. contended that,

> with the ALAO growing bigger almost daily, there is a real danger that an independent legal profession standing between the government and the citizen will disappear. This, of course, is the first requisite of a totalitarian state.[70]

The injury to the public interest resulting from this growth of salaried legal aid delivery was said to occur in several ways. Studies of legal needs have made the finding that the way clients come to contact a lawyer is often a haphazard process. Partly as a consequence of professional restrictions on advertising, the legal market is highly imperfect, with widespread ignorance among consumers about the relative skills of various practitioners. This is particularly so among poor and disadvantaged clients.[71] Nevertheless, the private profession's leadership continuously stressed the loss of the client's freedom to choose between different practitioners in salaried schemes so as to

support their own claim for control.[72]

To this criticism was added the abstract claim of a necessary conflict of duty arising from salaried government employment. This comprised, according to the Law Society of New South Wales,

> the conflict of interest and duty involved in an employee of the State representing a member of the public against the State which is his opponent, or against another member of the public also represented by a fellow employee of the State.[73]

Critics of Law Society schemes, including the Poverty Commission, had questioned the public benefit in the determination of grants of aid by committees of private lawyers with their associated high rate of refusals and limited appeal provisions.[74] But it was still argued that private professional control could guarantee the protection of the public interest, avoiding instances of the State refusing to grant aid in a cause against itself despite the merits of an application for assistance.[75] The hardline adherents to this view conceded no halfway point between the alternatives of private professional control or a scheme inscribed with the arbitrary power of a monolithic bureaucratic 'state'.

In the viewpoint of the Law Society of New South Wales, the argument regarding conflict of interest oscillated between an opposition to government control of salaried schemes and a less common but more extreme opposition to the development of any form of salaried aid outside of Law Society control.[76] The latter may have been directed towards containing the possible development, on Fitzroy's lines, of independent salaried legal centres free of either direct state or private professional control. This may also have motivated the Society's own establishment of a salaried legal centre in 1975, and its further proposal for profession-controlled salaried referral bureaux at government expense.[77]

This stress upon the need for 'independence' reinforced moves to limit the development of salaried aid and the nature of state involvement, but it also had

important effects upon the occupational order in this field. The claimed sanctity of the lawyer-client relationship had served to affirm professional control over legal work in both the older private schemes and, more interestingly, in the ALAO. The exclusion of welfare paraprofessionals from the treatment of client problems, as noted above, could be justified in terms of the 'confidentiality' required in this relationship.[78] Similarly, the Poverty Commission's proposals for local consultative committees involving non-lawyers in decision-making in legal aid agencies, were rejected by professional bodies on the basis of this tenet of professional ethics.[79] They jointly argued that,

> ... the applicant for legal aid should be entitled to have his problem handled by an independent lawyer in a confidential manner so that neither the other party nor outsiders need know that he is being assisted.[80]

But as well as excluding outsiders and potentially rival occupations, this idealised model of the independent private practitioner was powerfully linked to arguments about the independence and integrity of the entire legal and judicial system. This effectively interlocked with the political outlook and interests of allied legal occupations which had a vicarious status deriving from their image of an autonomous and public-spirited legal profession. For example, the loss of the independence of the private bar that could result from an increasing reliance upon legal aid work from state schemes, was feared by some observers as likely to result in a decline in the independence of the judiciary selected overwhelmingly from barristers' ranks in Australia.[81] The closeness between the outlook of many judges and the perspective of the private profession they derived from, in regard to Labor's reforms, was reflected in the words of Mr. Justice Bowen to a conference of the Young Lawyers Committee of the New South Wales Law Society in November, 1973, warning of an impending 'nationalisation' of the profession with ruinous results such that it would be no longer possible for a citizen to get 'a member of the free legal profession to act

for him with complete fearlessness and independence'.[82]

This intersection of occupational interests and ideologies soon turned conservative anti-Labor sentiments into a more direct form of political assistance. The South Australian Law Society had used its own disciplinary powers to censure ALAO solicitors over allegations of 'touting' after they had allowed themselves to be named as practising lawyers in press interviews in 1974.[83] But external reinforcement of the private profession's stance soon developed. This included the disruption to ALAO and ALS duty solicitor schemes by police in New South Wales and Victoria in early 1975. These solicitors were denied access to persons in custody in accordance with police standing orders stating that such access could only be granted to previously retained counsel.[84] This mostly had a nuisance effect but the move effectively blocked many prisoners from obtaining legal representation. The conservative political sympathies of many police officers, were evident in that this same requirement was apparently waived for the similar duty solicitor schemes established by the Law Societies in both states.

However, it was support from the judiciary that was most valuable in appearing to vindicate the professional opposition to Labor's salaried schemes. In the Supreme Court of South Australia in 1974, this took the form of the refusal of one judge to grant a right of audience to ALAO solicitors, finding they were not employed as principals by their clients.[85] But a greater challenge to the service and the right of its professional staff to perform legal work stemming from the arguments regarding the independence of salaried lawyers, was posed by the finding of the Full Bench of the Supreme Court of the A.C.T. in Ex-parte Hartstein.[76] In this case the registrar of the court had instituted proceedings questioning the right of ALAO officers to practise in that territory. In March 1975, the court held that they could not so act as lawyers for the various clients of the service. According to the provisions of the Territory's

Legal Practitioner's Ordinance (1970), and as a matter of 'general law', employed solicitors could only perform legal work when employed by either a sole client or a fellow professional.[77] Thus, Mr. Justice Fox declared of the ALAO that, 'the office should regard itself as absolutely debarred in a wide range of cases'.[78]

In reaching this decision the court referred to the general conflict of interest allegedly experienced by salaried government lawyers between the interests of their clients and those of their employers, and the negative effect of this upon their professional independence. In the view of Justice Fox, the work organisation of the ALAO was such that,

> ... it weakens the reliance the court should be able to place on the independence of the persons representative of the diverse interests involved ... it is fundamental that the legal practitioners acting for members of the public should be, and clearly appear to be, independent of the executive government.[79]

The actual interference with ALAO services resulting from this decision was minimised by the quick enactment of a new temporary ordinance overriding it, after an amendment to the earlier statute had been blocked by the Senate.[80] Furthermore, the ruling had only a doubtful status as a valid precedent throughout Australia. In the style of many private professional comments on the issue of independence, the judgment referred to no actual instance of any conflict of interest in ALAO activities. Its logic relied on the abstract criterion of the general form of a lawyer's employment rather than assessing the real likelihood of actual interference with professional autonomy in the performance of legal work. As Disney also noted, if the ruling were followed elsewhere in a literal way, it would have threatened well established salaried government schemes in Queensland, Victoria and New South Wales.[81] The employment by a sole client requirement also seemed to question the activities of some corporate lawyers, as well as the ALS and community legal centres including that founded

by the Law Society of New South Wales in Mt. Druitt.[82]

However, in obiter, this much-publicised judgment questioned the overall independence of the ALAO, and the manner in which the office had been established was described as 'constitutionally unsound, and inimical to the proper administration of justice'.[83] This was welcomed by the various Law Societies as an apparent reinforcement of their position by the force of judicial authority. The presiding three judges were at pains to explain their own support for the concept of expanded legal aid - Justice Connor even voicing his regret at the likely results of the court's unanimous decision.[84] But their views on the proper scope of the office and the appropriate form of legal aid schemes conformed with those of the private profession. As well as supporting increased government funding they felt that the ALAO could only properly take applications for assistance and offer limited legal advice. Referring to the representation of the registrar in Hartstein by private counsel paid by the state, Justice Fox, revealingly commented that 'this is the way the system should work'.[85] Thus, these judicial views sat well with private professional proposals for an expanded judicare scheme and a downgrading of the ALAO into a system of profession-controlled referral bureaux.

Despite this reinforcement, the private professional claim of an innate lack of independence in salaried government schemes was not backed with substantial evidence. In the case of the ALAO, no actual instance of undue administrative or political interference with the conduct of any proceeding was ever cited.[86] In cases of a real conflict of interest provision was made for a second party to obtain outside representation.[87] In retrospect, this exaggerated private professional and allied judicial anxiety regarding professional 'independence', can be understood as a consequence of a wider crisis in the profession. Older established groups of lawyers, from which the organised leadership were mostly drawn, based their own professional identity on the

traditional market model. But this had a decreasing relevance to the real forms of employment and work organisation of the increasing number of salaried lawyers in these years. Although the ALAO's development and related reforms hastened this change, it was unrealistic for the critics of the Whitlam government to regard it as directly blameworthy for the more complex divisions in the profession emerging in this period. Furthermore, with the political conservatism of these critics of the growth of the salaried public legal sector, they were far less vocal in questioning the contemporary rise of that new corporate elite of inhouse lawyers referred to above.[88]

Much of the private professional complaint about Labor's salaried schemes lacked plausibility in view of the previous general acceptance of similar pre-existing services. But the larger scale of these developments and the different circumstances of the profession in the 1970s were such that they threatened to uproot its ideal representation by its traditional leadership.

Although a historical explanation can be given for this growing ideological opposition to salaried government aid, the issue of organisational independence for new schemes was a real one and this was recognised by groups of progressive lawyers. Sexton and Maher are correct in noting that the Hartstein ruling reflected a private professional snobbery towards salaried lawyers, and that the notion of professional 'independence' is always relative.[89] But their liberal critique falters in arguing that it is virtually irrelevant as it is,

> ... a little ephemeral for a lawyer, or anyone else, who is employed by a corporation or by a government department - or it might be added, who depends upon a regular group of clients.[90]

The political advantages of an overall independence for legal aid schemes have been most evident in the conflict between the United States Legal Services programme and conservative politicians including Nixon and Reagan, and the narrow survival of the Legal Services Corporation founded in 1974.[91] The latter has been able to avoid direct political interference in its activities and better

cope with destructive financial cutbacks through its independent statutory form. The same need for organisational independence has been evident in Australia in episodes including the freezing of Commonwealth funds for the New South Wales ALS in 1972 by the Minister for Aboriginal Affairs over alleged misappropriations, as the service assumed a leading role in organising the politically embarrassing Tent Embassy protest in Canberra.[92] Similarly, the Queensland Bjelke-Petersen government has more recently interfered in the functioning of legal services by blocking Commonwealth funds for the Caxton Street legal centre without explanation.[93]

For political reasons, the Labor government found it necessary to found the ALAO and ALS by executive action. The resulting bureaucratic control of the ALAO by the public service had 'interfered' with its independence in the indirect sense of moving it towards a conservative form of lawyering in traditional areas. This adverse effect was recognised by the Poverty Commission in its call for control by an independent commission to ensure innovativeness in a fresh scheme. It also motivated the independent community legal centres to stubbornly protect their autonomy from both the state and private professional organisations. The ALAO's lack of an independent statutory basis made it very vulnerable to criticism, particularly from the Law Societies - even if not well substantiated and expressed in a rhetorical form that thinly veiled the professional self-interest therein.

The Law Societies' claims regarding salaried lawyers ran together arguments regarding the need to avoid individual cases entailing a conflict of interest with the claim of public benefits in its own control of legal aid delivery and administration. But the subjectivism of the concept of professional independence made its ideological content very malleable. Allegiance to the notion was general throughout the profession, but there was little agreement on what it meant in practice. Just as notions of the maintenance of legality and due

process had rebounded back on private lawyers in the criticism of their own legal aid schemes, the claim of protecting the profession's 'independence' was also not the exclusive preserve of the private profession and found expression in new forms for new interests.

Salaried government lawyers viewed themselves as better servicing the needs of the underprivileged through the income security which made them independent of the selfish calculations of the legal marketplace. Other lawyers in community legal centres valued their independence from both a financial reliance on wealthy clients and administration by the state. For example, the Fitzroy Legal Service justified itself in 1975 with the view that, 'It is absolutely essential that there is an adequate body of lawyers independent of government or any other class of rulers'.[94]

This conflict was not resolved by the Labor government's attempt to ward off criticism of the ALAO by placing the service on a statutory basis in late 1975. These divided views on the best resolution of the problem of 'independence' and separate claims to protect the public interest, remained the ideological terrain of the struggle to remodel the ALAO and other services through the draft Legal Aid Bill, and of debates in the late 1970s.

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CHAPTER FIVE

PROFESSIONAL MOBILISATION

State Mobilisation

Labor's reforms and the ideological threat posed by many of the findings and recommendations of the Turner Committee and Poverty Commission, gave rise to a need to mould this uneven and disparate professional opposition into a more unified force. This was partly achieved by a greater co-operation between professional organisations at the national level. But the most militant opposition to reform was state-based and directed towards the restoration of state-level control of legal aid.

This was reflected in a joint statement of Law Society presidents submitted to Murphy in October, 1974.[1] This document asserted that all unmet needs were of a nature and scale that could be readily met through existing professional schemes if further funds were provided by the Commonwealth.[2] The ALAO, it was argued, should not itself conduct any litigation, but remain confined to its advice-giving and referral role.[3] The overall control of legal aid services including the distribution of work to the ALAO was sought in a proposal to establish private-lawyer controlled state and local legal aid committees with far-reaching powers.[4] These would determine matters including the allocation of funds and work in a given area, to all agencies whether government, private professional, or formally independent.[5]

These changes were to be monitored at a national level by the establishment of an Australian Legal Aid Advisory Commission with an advisory and research function similar to that proposed by the first Turner report.[6] But the Law Society presidents clearly stressed their preference for the organisation of legal aid and a restructured ALAO on a state basis. As this conformed with the

traditional organisation of the legal profession on state lines, it would more readily facilitate the private professional control of legal aid.[7]

The history of legal aid in Australia in the late 1970s demonstrated that the interests of state governments and agencies, and the state Law Societies could conflict sharply. But in the debates regarding Labor's reforms in this period, the defenders of those separate interests often did not distinguish between them. The viewpoint of the Law Societies was supported by the mostly Liberal and Country Party-controlled state governments that remained hostile to the Whitlam government, and by the senators drawn from these conservative parties who held a majority in the Federal upper house.

This hostile senate majority was under the direction of Senator Ivor Greenwood, the opposition's Shadow Attorney-General, who called for a 'rationalisation' of schemes in line with a supposed exclusive constitutional power of the states to administer legal aid.[8] The anti-Labor alliance in legal aid assumed the form of a catch-all 'states' rights' opposition - expounded by private lawyers, state politicians and state bureaucrats alike - to the centralist intrusion of the Labor government into a state sphere without consultation with either the state governments or private legal aid committees. This view was reflected in the submission of O'Grady, the New South Wales Commissioner for Legal Aid Services, to the Turner Committee that,

> ... legal aid is provided by lawyers; the practice of private lawyers is regulated under state law and there is no head of power in the Federal constitution allowing the Commonwealth parliament any entry to the field. On any reckoning, the control and administration of legal aid is a matter for the states and the private legal profession.[9]

However, this state opposition was not just the simple outcome of a resentment of the Commonwealth's unwanted intervention in the field. The post-war expansion of the Commonwealth's revenue deriving from its power to tax personal incomes, gave it a far greater capacity to intervene in areas of

welfare than the various state governments. These governments resented this revenue imbalance and their increasing dependence upon the Commonwealth for funds. This was felt in areas including the increasingly expensive provision of legal assistance. An envious state attitude to the relatively well-funded ALAO which had begun to take up the bulk of federal money allocated for legal aid, apparently underlay repeated assertions that the office was unconstitutional in form. This was clearly evident in the claim made by the New South Wales Commissioner in his 1974 Report that,

> It is only natural that any Commonwealth Government should wish to channel the major part of its money available for legal aid into its own office; there must be competition for funds, and the States are badly handicapped in that competition by the very existence of the Australian Legal Aid Office.[10]

The High Court Challenge

Some element of co-operation between the Labor government, state governments and state schemes, was suggested by the demarcation agreements made in 1975 to avoid the duplication of work, particularly in the area of family law.[11] But Commonwealth-state relations were generally strained throughout this period. In Victoria, this state government animosity peaked in 1975 with the refusal to sign one such agreement. The Liberal Attorney-General, Wilcox, refused to acknowledge the role of the ALAO in legal aid delivery by accepting a federal grant of $300,000 for that state's financially depleted scheme, 'subject to the condition ... that there should be consultations between representatives of the State, the Law Institute and the ALAO to avoid duplication of the services of the ALAO.'[12] This dispute was aggravated by the Commonwealth Attorney-General's subsequent direct payment of this sum to the Victorian Legal Aid Committee. This body sympathetically directed it on to the snubbed state Attorney-General. He could then pay it back to the committee as was the practice followed in the other states.[13]

This conflict with the Commonwealth government was closely related to other events occurring in this state in early 1975. These came to comprise the highest point of militant professional mobilisation against contemporary legal aid reforms in Australia. In reaction to a requisition signed by sixty-four of its members, the Law Institute of Victoria held an extraordinary general meeting - attended by some eight hundred lawyers - in Melbourne on the 20th of February, 1975.[14] This requisition consisted of a series of motions opposing Labor's legal aid reforms. Some of these sought to have the Institute declare its opposition to the intrusion of the Commonwealth into the field of legal aid in Victoria, as well as its resistance to government attempts to nationalise the profession as being 'destructive of an independent legal profession and as being likely to cause that profession to become no less than an arm of government.'[15] The key motion was directed towards the launching of a legal challenge alleging that recent Commonwealth appropriations for legal aid were invalid, and,

> To have the establishment and operation of the Australian Legal Aid Office declared by the High Court as being beyond the power of the Commonwealth of Australia under the Constitution of Australia.[16]

This motion was lost at the meeting as it did not obtain the required seventy-five percent of attending members' votes. But in a postal referendum in May, which required only a simple majority of supporting votes, it was carried along with all the related motions.[17]

The Victorian government had already demonstrated its hostility to aspects of Labor's social reform programme in launching a constitutional challenge to the Australian Assistance Plan (AAP) in December, 1974. Before the February meeting, the Victorian Attorney-General, in his self-styled role as a 'watchdog' of federalism, privately informed the Institute that he would willingly also give his fiat for a challenge to the legal aid programme.[18] With this fiat and the further encouragement of the Hartstein ruling in March, a High

Court writ was issued on the 12th of August to begin the legal challenge.[19] Due to the dismissal of the Whitlam government in late 1975 this matter was withheld from hearing and then finally withdrawn in 1977.[20]

Prior to the February meeting the Institute received counsel's opinion that there were grounds for such a challenge.[21] Similar legal advice had been given in 1974 to Law Societies in other states and the LCA, which had also considered this strategy.[22] Given that the similar challenge to the AAP was dismissed by a majority of the High Court in Victoria v. Commonwealth in October 1975, and that several judges gave a wide interpretation of the Commonwealth's power to appropriate funds for such things as welfare-employment schemes under Section 81 of the Constitution, the advocates of the challenge may have been over-confident about their likely success.[23] Some legal authorities also argued that the Commonwealth could validly implement a national legal aid scheme through other measures such as a system of tied grants to the states.[24]

Murphy also later argued that the ALAO, unknown to its enemies, did have a statutory basis in being referred to in trade practices, consumer protection and environmental legislation, as well as the Family Law Act passed in 1975.[25] But with such speculation aside, the challenge is of interest for what it indicated about the ideologically and politically divided state of the profession and private lawyers, even at this high point of conservative mobilisation to secure the control of expanded legal aid services and resist the development of a large salaried sector. Furthermore, some explanation of the apparent irrationality of aspects of this opposition is necessary. This is especially so given the financial boost which private lawyers derived from the referral of matters from the ALAO.

This opposition was partly a consequence of the period in which the ALAO and related reforms had been developed and the history of the government which conceived and introduced them. The Whitlam government and its reform

programme met a widespread resistance - from business and political circles, the state bureaucracy, media, and professional middle class - with few parallels in Australian political history. This reaction has been described by Connell in Ruling Class, Ruling Culture as an exceptional and general political and cultural mobilisation of the privileged sectors of Australian society, culminating in the government's sudden dismissal in November, 1975.[26] In this atmosphere of political turmoil, opposition to the government permeated the traditional professions and did much to fashion the negative and highly ideological response of many lawyers to Labor's legal aid initiatives. This fact may explain some of the strong opposition to the ALAO felt even by the suburban and country practitioners who voted in Victoria for a High Court challenge, despite a high number of family law and criminal referrals. In this respect, the challenge reflected what Alan Nicol, the former Deputy Executive-Director of the Institute, terms 'the innate political conservatism of the profession.'[27]

It was noted above that Armstrong has suggested that a greater objection to the service developed in Victoria and New South Wales through the forms of legal work in those states.[28] She also contends that rifts in the consciousness of the profession in each state related to this work segmentation. The controlling elites of the various Law Societies consisted primarily of lawyers from large and well-established city law firms, specialising in such areas as taxation, commercial and company law. These practitioners did little legal aid work and derived no substantial material benefits from the referral policy of the ALAO. Accordingly, they were more inclined to view the service as unnecessary.[29] This fits Harkins' perception of corporate lawyers as most hostile to the service.[30]

Some support for this analysis can be found in the arguments adduced by the advocates of the High Court challenge, which suggested a considerable ignorance about the actual operation of the ALAO. The various motions were

proposed by McMillan, a partner in Melbourne's largest law firm and with apparent Liberal party connections, and moved by Alan Cornell, a company tax expert and later president of the Institute and Law Council.[31] Without supporting evidence McMillan claimed that the office acted for anyone, and having no real test of eligibility it was a direct economic threat to private law firms.[32] This appeal to the legal pocket was reinforced by the assertion that the profession's independence in the form of its traditional organisation around the private market was being seriously compromised and that,

> Once the profession, by its dependence upon government for its livelihood; and by its progressive loss of a professional relationship with its clients, becomes an arm of government, you can forget democracy.[33]

This claim was extended with a caricature of the Whitlam government as dangerously radical, and drawing a contrast between 'the future of an independent and decent legal profession versus Marxist-socialist type state control of our profession.'[34]

It is important to also consider that there was no simple uniformity in the views of Law Society leaders and prominent members of the private profession, and the arguments of McMillan and his supporters cannot be taken as typical of them. At a special meeting of the Council of the Law Institute in early February, the Council's members refused - by a vote of twenty-one to one - to endorse the move to bring on a legal challenge.[35] Opponents of the challenge included John Dawson, president of the Institute and interestingly a member of the Liberal party, the Executive-Director Gordon Lewis, Deputy Executive Director Alan Nicol, future presidents John Richards and Brian McCarthy, as well as David Jones, a Council member and future chairman of the Australian Broadcasting Tribunal.[36] These and other senior, influential members of the profession took a similar stance at the general meeting on the twentieth of February at which the motion was narrowly defeated.[37] The first litigation firm

approached to handle the challenge refused this offer of work as it did not approve its aim.[38]

There could be several reasons for this division. A considerable number of Institute members appeared to be genuinely concerned about the failings of the private schemes and the exclusion of individuals in need of assistance from the legal system.[39] Some also argued that there was nothing innately wrong with the provision of assistance by a salaried government service, where the private profession had failed in its professional duty to provide help for those who could not afford it.[40] Smith, the former chairman of the Victorian Legal Aid Committee, regarded the development of the ALAO as fully justified by reason of the extensive unmet need that it could help satisfy.[41] The 'public interest' lay in the meeting of that need, not in the simple destruction of the office and a return to a full state-based control of legal aid.

Opposition to the challenge also derived from some of the more conservative but politically astute conceptions of the long-term ideological and material interests of the profession. Some Council members were critical of the ALAO's lack of organisational independence, and concerned about the declining proportion of legal aid dollars in the direct control of the profession. But they were reluctant to assume the dangerous course of becoming involved in a dispute between the Commonwealth and a state government.[42] Furthermore, they were sensitive to the charge of self-interest. They foresaw that because of the considerable negative publicity surrounding the profession's own efforts in legal aid and the proposed challenge,

> No matter what lawyers might think of the arguments in favour of the motion, the public would see a legal challenge as nothing more than an attempt to deprive the disadvantaged of assistance to which they are entitled.[43]

This adverse publicity would be worse should the Institute lose the action in court; an outcome recognised by several members as a real possibility.[44]

As well as these arguments, there was some acknowledgment of the actual material benefits deriving from the further subsidisation of the legal market and salaried employment of lawyers, referred to as the 'new opportunities' created by Labor's reforms.[45] It was apparently too early for ALAO referrals to have had an impact on the attitudes of a large number of practitioners.[46]

But the Western Suburbs Law Society, a body representing some of Melbourne's suburban lawyers, had already lobbied against the proposed challenge, arguing that it could undermine the private referral work that was subsidising the practices of its constituents.[47]

Furthermore, as the challenge was motivated by an opposition to Commonwealth involvement in the field, this appeared to contradict the earlier professional policy of seeking out federal involvement in legal aid.[48] It also led to anxiety about the unpredictable effects of any challenge upon the finance of the private schemes. In Victoria, this concern was exacerbated by the financial strain being experienced by the Legal Aid Committee and the small size of state government grants.[49] As the legal action also challenged the validity of general commonwealth appropriations by which money had been given to these schemes, the 'success' of this litigation could result in a loss of all federal funds for the Legal Aid Committee and undermine its own scheme.

Other members noted the uncertainty of the expectation that a successful challenge would result in a transfer of financial support to the professional schemes or to an expanded judicare system based on the 1972 British scheme. It could just as easily result in a decline of commonwealth interest in this field of welfare, for, as Smith argued,

> ... it is politically naive to expect Federal governments these days, of whatever complexion, to make substantial grants of funds for various purposes without becoming actively and directly involved in the spending of it. If a successful constitutional challenge is ultimately made to whatever legal aid machinery the Federal government sets up, it cannot seriously be expected that the government will simply pour the money it would otherwise have used on its own scheme into the State schemes.[50]

As well as all these considerations, the challenge was deemed 'premature' by some of the Council who saw other, more politically viable, means of ensuring a professional hold on expanded schemes. Of all the professional submissions to the Turner Committee, only that of the Law Institute had accepted the development of the ALAO, though in a very limited form.[51] The majority of submissions called for the effective dissolution of the service. It was quite ironic that the most serious moves towards a legal challenge came from this state.

Murphy had made some concessions to the Law Societies in specifically excluding probate and conveyancing from ALAO work, and announcing plans to establish the service on a statutory basis.[52] But statements of dogmatic opposition, especially when accompanied by open requests for more commonwealth money, were dismissed as impertinent. The Attorney-General keenly defended the need for a service he had himself conceived and established. At the October meeting in 1974, the Law Society presidents were subjected to a stinging attack from Murphy, for what he later termed their 'neanderthal' view of the appropriate scope and organisation of legal aid, their narrow conception of public need, and a self-interested 'obsession' with fee scales.[53]

The political impasse which followed this was eased by Murphy's departure to the High Court in February, 1975. He was succeeded by a less forceful Attorney-General without his level of personal interest in legal aid reforms, and who was viewed by private lawyers as more 'conciliatory'.[54] The new incumbent, Kep Enderby, quickly obtained cabinet approval in March to place the ALAO on a statutory basis in order to quell the growing criticism of the office.[55] At the same time, he followed the general recommendations of the Turner Committee in announcing plans for a national legal services commission.[56] The Law Societies and Law Council were invited to make submissions regarding its structure and activities.[57]

In Victoria, these developments were welcomed by Council members who regarded them as a more serious commonwealth attempt to meet criticisms of the ALAO and related reforms.[58] Furthermore, the establishment of a statutory commission may have been seen as a more ready way to ensure both the control of legal aid by private professionals and continuous substantial funding from the commonwealth. This alternative conservative strategy, strongly advocated by the Law Council of Australia in 1975, would involve far less destructive political conflict than a successful High Court challenge, and could give the private profession a capacity to internally direct the future form of state participation in the legal aid field.

In Justice and Reform, Johnson describes how the leadership of the American Bar Association gave politically valuable early support for the Legal Services programme of the national anti-poverty scheme in the 1960s.[59] This support clearly contrasted with the attitude of local bar organisations and local lawyers in small firms who saw a wholly salaried model of legal aid as an economic threat. Johnson refers to the strong attraction of high-status areas of the programme's work, especially law reforming, to explain this support.[60] But one of the explanations given for the long historical involvement of bar leaders in legal aid and their liberal perspective thereon has echoes of a Mannheimian faith in the public-spirited outlook of free-floating intellectuals;

> It may be that those leaders with a broader perspective are the ones who tend to rise to positions of national power. Or it could be that as any relatively sensitive person ascends towards national office, the parochial interests associated with his own clients gradually diminish and then disappear in the shadows of the problems of the total society.[61]

Although the professional debates surrounding the High Court challenge in Victoria suggest a similar rift between the consciousness of leading and rank and file lawyers, there were such strong self-interested reasons for an opposition to the challenge that it would be very misleading to cite this as evidence of a

widespread public-spiritedness deriving from the profession's leadership. Some enlightened views regarding the profession's duty not to hinder the expansion of legal aid services, whether profession-controlled or otherwise, were expressed in these debates. It seems likely, as Nicol suggests, that a liberal perspective on matters of social justice and access to law has often been adhered to by a significant part of the leadership of the Victorian profession.[62] However, the legal profession throughout Australia does not appear to have any developed tradition of corporate liberalism which compares with that found in the United States Bar.

Support for the view that the work patterns of the traditional leaders of the profession rendered them unsympathetic to legal aid reform, can be found in the widespread and ongoing hostility of that leadership throughout Australia to Labor's initiatives in this period. The contradictions and uncertainties evident in the moves towards the Victorian legal challenge suggested a faltering political mobilisation from a more internally heterogeneous private profession, but they did not alter the general tone of that opposition.

National Mobilisation

In The Legal Mystique, Sexton and Maher have noted that until recently the various Law Societies representing Australia's lawyers have only rarely engaged in debate surrounding issues other than those regarded as 'legal', being mostly preoccupied with such internal matters as professional discipline.[63] However, the ease with which a simple distinction could be made between political and 'legal' matters was disrupted in the early 1970s. The profession and the legal system were affected at many levels by the initiatives and activities of the Whitlam government. These included reforms and new legislation in such areas as family law, trade practices, company, consumer, and administrative law, as well as the expansion and reorganisation of Commonwealth

legal aid.[64]

The pace of these developments and their effect upon legal work prompted some organisational changes to the traditional leadership of the private profession. The political credibility of the profession was being damaged by the embarrassing contradictions and divisions in state Law Society responses to legal aid reforms. The need for a much greater degree of co-ordinated lobbying was evident in the limited and disorganised professional replies to the reports of the Turner Committee and Poverty Commission.

It became politically essential to transcend state differences and jealousies, and to develop something approximating a national professional view on issues including legal aid. Accordingly, the formerly minor Law Council of Australia assumed an increasingly more vocal role in developing policy, and in lobbying commonwealth agencies and politicians. In legal aid matters, the Law Council adopted a stance that was even more conservative than that taken by many of the profession's leaders at state level.[65]

In early 1974, the Council appointed an adhoc committee to formulate legal aid policy. This was mostly comprised of members of the Legal Aid Committee of the Law Society of South Australia, and was chaired by Cedric Thomson, the Society's president and a staunch critic of the ALAO.[66] The committee at first responded to the Turner Report by contending that there was no extensive unmet need in Australia requiring 'free' legal work or the development of alternate modes of delivery, especially through salaried lawyers.[67] The report's criticisms of Law Society schemes were dismissed as highly exaggerated.[68] Similarly, the Poverty Commission was attacked for an 'academic bias' which overlooked the'cost-efficiency' of private schemes, and for the unfair expectation that practitioners ought be reimbursed in legal aid work for anything less than full fees.[69] At the same time, its misguided conception of legal aid as a form of welfare, was said to underlie its

unprofessional proposals for both 'community involvement' and lay representation on legal aid committees.[70]

In this view, it was proper that both non-lawyer and government involvement in legal aid be strictly limited. The appropriate role for government was the provision of finance 'principally devoted to assisting well-established professional bodies to carry legal aid to all areas of the community.'[71] The Whitlam government was criticised for establishing the ALAO without consultation or any 'proper' constitutional basis, and the service itself was harshly denounced as,

> ... another expensive branch of the public service which is a threat to the concept of a strong and independent legal profession which protects the citizens in the community.[72]

It was consistent with this hardline conservative response that the Law Council sought guarantees that the office would function only as a referral service and administrative support for the private schemes, regardless of whether or not the commonwealth had the power to grant full aid in federal matters.[73] It was argued that this process ought to begin with the transfer of all ALAO duty solicitor schemes to the Law Societies.[74]

In 1975 the Council reiterated its claim that legal aid ought be controlled largely by the private profession. But the same political circumstances that provided misgivings among members of the Law Institute of Victoria regarding the High Court challenge, apparently produced changes in the Council's proposals on legal aid. The Council had denied the need for the ALAO and called for a return to the organisation of legal aid at a state level, with no direct involvement but plenty of funding from the commonwealth.[75] But from early 1975, this virtual reproduction of state Law Society views ended. Apparently in response to the government's determination to place the ALAO on a statutory basis and establish a national advisory commission, a new political tack was taken.[76] By May, 1975, the Council's president, O'Leary, publicly announced his

acceptance of the Labor government's decision to establish the ALAO and match its expansion of funding with a greater input in the running of legal aid schemes.[77] Furthermore, he conceded that some form of salaried service was needed to complement the private schemes.[78]

This change of position resulted in a clear difference between the previous combined state government and professional proposals for reform, and those newly expressed by the Law Council. The Council's later submission to the Turner Committee expounded the principle that legal aid ought be placed under the direction of the private profession, but it also aimed ambitiously towards the direct control of a modified ALAO at a national, rather than state, level.[79] It was again argued that ALAO offices should function as limited government-financed referral bureaux. These were to be directed by an 'independent' Australian Legal Services Commission, with far more than mere advisory powers.[80] This would have a large proportion of private lawyers as representatives thereon.[81]

The proposed powers of this Commission extended well beyond the advisory role agreed upon by the state Law Society presidents and suggested by the first Turner report.[82] These included the definition of the form of legal aid to be provided by either salaried or private agencies, the circumstances in which it would be granted, and the determination of the payment of fees to private practitioners, as well as,

> ... the allocation of work from applicants to the ALAO, and between the ALAO salaried service, the private profession and any other legal aid agencies.[83]

The Council's proposals here comprised a curious overlap with those of the Poverty Commission for a powerful 'independent' Commission.[84] Both bodies, though with very different aims, saw such a commission as the means by which to restrict the form and extent of state involvement in legal services and, more immediately, to wrest control of the ALAO from the commonwealth public

service bureaucracy.

This difference between state and the later Council views, and the proposed defacto control of the ALAO through a national legal aid commission, reflected the Law Council's own preference as a national body for a national solution. The separate plans of the Council and the Law Societies were equally conservative and similarly directed towards ensuring a private professional dominance in the legal aid sphere. But the Council's view reflected a stronger element of political realism in that it acknowledged that some further degree of commonwealth involvement would follow any vast increase in its financial commitment.

The Law Societies had perceived a potential threat to the financing of state schemes in the national control of legal aid by a commission with direct responsibility for the ALAO. As was later illustrated in the Fraser years, it was not enough to merely suggest a return to the halcyon days of a fully state-based organisation, and then demand further funds from the commonwealth. If this was the case, the frequent professional call for co-operation and 'partnership' with the federal government, and between salaried and private schemes, would be dismissed as simple rhetoric.[85] It was most important to limit the extent of the commonwealth's involvement without risk to its subsidisation of expanded, and if possible, profession controlled schemes, even if this would require a considerable reorganisation of legal aid throughout Australia.

The Legal Aid Bill, 1975

The continuing tension within the profession regarding the most appropriate response to legal aid reforms was also evident in the debate surrounding the attempt to place the ALAO on a statutory basis. The draft Legal Aid Bill was introduced into the House of Representatives by the Attorney-General in June, 1975.[86] This bill was intended to incorporate the

ALAO as a statutory authority granting legal aid in federal matters. But it left the basic structure, administration and work organisation of the office intact. It provided for control by a special three-member board of management charged with the 'general direction' of the service.[87] This was to comprise a judge or private lawyer of high standing appointed by the Attorney-General as chairman, an enrolled barrister or solicitor appointed after consultation with the Law Council, as well as the National Director of the ALAO as a full-time member.[88]

The bill rejected the various recommendations made for a national legal aid commission with direct responsibility for services. The Attorney-General instead opted for the proposal of the first Turner report and provided for an Australian legal aid commission with a research and advisory function with respect to the assessment of needs, different schemes and their finance.[89] This commission would comprise a judge or enrolled barrister or solicitor as the full-time chairman, a representative of the Attorney-General, as well as six to eleven other commissioners appointed by the Governor-General.[90] These appointees were to be drawn from private lawyers, persons concerned in the administration of legal aid schemes, persons from interested organisations and bodies, or otherwise with any relevant experience or knowledge.[91] At the bill's second reading these were detailed [illegible] representatives of the private profession would be in a clear minority.[92]

The bill also provided for the forming of state and local consultative committees for the purpose of assisting the office.[93] These would each consist of a member of the ALAO, a representative of private lawyer organisations, and such other persons as the Attorney-General considered appropriate.[94] Other provisions affirmed the role of the office in environmental and public interest suits, and gave it the statutory right to advertise.[95]

The influence of the federal bureaucracy, and in particular, the Attorney-General's department over legal aid policy and the ALAO became evident again

in the drafting of the bill. There was no consultation with outside groups in this process, and the bureaucratic determination to retain the service essentially in its current form prevailed. Despite the government's claim, the bill would not render the office 'independent'. The office was to be kept as a public service department and its staff were still to be employed as full public servants.[96] The advisory-only role of the proposed commission was explained in terms of the need to avoid any conflict of interest that could result through the direct involvement of such a body in delivery.[97] But for the bureaucracy, there were other advantages in this. Although giving the appearance of widespread involvement, the strict limits upon the powers of the proposed commission would serve to exclude external groups, including the Law Societies, progressive lawyer and community organisations, from having any extensive involvement in the running of the office.

Although the board of management was given 'general direction' of the office by the bill, the real power to administer the service remained with its public service head, the National Director.[98] The Director would control aspects of administration including the employment of staff, the establishment of new offices, the allocation of work between staff and private lawyers, as well as the guidelines and appeal procedures for grants of aid.[99] The bill gave the Attorney-General considerable power have an equal say with the board on questions of office policy.[100] The Attorney-General was also to have wide personal power over the establishment and membership of the planned consultative committees.[101] The exclusion of nuisance groups at this local level was assured by the limited power of these committees in which the Attorney-General could include community representatives, and by the lack of any provisions allowing for the participation of non-lawyers in office decision-making.[102]

Although intended to politically defuse the legal aid issue, this draft bill drew criticism from all quarters. It had little in it to satisfy any of the lobby

groups hoping for an expansion of alternate legal services. It was also rejected in this form by the Law Societies which produced their own proposed amendments to the legislation. In this process, the Law Council still attempted to direct the profession into a common stance. But the submissions gathered from the various Law Societies by the Law Council executive, suggest that major divisions regarding legal aid reform still persisted.

Despite the recent views of the Council, the Law Society of Western Australia still expressed its preference for a federally financed organisation of legal aid through profession-controlled, state commissions.[103] As well as this difference among conservative plans, the Council's view conflicted with the relatively liberal submission of the Law Institute of Victoria.[104] The latter criticised the lack of independence of the proposed ALAO board and sought a stronger role for the national commission. But it did not argue the need for majorities of private lawyers on those bodies, and substantially accepted the rest of the bill.

Among the conservative camp, the Tasmanian proposal went the farthest in seeking to limit the ALAO to the giving of legal advice only.[105] But the final proposals of the Council's executive, submitted to the Attorney-General in August, borrowed heavily from the more detailed submissions from South Australia and New South Wales.[106] This dropped the previous proposal for a commission with direct involvement in delivery, controlled by a majority of private lawyers.[107] For a more simple response to the government's proposals (and realising where the throne now was), the Council insisted ~~instead~~ upon a larger managing board of five members ~~and~~ with more specific powers to control the office free of intervention from the public service and Attorney-General.[108] Only two of these new members were to be Council nominees.[109] But a private lawyer majority would result from the proposal that the third additional member representing 'consumer interests' would also be a private practitioner of at least five years standing.[110]

This last proposal, as well as the suggestion from the Law Society of New South Wales that the Commission chairman be drawn from private practice, probably reflected the realisation that the mere appointment of qualified lawyers to these bodies from an increasingly divided profession would no longer guarantee a representation of the private profession's interests and traditional outlook, and the increasing suspicion with which this body viewed legal academics who were active in this field.[111] The Law Council similarly proposed that local consultative committees, which would determine applications for assistance, would be directed by a majority of private lawyers.[112]

Apart from this concern to ensure a strong private professional influence upon decision-making at the national and local levels, the Council sought a statutory guarantee that the work pattern of the ALAO would continue to lean towards the same referral role which had already so much restricted its impact as a new service. Provisions were added to the Council's proposals to the effect that the ALAO would concentrate on giving advice and as far as was practicable refer all matters to the private profession in the first instance.[113] Essentially, the office would provide aid in a way similar to the system of federally financed salaried bureaux favoured by the Law Society of New South Wales.[114]

Despite this professional lobbying, the government held firm with the main provisions of the draft bill - and refused to incorporate amendments that would render the office autonomous from the public service. Any such a move was viewed by the Attorney-General as likely to loosen the commonwealth's hold over services it now assumed responsibility for and could produce political embarrassments. He offered the justification that,

> ... you can't make a Commission completely independent, otherwise you'd be hoisted with decisions that often have political consequences and the government would be burdened with them without being able to influence them.[115]

But Enderby also more plausibly argued that as a principal source of legal aid

funds, the commonwealth had the right to an extensive participation in legal aid. To the disappointment of the Law Societies, this 'participation' was still meant by Labor politicians as not just an input in policy-making at the commission level on an equal or lesser footing with them, but was understood as a continuing full involvement of commonwealth agencies in legal aid delivery. It was an unfair expectation, in Enderby's words, for the commonwealth, 'to pay the piper and yet, not only be unable to call the tune, but also be excluded from the dance.'[116]

The government planned to rely if necessary on a favourable result in the AAP case and leave the ALAO in its original form.[117] But its proposals were defeated at another level through wider historical circumstances. Even though the profession's parliamentary allies echoed its criticisms of the bill, this mostly derived from a more strongly ideological opposition to the legal aid scheme founded by the loathed Whitlam government. This ideological view of the ALAO was epitomised by the shadow Attorney-General Ivor Greenwood. Greenwood had already argued that the rule of law did not require a more equal access to legal services, and that the profession was not morally compelled to do anything to improve that access.[118] To this reactionary claim he added that the ALAO had been established 'illegally' and as part of a conscious Labor attempt to destroy the independence of the private profession by nationalising it.[119] Accordingly, he favoured the complete abolition of the office above its reform, and argued for a return to the organisation of legal aid on a state basis and with private professional control.[120] With this aim he kept close contact with the Victorian advocates of the High Court challenge and assured them that the Legal Aid Bill would be blocked in the Senate, thereby preventing the ALAO from acquiring a statutory basis.[121]

Greenwood's closeness to the views of the most conservative elements of the private profession on this issue cannot be taken as typical of the federal

opposition. But the intention to dissolve the ALAO upon assuming office was. On the 26th of August, the opposition leader Malcolm Fraser announced in parliament his future aim of cutting government costs by abolishing several commonwealth agencies including the ALAO.[122] For this ill-timed announcement he fared badly against a series of attacks in parliament.[123] These referred to the results of an ANOP poll commissioned by the government as evidence of the growing public acceptance of the office and related legal aid reforms.[124] Of all the people interviewed in this, 94% agreed that the office was a necessary development.[125] More significantly, this acceptance cut across the usual party-political lines, being virtually the same among Labor and Liberal-Country Party supporters.[126]

Faced with the evident popularity of the service, the opposition took a more surreptitious course against Labor's legal aid legislation. As Greenwood had noted privately in August,

> The risk of opposing the Bill outright, - which, nevertheless, is the logical consequence of the arguments raised - is that we would be castigated as opposed to legal aid.[127]

Opponents of the bill resorted instead to a ready delaying tactic. After passing through the House of Representatives the bill was blocked in the Senate in October by an opposition proposal, put by Ellicott, the new shadow Attorney-General on Greenwood's death, to establish a joint parliamentary committee. This had broad terms of inquiry over matters including existing aid services, the most efficient forms of delivery, the extent of any duplication, and whether or not Labor's bill provided for an independent service.[128] It was expected that the inquiry would be followed up with broad amendments to the bill strengthening the autonomy of the restructured ALAO, justified by references to the Hartstein ruling and the coming High Court challenge.[129]

This move for a short time functioned to cover the rift in conservative proposals between different plans for a national or state-based organisation of

legal aid, and for either the abolition or restructuring of the ALAO. With the dismissal of the Whitlam government in controversial circumstances in November, the legislation lapsed and became a political deadletter. This event and the subsequent election of the Liberal-Country Party government was welcomed by leaders of the private profession as likely to result in a commonwealth policy more sympathetic to their interests. But this did not resolve the internal divisions among private lawyers regarding the nature of those interests or the wider rifts within the entire profession regarding the legal aid issue.

Alternative Reactions

As well as the expanded segment of salaried public service lawyers, another developing group within the profession challenged the dominance of the traditional private profession in the legal aid field in this decade. The further politicisation of this area of welfare followed from the active involvement of previously excluded groups in both policy and delivery. These included such lay organisations as the Council for Civil Liberties, and ACOSS and its various state affiliates and other welfare groups which made submissions to both the Turner Committee and the Poverty Commission favouring the extension of legal services as a welfare right, and with a greater involvement of non-lawyers.[130]

But the main element of this loose alliance of groups and individuals lobbying for the development of services in an alternate form, was a group of progressive lawyers standing outside conventional models of private or public service lawyering. Many of these new professionals were involved with the early development of the ALS and such voluntary services as Fitzroy Legal Service.[131] Their rise coincided with the further expansion of university legal education and the radicalisation of the student body in Australian universities in the early 1970s.[132] Their number included many students and lawyers from the growing academic sector of the profession. For example, the importance of this

group in the legal services field was most evident in the involvement of the staff of the recently founded law faculty at the University of New South Wales in the establishment of the ALS, in the conducting of research for the Poverty Commission, and in the regular press duels regarding legal aid policy which staff engaged in against Law Society figures.[133]

The common ideology of this alternative group within the profession surrounded a new model of professional practice that was felt to be most in line with the public interest. As noted above, ALAO staff rejected the construction of a notion of 'independence' deriving from the traditional market model of professional work; their salaried position rendered them 'independent' of the delivery, of legal services through a free market that was skewed in favour of large organisations and the wealthy.[134] Their existence - and the rejection of the full judicare model - was justified by the distinct nature of the legal needs of the poor and underprivileged.

Alternative lawyers extended this ideal model of socially useful professional practice in a way more closely based upon the example of neighbourhood law firms in the United States and Europe. This meant a more sophisticated model of needs than that inscribed in the institutional form of the ALAO and its regional offices. The alienation of downtrodden groups from the legal system was to be countered by something more than the mere delivery of further legal services in mostly traditional areas of law in a conventional way.[135] Autonomous local legal centres would engage in new areas of legal work with new methods including group work and the conduct of test cases. The dominance of lawyers over the area of legal assistance was to be countered by the full involvement of welfare professionals, legal professionals and community representatives in centre work and policy. This strategy of so-called 'de-professionalisation' was to be supplemented by attempts at community legal education.[136]

In this model, 'independence' was understood as organisational autonomy from either corporate or bureaucratic state interests. At the same time, 'independence' as a mercenary indifference to the inequalities between clients was rejected in favour of a form of socially committed lawyering which traditional private lawyers found disturbing and which many public service lawyers felt uncomfortable with.

The alternative group welcomed the election of the Whitlam government in 1972 and the general expansion of services and funding which followed. In particular, the national expansion of the ALS was made possible by federal money. But reaction to the government's major initiative, the development of the ALAO, was highly ambivalent. The expansion of the office was seen as justified by the further meeting of unmet needs. But alternative lawyers - many of whom had been recruited into the office - were soon disappointed by the mostly orthodox work and form of delivery, the timid effort to appease private lawyers with a high rate of referrals, and the lack of any substantial lay or community input. Furthermore, early hopes for the establishment of an autonomous national service similar to the United States Legal Services Corporation unfettered by conservative state bureaucrats, had been dashed by the development of the office as a public service agency.

There was also a widespread fear that a much-enlarged ALAO would absorb commonwealth funds that might otherwise be available for independent services. Although Fitzroy Legal Service expanded its operations through a small commonwealth grant in 1974, like the various Law Society schemes, it had no guarantee of any future funding.[137]

An even greater suspicion regarding the results of an ongoing expansion of the office, was felt within the ALS's. These had been founded with the argument that a highly specialised independent service with a strong local base was necessary to meet the legal needs of Aboriginal communities. The services

managed to avoid control by the Attorney-General's Department, but felt starved of funds in comparison with the ALAO, and feared their eventual absorption by the office - possibly through the centralised direction of all legal aid services by the national legal services commission provided for in Labor's draft legal aid bill. Thus, a Canberra conference of the ALS in August, 1975 called for a specific clause in the bill guaranteeing the autonomy of the service.[138]

However, with the political mobilisation of the conservative elements of the profession at a state and national level against Labor's legal aid programme, a qualified support for the ALAO was more openly expressed. For example, the early issues of the Legal Service Bulletin - a periodical founded by FLS, with seven hundred subscribers in 1975, and providing an important alternative forum - had referred to the ALAO as a rival organisation to the community legal centres that Fitzroy was a forerunner of.[139] The latter form of service was also said to be more efficient - and more genuinely independent of government than the ALAO.[140] But the criticism of the ALAO was more muted with the moves towards the High Court challenge from Victoria which the Bulletin denounced as motivated by 'political expediency, reactionary conservatism and shear bloody-minded self-interest.'[141] Support for Labor also reflected growing fears regarding the likely fate of community legal centres and legal aid generally, if the Liberal-Country Party opposition returned to power, as appeared probable throughout 1975.

Fraser was attacked for his announcement of plans to abolish the ALAO and reorganise legal aid on a state basis.[142] This policy was contrasted with the general improvement made under Labor, even through its development of a relatively conservative salaried service. Thus, in November, 1975 the Bulletin argued, that,

> The ALAO has proven to be controversial, perhaps unconstitutional, but unmistakeably welcomed as a bold and much needed initiative by all those concerned with legal aid - especially the clients. It may not be ideal - we have often criticised it in theory and administration - and the debate as to alternative ways and means goes on. But whatever system eventually prevails, the ALAO is there now - real evidence of the Labor government's concern with the principle of equality before the law, and a willingness to act.[143]

This same overall ambivalence towards Labor's initiatives was reflected in the reactions to the draft legal aid bill and proposed national commission. The attempt to place the office on a statutory footing was supported by the alternatives group, but otherwise the detailed criticism of the draft provisions that were made by the Poverty Commission were widely shared. The Commission criticised the bill's failure to give the ALAO real autonomy in policy or administration, free of departmental or ministerial intervention, and proposed amendments to counter this.[144] This was seen as necessary to counter any impression that the ALAO was merely another 'government office'.[145]

Although the Poverty Commission had originally proposed the control of legal aid services, including the ALAO, by a national commission, it came to accept the idea of a controlling board provided for in the bill. But it challenged the need for a majority of practising or former private professionals thereon, and sought a non-lawyer nominee to replace that of the LCA.[146] Similarly, the Poverty Commission criticised the limited advisory role of the planned commission, arguing that it ought be granted executive powers to independently formulate legal aid policy, allocate funds and resources, conduct research and training, and make general submissions regarding legal services and law reform.[147]

The Commission rejected the view that a body formulating detailed policy at the same time as allocating funds, had a necessary conflict of interest, with the claim that an independent commission could 'buffer' governments from

outside, and especially state, criticism.[148] The representativeness of the body was to be ensured by the requirement that at least one-quarter of members be lay representatives and that private lawyers should not exceed one-half of the Commission's members, arguing that, 'theirs is not the sole or even the predominant interest to be considered.'[149]

This claim was backed by the view that legal aid was part of a broader system of welfare, and that the special needs of poor and underprivileged groups were best understood and interpreted by either new groups of socially committed lawyers or welfare professionals and organisations.[150] As well as this, the Commission proposed a greater non-lawyer input at the local level by the inclusion of lay community representatives on legal centre committees.[151] Detailed suggestions were made for a liberalisation of proposed restrictions on assistance, as well as amendments that would strengthen service involvement in activist modes of delivery.[152]

These general proposals to render the ALAO autonomous, and to develop alternate forms of lawyering with a local community base, were reiterated by the various 'welfare submissions' made to Enderby in regard to the draft bill.[153] The latter attacked the Law Council's plan to effectively downgrade the ALAO to a referral-only service.[154] Even more strongly than the Poverty Commission they stressed lay and community involvement at all levels, arguing that welfare and community groups ought nominate two members of an expanded controlling board of five.[155] A widened representation on the proposed commission exceeding one-half of members was also sought with the claim that the real needs of legal consumers, not of legal practitioners and bureaucrats, would be more accurately represented;

> It has been clear that the deliverers of a service are not always aware of the needs of the community. This has been very obvious with the medical profession, and there is no reason to believe that it will not be so with the legal profession.[156]

The vicarious representation of consumer and community interests at this level was to be balanced locally by overcoming the 'pure tokenism' of the committees proposed in the draft bill.[157] The establishment of these was to be mandatory.[158] They were to include a majority of elected local residents and were to have the wide powers over their own budgets and grants of aid suggested by the Poverty Commission.[159] Other proposed amendments provided for further law reform work and test cases on behalf of specific community groups, paraprofessional and community legal education, as well as for the referral of matters by the ALAO to alternative legal services and centres.[160]

This lobbying to substantially amend the bill was most articulate, being assisted by sympathetic press reports and reinforced through a Sydney conference timed to coincide with the government's deliberations.[161] But given the greater influence of the Law Council and Law Societies within the Federal Senate, the government saw little point in making amendments to the bill in order to satisfy its least powerful critics. So the alternative group forced no changes to the draft legislation. However, their lobbying suggested that a vocal new interest outside of the state or traditional organisation of the profession had now entered the fray in debates regarding legal services, and would so continue in the coming restructuring of aid on a state basis.

The particular bureaucratic conservatism suggested by the draft bill had pushed this group into the uncomfortable position of sharing in the opposition of conservative private lawyers and politicians. These conservatives selectively appropriated criticisms of the ALAO and Labor reforms, from the Poverty Commission and other alternate groups, to justify blocking the bill and to deny the need for any expansion of salaried services outside of private professional control. As one commentator put it;

> People from voluntary services, the law schools and so on who criticised the Bill for being too conservative now find themselves in the ironic position of having their arguments used by the opposition to suppress any Bill. In the same way

> the official bodies of the profession use the work of the voluntary services as evidence that the profession takes care of the legal needs of people in poverty.[162]

In one sense, this overlap of conservative private professional and alternative viewpoints was not surprising. Both insisted that a real threat to legal professionalism, however differently conceived, was posed by the lack of organisational autonomy of new legal services from the state bureaucracy.[163] But beyond this common element in their notions of professional independence, the traditional and alternate models of practice diverged with the latter in favour of a committed advocacy and social reformist goals exceeding the remedy of individual legal matters. The limited overlap of interests in opposing the centralist and bureaucratic elements of the legal aid bill, reflecting a common interest in moulding and limiting the pattern of state involvement in legal services, could not veil the growing and fundamental rifts among Australian lawyers in this area, and the emergence of a socially and politically distinct new segment within the profession.

Notes to Chapter Five

1. 'Memorandum for discussion with Senator the Honourable L.K. Murphy' (unpublished), 'Legal aid - meeting with Attorney-General', 6/11 November, 1974, p.450.

2. ibid., p.451.

3. ibid., p.450.

4. ibid.

5. ibid.

6. ibid., p.451.

7. ibid., p.450.

8. Sen. Ivor Greenwood, 'Securing equality before the law - the solicitor's role' (unpublished), p.7.
I. Greenwood, 'Liberal policy', LSB, March, 1975, p.176.

9. Australian Legal Aid Review Committee, 2nd Report, March, 1975. Canberra, AGPS, 1975. Appendix C, p.42.

10. New South Wales Commissioner for Legal Services, '1974 report on legal aid' (unpublished), p.22.

11. Sackville, Law and Poverty in Australia, op. cit., p.19.

12. Kep Enderby, Attorney-General of Australia, Letter to Law Institute of Victoria, 12/2/75.

13. Mr. Enderby, Representatives, 17/4/75, p.1757.
Senator Greenwood, Senate, 23/4/75, p.1296.
Senator Missen, Senate, 13/5/75, p.1346.
'State government bypassed on legal aid', Australian, 7/5/75.
'Enderby bypasses Victorian Government with legal aid grant to Law Institute', Aust. Fin. Rev., 7/5/75.

14. Law Institute of Victoria, 'Requisition re: Commonwealth legal aid', 10/2/75.
'Extraordinary general meeting', LIJ, March, 1975, p.62.

15. ibid., p.63.

16. ibid.

17. 'Postal referendum', LIJ, May, 1975, p.149.
See generally, 'Elitists set to keep law where it "belongs"', Nation Review, 28/2/75-6/3/75.
'Battle due on legal aid', Age, 16/4/75.
'Legal aid trouble ahead for Labor', Nation Review, 20/6/75-26/6/75.
A similar motion to mount a legal challenge to the ALAO, was narrowly rejected by the Law Society of Western Australia in the same month, LSB, May, 1975, p.210.

18. V.F. Wilcox, Attorney-General of Victoria, Letter to Law Institute of Victoria, 19/2/75.

19. J. Harkins, 'Federal legal aid in Australia', op. cit., p.27.

20. LIJ, June, 1977, p.222.

21. Law Institute of Victoria, 'Information re: High Court challenge', 1975, p.3.

22. A. Nicol, Interview, 15/11/85.

23. Victoria v. Commonwealth (1975) 50, ALJR 157.
P. Bayne, 'The AAP case and the ALAO', LSB, November, 1975, p.291.
G. Evans, 'Constitutional issues', LSB, March, 1975, p.166.

24. Sackville, Law and Poverty in Australia, op. cit., p.52.

25. Mr. Justice L. Murphy, Interview, 13/3/86.

26. R.W. Connell, Ruling Class, Ruling Culture. Cambridge, Cambridge University Press, 1977, Chapter 6.
M. Crommelin and G. Evans, 'Explorations and adventures with commonwealth powers', in G. Evans (ed.), Labor and the Constitution 1972-75. Melbourne, Heinemann, 1977.

27. A. Nicol, Interview, 15/11/85.

28. Chapter Four, Note 41.

29. ibid.
See also Y. Preston, 'Australia's big law firms are hard to find in the legal aid system', National Times, 25-30/8/75.

30. J. Harkins, Interview, 17/10/86.

31. A. Nicol, Interview, 15/11/85.

32. C. McMillan, 'Proposer's statement', in 'Forum: Constitutional challenge to the ALAO', LSB, March, 1975 p. 21

33. ibid.

34. ibid., p.165.

35. Law Institute of Victoria, 'Information re: High Court challenge, 1975', p.12.

36. A. Nicol, Interview, 15/11/85.

37. A. Smith, 'Supporting ALAO', in 'Forum: Constitutional challenge to the ALAO', LSB., March, 1975 p. 20

38. A. Nicol, Interview, 15/11/85.

39. Law Institute of Victoria, 'Information re: High Court challenge', op. cit., pp. 9, 10.

40. ibid.

41. A. Smith, 'Supporting ALAO', op. cit.

42. Law Institute of Victoria, 'Information re: High Court challenge', op. cit., pp. 6, 13.

43. ibid., p.13.

44. ibid., p.10.

45. ibid., p.11.

46. A. Nicol, Interview, 15/11/85.

47. 'Law group will fight threat to legal aid', Age, 17/2/75.

48. Law Institute of Victoria, 'Information re: High Court challenge', op. cit., p.12.

49. Between June, 1970, and 1975, the Victorian Legal Aid Committee received only $77,000 from the state government. ibid., p.12.

50. A. Smith, op. cit., p.171.

51. See Chapter 4, Note 42.

52. LIJ, November, 1974, p.450.

53. Mr. Justice L. Murphy, Interview, 15/3/86.
J. Harkins, Interview, 17/10/86.
At this meeting Murphy also rejected the proposal for a return to a state-based organisation of aid.

54. This generous view was not shared by ALAO staff. Many of them regarded him as a 'political lightweight', less able to defend the service. J. Harkins, Interview, 17/10/86.

55. 'Legal Aid - special report', Law Council Newsletter, June, 1975, p.2.

56. ibid.
K. Enderby, 'Labor policy', LSB, March, 1975, p.174.

57. K. Enderby, Attorney-General of Australia, Letter to Law Institute of Victoria, 4/3/75.

58. A. Nicol, Interview, 15/11/75.

59. E. Johnson, Justice and Reform, op. cit., p.170.

60. ibid.

61. ibid.
See generally K. Mannheim, Ideology and Utopia. New York, Harvest, 1936.

62. A. Nicol, Interview, 15/11/85.

63. M. Sexton and L. Maher, The Legal Mystique, op. cit., p.35.

64. ibid.

65. The greater conservatism of this body is probably a result of the equal representation of State Bar Associations thereon. The bar is well known for being the more conservative branch of the profession. J. Gordon Interview [illegible]

66. Law Council of Australia, Submission to Australian Legal Aid Review Committee, 16/7/74.

67. ibid., pp. 11, 20, 14.

68. ibid., p.21.

69. C. Thomson, 'Commentary re: Commonwealth commission of inquiry into poverty - Legal aid in Australia', January, 1975, pp. 26, 27.

70. ibid., p.35.

71. ibid., p.7.

72. ibid., p.46.

73. ibid., p.30.

74. ibid.

75. ibid., p.37.

76. K. Enderby, Attorney-General of Australia, Letter to Law Council of Australia, 19/2/75, p.1.
Press Release, 'Legal Aid Council proposed', Attorney-General's Department, Canberra, 19/2/75.

77. 'Legal aid - special report', Law Council Newsletter, June, 1975, p.1.

78. ibid.

79. Australian Legal Aid Review Committee, 2nd Report, op. cit., Appendix A, 'Submission by LCA regarding Australian Legal Aid Commission'.

80. ibid., pp. 27, 28.

81. ibid., p.27.

82. 'Joint statement of the LCA and presidents of the state Law Societies on legal aid - 8/10/74', LIJ, November, 1974, p.450.
Australian Legal Aid Review Comm. Report, op. cit., February, 1974, p.13.

83. Australian Legal Aid Review Comm., 2nd Report, Appendix A, 'Submission by LCA regarding Australian Legal Aid Commission', op. cit., p.28.

84. Sackville, Law and Poverty in Australia, op. cit., p.45.

85. 'Australian Legal Aid Review Committee - Submission by the Law Society of New South Wales', Law Soc. Jnl., November, 1974, p.223.

86. Harkins, 'Federal legal aid in Australia', op. cit., p.31.

87. Legal Aid Bill, 1975 (Draft), S.11.

88. S.11.

89. S.14; S.17.

90. S.15.

91. S.16.

92. Attorney-General Enderby, Representatives, 5/6/75, p.3473.

93. S.38.

94. S.38.

95. S.29 and S.27.

96. S.71.

97. Attorney-General Enderby, Representatives, 5/6/75, p.3473.

98. It apparently was for this reason that the bureaucracy first proposed the establishment of a board of management, to make the continuing control of the office by the Director less obvious. C. Harders, Secretary, Attorney-General's Department, Canberra, Letter to the Attorney-General re: Legal Aid Bill', 9/5/75, p.4.

99. S.22(1).

100. R. Sackville, 'Legal Aid Bill, 1975', LSB, June, 1975, p.235.

101. S.37 and S.38.

102. R. Sackville, 'Legal Aid Bill, 1975', op. cit., p.239.

103. Law Society of Western Australia, 'Outline submission to the Hon. Attorney-General of Australia, on Legal Aid Bill, 1975', 30/7/75.

104. Law Institute of Victoria, 'Proposed amendments to the Legal Aid Bill, 1975'.

105. Law Society of Tasmania, 'Submission to LCA regarding proposed amendments to the Legal Aid Bill, 1975'.

106. LCA, 'Legal Aid Bill, 1975 - Collation of views of constituent bodies - for executive meeting', 1/8/75, 28/7/75.
Law Society of New South Wales, 'Submission to the LCA regarding the Legal Aid Bill, 1975', 29/7/75.
See proposed New South Wales amendments in Supplement to the Law Society Bulletin, June, 1975; and more generally, A. Loxton, 'President's message - Legal Aid Bill, 1975', Supplement to the Law Society Jnl., August, 1975.
'Legal Aid Bill', Law Society Jnl., October, 1975, p.239.

'Legal Aid Bill, 1975', Law Society Bulletin (South Australia), August, 1975, p.1.
'President's message', The Law Society of the A.C.T. Newsletter, August, 1975, p.1.

107. Law Council of Australia, 'Submission to the Attorney-General of Australia concerning the Legal Aid Bill, 1975, on behalf of all constituent bodies', 4/8/75.

108. ibid., p.3 and p.1.

109. ibid., p.3.

110. ibid., p.8.

111. LCA, 'Collation of views of constituent bodies re: Legal Aid Bill, 1975', op. cit., p.12.
A similar New South Wales proposal to even block the appointment of any judge as Board chairman and so create a clear private professional majority thereon, was rejected by the Council, ibid., p.10.

112. LCA, 'Submission to Attorney-General of Australia concerning the Legal Aid Bill, 1975', op. cit., p.11.

113. ibid., p.5.

114. Law Society of New South Wales, 'Submission to Australian Legal Aid Review Committee, 2nd and 3rd Terms of Reference', op. cit., p.181.

115. K. Enderby, 'Labor policy', LSB, March, 1975, p.174.

116. K. Enderby, 'The balance of justice', Summons (1975), p.59.

117. R. Ackland, 'Legal aid office rescue plan', Aust. Financial Rev., 29/9/75.

118. I. Greenwood, 'Securing equality before the law ...', op. cit., pp.5, 6.

119. ibid., p.8.
Sen. Greenwood, Senate, 14/11/74, p.2386.

120. I. Greenwood, 'Liberal policy', LSB, March, 1975, p.176.
See also R. Ackland, 'The politics of legal aid', Aust. Fin. Rev., 30/4/75.

121. M. Sexton and L. Maher, The Legal Mystique, op. cit., p.175.
J. Lapsley, 'The row splitting the lawyers', Aust., 8/9/75.

122. M. Fraser, Representatives, 26/8/75, p.526.
Of course, this goal of reducing costs conflicted with Greenwood's plan for continuous high funding of privately controlled legal aid.

123. Mr. Lamb, Representatives, 1/10/75, p.1552.
Mr. Innes, Representatives, 2/9/75, p.867.
Mr. Enderby, Representatives, 8/10/75, p.1829.
Mr. Enderby, Representatives, 9/10/85, p.1930.

124. The Australian Legal Aid Office - a research study of the implications and communicative effectiveness of its introduction, ALAO, July, 1975.
Extract from ANOP report, Representatives, 1/10/75, p.1552.

125. Representatives, 1/10/75, p.1552.

126. ibid.
See also Y. Preston, 'Legal aid rates high in public opinion - even among liberals', National Times, 22-27/9/75.

127. quoted in M. Sexton, 'Talking points - ALAO', Attorney-General's Office, 1975, p.2.

128. R. Ellicott, Representatives, 9/10/75, p.1978.
'Legal Aid Bill', Law Society Bulletin (South Australia), November, 1975, p.3.

129. 'Coalition seeks study of legal aid bill', SMH, 10/10/75.
130. 'Legal aid - ACOSS Submission to the Legal Aid Review Committee', Aust. Social Welfare, March, 1974, p.3.
S. Armstrong, 'Submission to the Legal Aid Review Committee on behalf of community legal aid services', 25/9/73.

131. See generally, J. Basten et al., 'Legal centres in Australia', op. cit.
P. Cashman, Fitzroy Legal Service Research Project, Faculty of Law, University of Melbourne, 1973.
D. Neal, 'The delivery of legal services - the innovation approach of the Fitzroy Legal Service', MULR, 11 (1978), 427.

132. J. Basten, 'Neighbourhood legal centres in Australia: a legacy of the Vietnam war?', op. cit.

133. See J. Broadbent, President, Law Society of New South Wales, 'Letter of complaint regarding press comment on legal matters to Dean of the Law Faculty, U.N.S.W.', 10/9/73.

134. Chapter Four, p.187.

135. For an extended Australian example of the view see S. Bothmann and R. Gordon, Practising Poverty Law. Melbourne, FLS, 1979.

136. ibid., p.72.

137. 'Editorial', LSB September, 1974, p.1.

138. 'Commentary on draft Legal Aid Bill', New South Wales, ALS, 1975.
'Press release', Canberra, ALS Conference, 4/8/75, p.2.

139. 'Branch offices of the ALAO are springing up everywhere, and much money and effort is being directed from Canberra into ensuring that they receive adequate funds, facilities and personnel. Meanwhile the voluntary services lack everything - except clients.'
'At the risk of demonstrating poverty-paranoia, I fear the worst, i.e. that the voluntary services very soon become merely an after-hours adjunct of the ALAO, perhaps operating from its day-time premises.'
'Editorial', LSB, June, 1974, p.21. Murphy's plea for private lawyers to co-operate with the ALAO in an after-hours voluntary service was also perceived as a direct threat and dismissed as 'ill-disguised takeover talk'. ibid.

140. ibid.

141. 'Editorial', LSB, July, 1975, p.216.

142. 'Editorial', LSB, November, 1975, p.285.

143. ibid.
The Bulletin also carried articles which gave a qualified support to the development of the office. For example, see M. Head, 'General comments - in forum: Constitutional challenge to the ALAO', LSB, March, 1975, p.175.
H. Finlay, 'The ALAO faces change', LSB, September, 1975, p.267.

144. Sackville, Law and Poverty in Australia, op. cit., p.21.

145. Sackville, 'Legal Aid Bill, 1975', LSB, July, 1975, p.236.

146. Sackville, Law and Poverty in Australia, op. cit., p.39.

147. ibid., p.47.

148. ibid., p.44.

149. S. Armstrong, Legal Aid in Australia, op. cit., p.172.

150. Sackville, Law and Poverty in Australia, op. cit., p.27.

151. ibid., p.48.

152. ibid., pp.27, 28-29.

153. M. Sexton, 'Memorandum re: Legal Aid Bill, 1975 to Attorney-General Enderby', 18/8/75, p.1.

154. 'Law Council attacked in legal aid moves', Aust. Fin. Rev., 19/8/75.

155. Sexton, op. cit., p.4.
Alternate legal services, 'Legal Aid Bill 1975 - Summary of proposals'.

156. Sexton, op. cit., p.7.
Quote - from 'Submission to the Attorney-General on Legal Aid Bill, 1975', ACOSS, 1/8/75, p.2.

157. ACOSS submission, op. cit., p.3.
Sexton, op. cit., p.16.

158. 'Alternate legal services, Legal Aid Bill 1975 - Summary of proposals'.

159. ibid.
Sexton, op. cit., p.16.
'Proposed amendments re: Legal Aid Bill, 1975', Fitzroy Legal Service, 4/7/75.

160. ibid., FLS, 4/7/75.

161. 'Press Statement - re: Legal Aid Bill, 1975', Conference on Legal Services, Sydney, 7/6/75.
'New South Wales conference on legal services', LSB, July, 1975, p.246.

162. 'News item - Legal Aid Bill, 1975', LSB, November, 1975, p.313.

163. Even the Law Council proposed more powerful local committees, though under local lawyer control.
LCA, 'Submission to the Attorney-General of Australia concerning the Legal Aid Bill, 1975', op. cit., p.11.

CHAPTER SIX

FRASERISM AND LEGAL AID

The ALAO's Demise

The prospects for any continuous expansion of commonwealth legal aid services ended with the election of a new conservative government in December 1975. The Fraser government assumed office with the intention of making stringent cutbacks in the federal budget. In a period of deepening economic recession among the advanced capitalist economies it adopted the view that long-term recovery was only possible through a major reduction in public spending. The designated targets for these cuts included many of the social welfare programmes founded or expanded by Labor, as well as the public service bureaucracy which had grown considerably in the previous three years.[1] One planned means for achieving these economies was by the policy of 'new federalism' - the transfer of the administrative control and responsibility for a number of government agencies to state governments. It was also believed that this would counter the 'centralist' imbalance that had resulted from Labor's policies.

In 1975, both Fraser and shadow Attorney-General Greenwood had declared a clear intention to abolish the ALAO and transfer its activities to some form of state control.[2] The task of this major reorganisation of federal services fell to the eventual Liberal Attorney-General, Robert Ellicott. Ellicott justified the plan to dissolve the service, by contending that it was lacking in both a sound constitutional basis and independence of government. It was also viewed as costly and cumbersome in its present structure, and too much overlapping with other legal aid schemes. He argued that it was in the 'public interest' if schemes were administered so 'there should be efficiency and no

unnecessary duplication in the administration of legal aid'.[3]

On the 15th of January, 1976, the Attorney-General announced a general review of Australian legal aid schemes and the commonwealth's role in them.[4] In keeping with the policy of new federalism a plan to redirect control of the ALAO to the various state governments was adopted. The actual terms and manner of the implementation of this scheme were to be decided in negotiations with those governments. But its basis was to be the eventual dismantling of the ALAO and the transferring of its staff and offices into restructured state schemes. This process began with the absorption of the ALAO in Western Australia into a new state scheme under legislation enacted in 1976.

Despite repeated government assertions to the contrary, implementation of this plan guaranteed the virtual destruction of Australia's first national legal aid service. In early 1976 Ellicott insisted, in reply to his critics, that there was a certain place for salaried lawyers in this reorganisation of the ALAO, but there was considerable uncertainty as to what their actual role might be in the various new schemes.[5]

As well as this uncertainty, government policy had a sudden negative effect on the funding, staffing and work patterns of the office. The proposed expansion of the service through a further twenty eight offices was delayed indefinitely.[6] Similarly, the ALAO's staff ceiling was lowered from the figure of 442 imposed in the Hayden 1975 budget to 364.[7] As this figure was less than the actual number of employees, a policy of not replacing outgoing staff was implemented. This undermined the operation of two-lawyer regional offices whenever the replacement of professional staff was extensively delayed. Staff shortages remained an ongoing hindrance to the work capacity of the ALAO where it still functioned even after the end of the decade.

These pressures were reinforced by inadequate funds. Increases in administrative and legal costs absorbed more and more money, especially in the

area of family law, without a corresponding expansion in the number of clients assisted. This was especially so after the Family Law Act came into force in early 1976. This was a major factor forcing rises in the legal aid provision in successive budgets, that was not anticipated by the Fraser government when it assumed office. Total legal aid spending (excluding the provision for Aboriginal legal aid) rose from $13.7 million in the last Labor budget of June, 1975, to $18 million in 1976-77, $20 million in 1977-78, $21.9 million in 1978-79, and $25.6 million in 1979-80.[8]

However, these increasing amounts barely covered rises in general and legal costs in a period of double figure inflation. The inadequacy of available funds was reflected in the limited allocation made for that referral work through which the service directed the bulk of its more complex cases. In June, 1975, $12.5 million had been allocated for the ALAO.[9] Of this, $7 million was set aside for referrals.[10] But as this soon reached a figure of $1 million per month - at which level the government imposed a strict limit - real expenditure was far higher than the formal budget provision.[11]

In 1976, the Attorney-General replied to the claim of the opposition and various welfare and legal groups that he intended to undermine the viability of the service, by referring to a 23% increase in overall spending in 1976.[12] But in order to restrain spending, the new government had already affirmed the $1 million monthly limit.[13] Additionally, the $15 million provided for the ALAO in the first Liberal budget included only $9.6 million for referrals.[14] Although it was the higher figure of $1 million each month which prevailed in practice, this depressed level of funding continued for a long period. These commitment funds did not increase significantly in the late 1970s and hovered around the $12 million per annum mark with only one formal increase of $50,000 per month (or $.6 million per year) being made in October, 1977.[15] This rise did not mean any real expansion of funds as it did not even cover cost increases including the 30%

rise in barristers' fees in Victoria in 1977, and a general 20% rise in family law costs in the following year.[16]

The government continuously refused to index the referrals' provision in line with such rising costs. In fact, in the 1978-79 budget the annual allocation was reduced by $600,000, in accordance with the view of the government's economic 'razor gang'.[17] The impossibility of adhering to these low levels was obvious. In 1978-79 actual payments to the profession totalled $14.6 million.[18] Eventually the further pressure of rising costs and the growing criticism of the government's stance resulted in a rise of $4 million in 1979-80 to give a total allocation of $16.6 million.[19]

The adverse result of this depressed funding for private legal work was reflected in the referral figures for the ALAO in this period. These indicate that in the year between 1976-77 and 1977-78 referred matters fell from 49,063 ($11.9 million) to 43,127 ($10.2 million), a drop of around 10%.[20] However, despite static funding and this real reduction in the number of referrals, it cannot be assumed that a substantially greater proportion of ALAO work was completed by salaried staff. Such a shift in the balance of the 'mixed model' adopted by both the service and the state commissions which succeeded it, was frequently suggested by government and legal aid officials as a result of their growing concern about rising professional costs in the late 1970s. But it appears that the lowered ALAO figures for this period were the result of an overall decline in office work and interviews conducted, rather than any policy of raising the level of work dealt with 'inhouse'.

As the salaried component of ALAO work was already hit by staff shortages, this lowered funding of referrals further undermined the work of office-staff. By 1978 the situation had deteriorated such that in several states, if some of the widespread public demand for help was not ignored, the monthly allocation regularly ran short before the next sum was available. In May, 1978,

the Tasmanian office was left without funds well before the end of the month.[21] The Victorian office was in a similar situation by mid-September and again in October, when it temporarily functioned as a virtual limited advice service.[22] Under pressure from the opposition, Attorney-General Durack finally admitted in October that there was a national backlog of some 2,400 cases - especially severe in Victoria and Queensland - and requiring half a million dollars to be dealt with.[23] A special government grant of $333,000 was allocated to meet most of this, and of this sum $200,000 was expended to avert the complete collapse of the ALAO in Victoria.[24]

The ALAO was not the only commonwealth-funded legal aid service to suffer financially in these years. Although the 1976-77 Liberal budget raised funds for the various Aboriginal Legal Services by 23% to a figure of $3.7 million, they remained around that mark throughout the late 1970s.[25] In the face of rising demand these services had already begun to overspend on their budgets in the Whitlam years. This trend continued in the Fraser years with cost increases that meant that in all states the ALS was constantly pressured by a real decline in funds. For example, in January, 1976 the New South Wales service was forced to temporarily suspend its operations due to lack of funds.[26] By November that year the Victorian ALS was virtually bankrupt and cut back its operations accordingly.[27] This funding crisis spread to other states, including South Australia, where the Council of the Aboriginal Legal Rights Movement in 1979 declared itself wholly unable to cope with growing demand and continuous static funding.[28]

Like the ALAO, these services did not manage to obtain substantial funding above the amounts first granted by the Labor government as 'starting money' in their foundation years. This led to the increasing fear from ALS staff and their supporters that the Fraser government might include these services in its plan for an overall rationalisation of commonwealth aid, absorbing them into

either the ALAO, or any newly restructured scheme and ending the development of independent and specialised services for Aborigines.

The negative effect of the cutbacks in ALAO funds were obvious in changes made to restrictions on the eligibility of clients, a more harsh test of means, and the exclusion of more and more types of action from the work of the office. From January, 1976, the service no longer offered assistance in the enforcement of maintenance orders. This decision which caused considerable hardship as due to a jurisdictional mixup the states also no longer gave help in what they now considered to be a federal responsibility.[29] As well as this, the definition of 'federal persons' was narrowed. From 1976, migrants were only granted aid if they had been in Australia for less than two years, and in 1977, assistance to students was restricted to those studying full-time.[30]

But by far the most severe blow to the ALAO's original goal of general accessibility to citizens unable to afford private legal help, was delivered by the stringent income guidelines imposed in March, 1976.[31] These were placed on all applicants seeking aid beyond advice and were meant to ensure that assistance was only provided to persons with 'the greatest need'.[32] Under these new guidelines the maximum disposable weekly income allowed for applicants was reduced from $60 to $40 per week, with deductions for dependants reduced by $5 each per week. Such items as food, clothing, and vehicle payments were no longer permitted as deductions. At the same time, in order to counter the rising cost of family law matters, it was announced that assistance would no longer be offered for simple dissolutions of marriage unless an applicant could demonstrate 'special hardship'.

Ellicott insisted that the basic test of eligibility - the inability to afford private legal services - was unchanged, and that the new guidelines were merely a 'general standard'. But they were in fact implemented with increasing inflexibility as the demand for legal help exceeded the capacity of an

underfinanced and understaffed service. In September, 1977, a confidential directive to ALAO staff declared that the guidelines were to be regarded as a strict means test.[33] The 'federal person' criterion was also applied more strictly so that assistance could be withdrawn during legal proceedings if the recipient no longer conformed with this requirement.[34]

The direct effect of these restrictions was to restrict all but the destitute from eligibility. They excluded a large number of pensioners and welfare recipients whose income was regarded as too high although placing them well within the Henderson 'poverty' line. Furthermore, these guidelines lasted until late 1978 by which time they (and the assets guidelines which were still unchanged since August, 1975), had been rendered even more harsh by a CPI rise of 21.4% between 1976 and 1978.[35] The results of these restrictions were illustrated by a 1978 ALAO report regarding applications for assistance. This found that an increasing number of applicants were being excluded from help whose disposable incomes were only slightly outside the means test, and that nationally between June and December, 1977, applications for assistance rose by 12.3% (from 27,702 to 31,109), whereas the rate of rejections on the grounds of means rose by 20% (from 4,990 (18%) to 6,720 (21.6%)) in the same period.[36]

Although the income guidelines were 'liberalised' in October, 1978, to a figure of $52 per week, this was the only rise made until August, 1981 (when raised to $67 per week) and was not indexed for rises in the cost of living with a CPI rise of over 30% between 1975 and 1980.[37] Furthermore, its timing appeared to be a cynical move in that, although the recipients of the single unemployment benefit qualified by fifty-five cents per week, the age and widows' pensions were, six days later, raised to a sum slightly in excess of this cut-off mark.[38] These new guidelines were accompanied by other measures intended to conserve funds. These included increased Federal Court fees and new fee scales which no longer paid private practitioners for time spent waiting

at court on referred matters.[39] But the most retrograde of all the related changes was the introduction of mandatory contributions. This represented a significant move from the conception of legal aid as a social right back to notions of charity. The earlier requirements were widened such that a minimum payment of $20 was required in all cases where special hardship was not demonstrated.[40]

Attorney-General Durack also affirmed as government policy certain restrictions upon causes of action that were in practice already followed by the ALAO in most states. Grants of assistance were formally tightened in traffic matters. They were not available in conveyancing and probate matters without 'special hardship', or in family law disputes of access and custody without a prior attempt at settlement or counselling.[41]

The overall outcome of these staff shortages, limited funds and restrictions upon assistance was reflected in ALAO statistics for the first three years of Fraser's government. These illustrate the general decline in the work capacity of the office. The national total of interviews conducted by the ALAO equalled 151,948 in 1975-76, 129,697 in 1976-77, and fell further to 125,263 in the next year.[42] The public visibility of the rundown state of many offices and the frequent long waiting lists for service from 1976 on, may have deterred many potential clients of the service. But that this overall reduction of work was the direct result of a resources crisis, and not any decline in public legal needs, is suggested by the constant high demand for assistance felt throughout the decade.

In fact, given rising poverty and unemployment due to the depressed state of the Australian economy, it is likely that the total number of persons requiring assistance in such areas as family, consumer, credit, social security, tenancy and criminal law had increased sharply in this period. In the case of the ALAO, this rising though unmet demand for assistance also derived from the greater number

of 'federal persons'. Between 1975 and 1978-79 the total number of people receiving commonwealth unemployment benefits rose by 73% and various other pensions by 22%.[43]

This pressure on the service continued throughout the decade. The reported demand for aid rose suddenly in 1980-81 at the same time as a record level of unemployment was reached.[44] In these circumstances, the only option for the office was to react negatively. In April, 1981, the Victorian ALAO refused help for some 1800 applicants and from March till June the rejection rate in that state rose from 13% of applicants to a level of 40% with a more stringent application of tests of eligibility.[45] Also in April, the Melbourne Family Court duty solicitor service was suspended to release staff for other work.[46]

The decline in office resources also meant a qualitative change in service. A lower standard of assistance, frequently partial and obtained only with a long wait, was given to many who qualified for help. The type of lawyering engaged in by the office tended to become even more orthodox. Restricted aid was still available in environmental suits and the office did engage in several public interest test cases including Green v. Daniels where the Fraser government's refusal to pay unemployment benefits to school leavers without a waiting period was successfully challenged.[47] The remnants of the office have also represented clients before the Commonwealth Administrative Appeals Tribunal in the late 1970s and 1980s.[48] But staff and funding cuts reinforced the limited involvement in these and other areas of activist lawyering including group work and community legal education.

This tendency was confirmed by the effect of the harsh means test on the client pool of the service. Armstrong notes that the restriction of help to only the most destitute of applicants, effectively restricted assistance to mostly female welfare recipients, seeking help in the traditional area of family law

disputes.[49] By late 1976 these matters comprised 80% of work done in South Australia and 70% in New South Wales.[50] This trend apparently continued throughout the decade. The first annual report of the Commonwealth Legal Aid Commission in November, 1978, noted that 80% of all commonwealth legal aid matters dealt with nationally were in the family law area.[51]

The combined effect of short resources, staff cuts and an uncertain future, lowered staff morale and prompted internal resistance to the destruction of the office throughout the Fraser years. But most importantly, these combined factors and related restrictions on the work pattern of the office, confirmed that the original vision of a highly innovative and accessible national legal aid scheme was lost.

The Commission's Scheme

In early 1976 Ellicott began consulting with the state governments regarding the future form of public and private schemes. At the Hobart meeting of all Attorneys-General on the 4th of March, the commonwealth circulated a document prepared by Ellicott's department which outlined five different proposed schemes for discussion.[52] These were as follows:

(1) Delivery by existing schemes (including the ALAO) but with a new co-ordinating commonwealth commission controlling the federal schemes.[53] This was close to the changes proposed by Labor with the draft Legal Aid Bill in 1975, but with a commission that was more independent of the government and bureaucracy. For the government, its major flaw was that it would not allow the cost-savings hoped for from the new federal scheme.

(2) A scheme following the Law Council's August, 1975 proposal for a powerful 'independent' national commission controlling the ALAO and

legal aid funding, but with an effective private lawyer dominance through majorities on both the national commission and state committees.[54] This plan was still strongly put by the Council in 1976. But it was not favoured by the government. Problems foreseen included the accountability of the proposed commission as a recipient of public finance, and the likely criticisms and staff resistance to the effective private control of former government schemes.

(3) A system of independent state-based commissions covering all delivery, and with a small advisory commonwealth commission to monitor implementation of the scheme.[55]

(4) A system established through reciprocal legislation providing for joint commonwealth and state participation in delivery on a state by state basis, with shared funding and under the direction of joint commissions. A small advisory commission would monitor the scheme at the federal level.[56] This scheme would have the advantage of binding the commonwealth to some continuing direct involvement in legal aid. For this reason it was strongly supported by the public service union, CAGEO. But it conflicted with the commonwealth's plan to opt out of direct delivery, and a return to an autonomous state-based control of legal aid attracted some state governments.

(5) A scheme based on the Poverty Commission proposals. This would comprise a broadly representative national commission, overseeing delivery by a network of salaried neighbourhood offices engaged in both traditional and 'activist' lawyering.[57] This proposed stress on non-traditional lawyering did not meet the conservative outlook of the commonwealth and most state governments. The plan for a fully autonomous commission, with a strong lay, welfare and alternate lawyer representation, also raised

the issue of accountability. It had little support at the policy-making level as it conflicted with the perceived interests of the commonwealth and state governments, the federal bureaucracy (including most public service lawyers), and the private profession as represented by either the Law Council or Law Societies.

It was the original Liberal plan for a series of state commissions, option three, which Ellicott put most seriously at the March meeting and which was accepted at a further meeting in Adelaide in June. It thereby became the blueprint for the reorganisation of Australia's legal aid system.

This scheme entailed the administration and provision of aid, in both state and federal matters, by a series of state and territorial commissions. This would be achieved through the merging of the existing state government and private professional schemes with the transferred staff and facilities of the ALAO. It was intended that these latter staff lawyers would be retained as salaried officers of the new commissions.[58] Each commission was to be an independent statutory body comprising representatives of the state or territory, welfare organisations, and the legal profession with a strong or majority representation.[59] They were to be established under state legislation, but funding would derive from both the commonwealth and sources within each state or territory.[60]

Formal agreements were to be made with each state for the covering of federal matters in return for commonwealth funds.[61] Separate commonwealth legislation would establish a small advisory commission to monitor the implementation of the scheme.[62] It was a source of great relief to the staff and supporters of the aboriginal legal services that these were expressly excluded from the scheme and would retain their organisational and financial autonomy from the new commissions.[63]

Despite Ellicott's success in pushing for the government's preferred

option, and the general support of the Law Societies, there were strong obstacles to the ready implementation of this scheme and the dismantling of the ALAO. The further politicisation of this area of public policy, with the involvement and greater interest of lay organisations as well as new groups of lawyers, meant that on assuming office the Liberal government was quickly subjected to widespread criticism for its intention to abolish the ALAO. This came from within parliament and sections of the press, as well as from such groups as ACOSS and the newly formed 'Legal Aid Defenders'.[64]

During the Fraser years, members of the government regularly insisted that legal aid was not a unique or special service but merely another part of the public welfare system that ought be subject to the same cuts as others. For example, the Liberal Senator Baume attempted to reply to opposition attacks on the October, 1978 changes to ALAO guidelines and eligibility, by arguing that legal aid was by no means a 'social right' and could be best understood as '... a needs based service, not a universal right to all Australians ...'.[65] However, the increasing acceptance of the notion of widespread unmet needs in legal and political circles when set against the particular potency of the ideology of equal justice and access to law as fundamental to the democratic order, continually undermined this view. It also gave credibility to a representation of the Liberal government as unconcerned with the achievement of substantive justice and maintenance of this aspect of the rule of law.

As well as this ideological hurdle, other more tangible obstacles to the commission's scheme became evident. In establishing the ALAO the previous government had created a virtual public service department that was difficult to dismantle without the resistance of either service staff or other public servants who did not want the precedent of a successful large-scale transfer of several hundred staff out of the commonwealth bureaucracy. The resistance of ALAO staff was supported by public service unions including CAGEO (the Council of

Australian Government Employees' Organisation) and AGLA (Australian Government Lawyers' Association), as well as a newly organised ALAO staff association.

This hostility of staff and their representatives to the commission s plan was reinforced by their exclusion from both the original discussions of the scheme, and the later more detailed negotiations with state governments regarding the composition and organisation of the new commissions. In the case of South Australia, this was done at the commonwealth's insistence even though the Dunstan Labor government had no objection to the involvement of staff representatives.[66] In late 1976 these staff organisations resolved to support the refusal of ALAO lawyers to transfer to the newly planned West Australian commission, both due to their exclusion from negotiations and the excessive influence which the private profession would have over the commission and its work.[67]

Apart from this resistance, there was a more formidable though less expected obstacle to the scheme. Despite commonwealth references to the latter as a 'partnership' of governments and an exercise in 'co-operative federalism', in their more detailed negotiations with the commonwealth most of the state governments proved highly reluctant to assume the political responsibility for the provision of 'federal' as well as state legal aid where there was at best a likelihood of only static federal funding. The government insisted that it would only offer each new commission an annual commitment for dealing with federal matters in that state equivalent to that made in the previous twelve months.[68] In other words, funding would be close to the levels then being allocated to the various state branches of the underfinanced and rundown ALAO. As these grants were not to be indexed for inflation it seemed likely that their real value would decline each year and shift the financial burden of maintaining adequate services to the states.

This concern was most strongly felt by those state politicians who realised that the declared ALAO budgets considerably understated the real cost of running the service in each state as much of its administration was separately covered by the Attorney-General's department. It was felt that this financial strain would be exacerbated by increasing demand and growing costs, especially in federal family law matters, and through the private profession's expectation of a continuing flow of referred work. Furthermore, in a period of heightened consciousness of unmet needs, the implementation of the scheme could mean that the critical scrutiny of the newly emerged legal aid lobby could be directed further towards policy-making at the state level. This would have clear political advantages for the commonwealth but not for the states. Ellicott insisted that the principal purpose of the commission's scheme was to end the duplication of service, but also conceded that it had support from government members who believed they had an opportunity to shake off the political and financial responsibility for legal aid.[69]

The exception to this reluctance among the states to accept the major responsibility for delivery was the Court Liberal government in Western Australia. For strongly ideological reasons, it was keen to establish a commission quickly. This enthusiasm was apparently motivated by its hostility to reforms that derived from the Whitlam government, as well as some loyalty to fellow conservatives at the federal level. But this state government also insisted that the ALAO had no constitutional authority and saw a chance to redress an unlawful infringement on those 'states rights' which it valued highly.[70] Additionally, the Attorney-General, Medcalf, held a strong personal opposition to the concept of salaried government schemes free of any professional control and was keen to dismantle the ALAO in Western Australia. Accordingly, the first state commission under the scheme was established after the passage of the Legal Aid Commission Act in November, 1976.

However, the other states did not share this enthusiasm for the quick development of the commissions.[71] Western Australia was seen as getting little in return for its loyalty in that commonwealth legislation to support the deal and provide a basis for some guarantee of minimal funding, had not yet been passed. In his frustration at this general reluctance, Ellicott launched into parliamentary attacks on the new Labor Attorney-General of New South Wales, Walker, for his refusal to negotiate due to the commonwealth's strict terms regarding finance.[72] But the ambivalence felt by the other conservative state governments, and the early hostility of Queensland, would suggest that this was not a simple split on party political lines. Most states instead suspected that the Fraser government's rhetoric of 'partnership' and 'co-operative federalism' had a one-sided ring to it.

These obstacles were also evident in reactions to the two pieces of commonwealth legislation intended to hurry implementation of the scheme. In 1976 the government set about the establishment of a legal aid commission in the Australian Capital Territory where there would be no difficult negotiations with another government to slow developments. This body and its supporting legislation were to serve as a model for the states. A draft legal aid ordinance was circulated to limited groups, including the private profession, for comment in October. This provided for the fusion of schemes under a seven-member commission. These members were a judge or private lawyer as chairman, one nominee each from the Commonwealth Attorney-General, the ACT Legislative Assembly, ACOSS, and the ACT Bar Association, and two from the Law Society. Thus, current or former private lawyers would comprise a majority of members.[73]

In this and subsequent drafts the commission was given broad powers to provide legal assistance through either its salaried officers or private lawyers. Its work guidelines reflected some attempt to give a statutory recognition to the

'mixed model' of delivery. These sought to balance the need for accessible services for the disadvantaged, work autonomy and the desirability of tenured salaried officers engaging in professional work including litigation, with the desirability of maintaining the 'independence of the private profession' and the right of the assisted to choose a lawyer.[74]

However, this draft also provided for the private professional control of the all-important legal aid committees, which had wide powers to determine applications, dispense funds, and allocate work between salaried and private lawyers. These would comprise four members; the ALAO director and three nominees of the Law Society or Bar Association.[75] The draft also borrowed one of the more negative features of Labor's 1975 commonwealth draft in providing for consultative committees that were only advisory, and comprising a commission officer, a private lawyer, and 'such other persons as the Attorney-General may consider appropriate'.[76] It also contained provisions for student involvement, community legal education, law reform recommendations and the 'securing' of welfare officers in dealing with cases.[77] But otherwise, activist work, including the conduct of test cases and public interest lawyering, was not provided for.

Despite Ellicott's belief that this draft would hurry developments, on being leaked to the press it was subjected to severe criticism from legal service lawyers including ALAO officers.[78] The latter particularly resented the secretive drafting of the ordinance without consultation with staff, and the excessive proposed private control of commission. Welfare groups also attacked the proposed high proportion of private lawyer members, the lack of staff representatives, the weak position of the consultative committees, and what amounted to, in the words of one ACOSS press release, 'giving to the Law Societies a free hand in deciding how funds for legal aid will be spent'.[79] These groups instead suggested a larger commission with further lay representation to

express consumer interests.[80]

This critical view of the draft was reinforced by another government leak a few days later.[81] A plan by Ellicott to appoint the president of the New South Wales Law Society, Alan Loxton, to conduct an inquiry into the operation and future of the ALAO in New South Wales, became public knowledge. Loxton was well known for his open hostility to both the ALAO and any salaried legal aid service outside of private professional control.[82] The proposal was so roundly denounced by the New South Wales government, the press, legal aid lobbyists and federal opposition, and so much further provoked the anger of ALAO staff, that it was soon dropped.

In this atmosphere the government withdrew the draft ordinance for revision. A later draft was circulated (more widely) for comment in March, 1977, and the final (3rd) draft was enacted later that year as the Legal Aid Ordinance, 1977. The final act contained much the same provisions regarding the definition and forms of assistance and the organisation of its delivery. The private profession still retained a substantial measure of control over routine expenditures and work allocation. But the government did partly give in to external criticism in that it altered the composition of the various bodies established.

The commission was expanded in size to nine members, by the addition of two. These were the full-time director and another nominee of the Australian Capital Territory Legislative Assembly.[83] The private profession was left in a clear minority, comprising only three, or possibly four, of all members. Similarly, the committees were altered so that its members were reduced from three to two, and the appointment instead of a lay representative was made mandatory.[84] This partly muted the private lawyer influence on the commission's operations at this level.

The government also sought to push through its scheme with the hurried

passage of the Commonwealth Legal Aid Commission Act in June, 1977.[85] This both established the co-ordinating commission that was to oversee the implementation of the scheme and gave a statutory guarantee of certain rights and conditions for any transferred ALAO staff. The commonwealth commission comprised eight members. These were a judge or enrolled lawyer as chairman, another enrolled lawyer as the full-time Deputy Chairman, two nominees each from the commonwealth Attorney-General and the combined Attorneys-General of states which had founded commissions, as well as one nominee from the Law Council and a lay nominee of ACOSS.[86] The commission's role included ascertaining the need for legal assistance in Australia, making recommendations to the commonwealth and state Attorneys-General regarding 'the most effective, economic, and desirable means of satisfying that need', as well as conducting research, programmes of community legal education and the gathering of legal aid statistics.[87] In line with Ellicott's scheme this act created a commission with little more than advisory power, in contrast to the preference of the Poverty Commission, the previous Federal government, and the Law Council, for a strong national commission (though all of a different sort). Although the act provided for the commission to review applications for funds, this was only if 'directed to do so by the Attorney-General', and in practice the major financial arrangements were decided separately on a government to government basis.[88] The commission could also do little to ensure state compliance with its co-ordinating guidelines regarding assistance offered, accessibility, and modes of delivery.

This statute failed to build a wide consensus regarding the government's scheme or do much to hurry the establishment of state commissions. To prevent either the abolition of the salaried sector in the more conservative states, or the diminution of the role to making referrals only, provision was made for the employment of transferred staff on terms similar to commonwealth public

service standards, and for some guarantee of the right to engage in full professional work including litigation.[89] But the opposition of staff and their unions continued unabated. Their mistrust was further aggravated by the private-dominated form of the West Australian commission, the original Australian Capital Territory proposals and the Loxton fiasco. The Australian Government Lawyers' Association remained hostile to a plan that would eventually transfer one-quarter of all commonwealth government lawyers, and the Federal Executive of CAGEO rejected the bill outright after passing a resolution against the re-employment of staff as anything other than commonwealth public servants.[90]

Ellicott argued in parliament that it was 'the government's intention to maintain a continuing and direct involvement in the delivery of legal aid'.[91] But the bill was attacked as a clear attempt to downgrade the commonwealth's involvement in legal aid by opting out of direct delivery, and as contrary to the continuing reluctance of state governments to help implement the scheme. The opposition proposed major amendments directed towards upgrading the commission to a body extensively involved in delivery, and also to give it greater autonomy from the Attorney-General and control of its own budget in line with the Poverty Commission proposals.[92] The latter amendments were ironic given Labor's rejection of them in regard to its own draft bill in 1975. Apparently both major parties when in opposition were the advocates of greater independence for the commission.

It appears that this commission was founded principally to cover the implementation of the new federal scheme and the exit from the direct provision of assistance. The resulting body did for a while serve a useful fact-gathering purpose in regard to Australian legal services, and did occasionally assume an unexpected role of criticising the Fraser government for its inadequate funding of schemes in the late 1970s.[93] But the government's low

regard for the commission was demonstrated in its downgrading to a council with limited resources as a cost-saving measure in 1981.[94] This was an unsurprising development as it was always intended that the effective direction of the new schemes would be at state level.

Great Expectations

The Labor years had ended with the legal profession more divided over legal aid policy than any other issue in its history. But after the election of the new conservative government these divisions did not prove to be short-term. In fact, the Fraser government's legal aid policy further exacerbated them. The implementation of the commission s scheme and the move to dismantle the ALAO marked a complete rift between the bulk of the private profession and new groups of salaried legal aid and legal service lawyers which strongly resisted this process. In particular, the widespread private professional support for the scheme completed the alienation of ALAO lawyers who viewed the various Law Societies, not as the representative bodies from which they derived their identity as legal professionals, but rather, as another part of the array of conservative forces seeking to undermine their job base. As a result of these extreme external pressures, and not anything intrinsic to their bureaucratic employment, they eschewed collegiate loyalty and turned instead to public service unions to defend their occupational interests. It is interesting to note that Tomasic and Bullard's 1977 survey of New South Wales lawyers found that 73% of government lawyers felt the state Law Society was unresponsive to their problems, and only 29.5% regarded it as the professional organisation most concerned with their advancement.[95]

As well as this, divisions also appeared within the private profession. The state-based scheme was favoured by the various Law Societies and Bar Associations, especially in Western Australia and New South Wales, as

conforming with their view of the proper organisation of legal aid. But by contrast the Law Council's executive still pushed its 1975 proposal for a powerful national commission controlled by private lawyers nominated by the Council.[96] The rejection of this plan through a combined preference of the government, a majority of states, and the Law Societies, for a state-based system, marked an end to the pre-eminent role the Council had conceived for itself in the organisation of legal aid and the development of national policy. This meant that the state Law Societies continued on as the most important bodies expressing private professional interests in legal aid, as they also did in other areas of legal policy.

In addition to these rifts, the period produced other, less expected, setbacks for the private profession. Whitlam's dismissal and the conservative election victory raised high expectations within the private ranks of a more sympathetic treatment of their interests by the new government. However, the aim of securing effective control over new or expanding schemes as well as a continuous flow of substantial public finance, did not meet with the actual direction of Liberal policy. The previous government had whetted the professional appetite for commonwealth money, but Fraser's cuts soon demonstrated that only less or static funds could be expected from the new government. This was very clear in the virtual freeze on funds for ALAO referrals throughout the late 1970s.

In view of the earlier statements of support for the private aid schemes made by Liberal politicians, perhaps more disappointing was the parsimonious attitude taken towards these by the Fraser government. The Whitlam government had drawn professional fire for its 1975 reduction of funding to $1 million per annum after granting a larger sum in 1974.[97] But the Liberals affirmed this lowered figure in 1976 and directed that all such direct grants to private schemes would cease as state commissions were established.[98] In a period of

high inflation this amounted to a continuing reduction in funds. To meet the more pressing requirements of some schemes, this sum was delivered unevenly. For example, the Australian Capital Territory scheme was cut by one-third in 1976 while funding for the Victorian scheme increased.[99] The plight of these schemes was also made worse by a drop in the amounts available from private trust accounts as the economy moved more deeply into recession.[100] This resulted in a general contraction of activities and blocked plans to expand the scope of areas including the duty solicitor schemes begun in most states in the Whitlam years with government backing. This squeeze was sorely felt in New South Wales where the Law Society in 1975 had ambitiously begun new developments including a children's court scheme, referral centres, and a model legal centre, with the stated aim of demonstrating the superiority of private delivery.

Despite this reversal, the profession's political prospects in relation to the Fraser government and its planned reorganisation of legal aid, did at first appear good. The ultra-conservative Law Council criticised the first draft of the Australian Capital Territory bill, calling for further independence of the proposed commission from the Attorney-General and an absolute majority of nominees of the private profession.[101] Nevertheless, rival groups had been excluded from consultation, and a commission was planned with a majority of current or former private lawyers and with private majorities on the all-important legal aid committees.[102] The West Australian Legal Aid Commission Act of 1976, modelled on this draft, also gave the private profession a near-majority on the commission and a complete representation on the local committees, giving it actual control of much of the commission's daily operation.[103] This was partly modified by a 1977 amendment which reduced the power of the committees.[104] But the level of private lawyer control in fact still did compromise the independence of the commission and allowed for the external direction of aspects of the work of salaried officers.

But at this level also, the private profession met with some significant setbacks. Partly due to the heavy protests of rival groups it fared less well in the later Australian Capital Territory drafts. These expanded the size of the proposed commission so as to leave the private nominees in a clear minority.[105] Furthermore, the substitution of one lay member for one of the Law Society nominees on each committee, removed the majority representation on each of these bodies.[106] These changes still left the private profession in a strong position in this scheme. But this shift in the government's attitude to the administration of legal aid in mid-1977 was also reflected in aspects of the commonwealth Legal Aid Commission Act that year.

This legislation excluded the Law Societies from any direct representation on the commonwealth commission and, with Ellicott insisting that only a 'substantial' but not a majority representation of the profession was required, rather insultingly gave only one nomination for the eight-member commission to the Law Council.[107]

A further political setback was the eventual failure to reverse the growth of the salaried legal aid sector which grew substantially again in the 1980s.[108] Most of the Law Societies had argued that salaried professionals ought be used only as an adjunct to delivery by private lawyers and their role should be limited to simple advice and referrals.[109] The New South Wales Society went so far as to argue that the employment of such lawyers, other than by the society itself, was wrong in principle and a real threat to the profession's independence.[110] Even though the ALAO did in practice privately refer the bulk of its more challenging work, the hostility to the service only became muted after Whitlam's dismissal and as the profession entered the Fraser era with greater optimism regarding the containment of the salaried sector.

This view was probably encouraged by the statements of conservative politicians who felt there was 'some role' for salaried lawyers, understood as the

making of referrals only. These included the comment of one Liberal parliamentarian that,

> The sooner we get to a salaried scheme which enables one to go in and get general advice, followed by a transfer to the profession which can handle matters, subject to a reasonable means test, and fight in the interests of their clients in the true traditions of the law, the sooner we will get back to a really vibrant legal aid system.[111]

In a similar vein, the Attorney-General of Western Australia, Medcalf, warned that,

> The growth of a salaried legal service paid for by government must lead to conflicts of interest in which the individual risks being subordinated to the paramount interest of government.[112]

Medcalf further contended that lawyers should have only a temporary period of employment in any salaried office. Continuous and long-term careers in legal aid, he asserted, could not ensure the impartial representation of clients and gave rise to an unhealthy fragmentation of the profession.[113] Accordingly, the role of the salaried officers inherited by the new West Australian commission was downgraded and subjected to the direction of private lawyers who controlled the legal aid committees.

However, successive Liberal Attorneys-General at the federal level insisted that the salaried model was to be regarded as an acknowledged and permanent development in legal aid. Most of the Law Societies agreed that salaried lawyers had some role to play. But beyond the growing consensus surrounding this very general proposition, the real debate in this period was about the actual form and extent of that role. In this regard, Ellicott insisted that salaried lawyers should engage in full professional work, including the conduct of litigation, and be given the opportunity to develop their expertise with a complete career in legal aid. In fact, one of his major objections to the ALAO was the extent of 'unprofessional' clerical work performed by officers in

that service.[114] In his view, legal aid lawyers are 'real lawyers' if they do full legal work rather than simply give advice and refer clients to others.[115] Under the new scheme, the actual number of salaried staff above those transferred from the ALAO was to be determined by each commission. But in response to widespread criticism, Ellicott sought to avoid any repetition of the West Australian situation where the role of salaried staff had been downgraded by the excessive influence of private lawyers. Thus, in 1977 the private profession had its majorities reduced on the Australian Capital Territory committees, and the West Australian government was influenced to amend its legislation, with Medcalf being told by the commonwealth Attorney-General that he would have to 'learn to live with' salaried lawyers transferred from the ALAO.[116] Additionally, some guarantee of fair terms and conditions for the future employment of transferred staff without any direct infringement on their work independence was given in Part IV of the Legal Aid Commission Act that year so as to protect their 'professionalism'.[117]

The reasons for these setbacks and the increasing responsiveness of the government to the views of other groups interested in legal aid policy, had mainly to do with questions of finance. The private profession had already expressed its dissatisfaction with the low funding of its own schemes as well as the freeze on ALAO referral funds. But the major source of the animosity felt against successive Liberal Attorneys-General derived from the debate regarding the actual level of fees paid for work referred. The various Law Societies, and the Law Council in particular, continually rejected government proposals to cut growing costs by a reduction in the proportion of fees paid for ALAO referrals to less than 90%.[118] This was even though such a lower figure was already paid by the private state schemes in South Australia and Victoria.[119] It was this conflict over finance, and especially the level of fees, which apparently led to the important shift in government policy in mid-1977 further away from the

private profession's interests. Ellicott became increasingly disillusioned with elements in the Law Council and Law Societies who became more and more vociferous in their demands, and regarded public legal aid as a financial 'bonanza' for private lawyers.[120] This disillusion first became evident in the changes made to the draft Australian Capital Territory legislation.[121]

This tension between the profession and Fraser government continued throughout the decade. In October, 1978, the new Attorney-General, Durack, introduced changed fee scales which excluded payments for time spent waiting at court in order to preserve a $\$\frac{1}{2}$ million in legal aid funds.[122] Moreover, Durack repeatedly pressed for the reduction of fees as well as calling for a greater voluntary effort from private lawyers.[123] This conflict was well reflected in his declaration on opening the West Australian commission that,

> I cannot stress too often or too much that government funds, whether Federal or State, are tightly limited and that legal aid by governments cannot and will not be a complete answer to the problems of people who are obliged to go to law and cannot afford to do so. We have no plans to establish Legibank. That might be good for the legal profession, but would not be good for the taxpayer.[124]

The private profession reacted with further hostility to the proposed lowering of fees. The Law Council contended that high inflation had already lowered their real value and that it was now the responsibility of the government to see to the legal needs of the poor and disadvantaged.[125] The call for more voluntary involvement, especially in the form of a suggestion for an American-style pro bono scheme that would make a certain level of voluntary work mandatory, was also rebuffed.[126] As relations remained distant Durack publicly claimed that lawyers were deliberately and frequently overusing funds by such means as prolonging court cases.[127] He also argued that each new commission should function as a 'watchdog' of public money and resist the excessive demands placed on them by private lawyers, stressing at the opening of the Queensland commission that,

> ... it is not a reason for establishing a Legal Aid Commission to advantage the legal profession and give it the complete say and control about the disbursement of the legal aid dollar.[128]

In these views he was strongly supported by the new chairman of CLAC from 1980, Jostice Else-Mitchell, a strong advocate of neo-conservative cuts in government spending who gave repeated warning of,

> ... the selfish concern for the welfare of one profession or vocation and a disregard for the problems of public finance which are inherent in any subsidised social service or welfare scheme.[129]

The most surprising consequence of the Fraser government's economic policy in the area of legal aid, was its eventual reinforcement of means of delivery other than the judicare model. Ellicott, regarding himself as 'in the middle somewhere' in the salaried-judicare debate, did not favour either the abolition of the salaried sector or any further substantial expansion of it.[130] This decision was to be left for each state commission to make. But the establishment of the state commissions moved slowly and the commonwealth's expenditure grew steeply in the last few years of the decade. The greater use of salaried services, generally regarded as more cost-effective than private delivery, came to be viewed more favourably. It was for this reason that the ALAO Family Court Duty Solicitor schemes switched to salaried staff in 1978.[131] More generally, the threat to substantially develop this form of delivery, especially in criminal trials, was raised in reply to the profession's stubbornness regarding the conflict over fees, but was never fully acted on.[132]

But probably the most unexpected result of all during these years, was the quick development of a series of independent community legal centres throughout the country with the increasing support of the Fraser government and even conservative legal aid officials. These were at first viewed suspiciously by conservative politicians for a conscious rejection of the orthodox model of

professionalism in their efforts towards activist lawyering and due to the radical political stance and alternate social values espoused by many of their staff. The prototype of these centres, the Fitzroy legal service, had been viewed warily by Ellicott for involving itself in 'political' activities.[133] This service expressed great pessimism about the election of the Fraser government and then ambivalence about the state commission's scheme.[134] But as the government grew more concerned about growing costs and searched for a cheaper means by which legal assistance could be provided, it became impressed by the low overheads, high caseloads and extensive use of voluntary labour in such centres. In fact, their structure sat well with the Attorney-General's own view of the moral duty of the privileged to others. Ellicott became impressed by the voluntary schemes he observed on a trip to the United States, and late in the decade took a strong personal role in the founding and financing of the Inner City Legal Service - a Sydney centre staffed by private lawyer volunteers.[135]

These cost-saving features led the government to increase the national funding for community legal centres by $150,000 to $175,000 in 1979-80, $270,000 in 1980-81, and with a 48% increase to $400,000 in 1981-82.[136] This development was resented by Law Society leaders opposed to the expansion of private centres outside of their control. But with Else-Mitchell and a majority of the Commonwealth Legal Aid Council in support, Attorney-General Durack replied that the centres represented 'excellent value for the legal aid dollar'.[137]

This support was further justified by reference to the profession's own declining interest in the charitable provision of aid according to the traditional notion of duty. The centres were viewed as having a limited reliance on state support, and as usefully encouraging notions of 'self-help' among the poor and disadvantaged. It was this curious overlap of some aspects of the organisation and work of the community legal centres and elements of the traditional model of professionalism and classical liberal ideology which led the Attorney-General

to conclude at the opening of the Victorian commission in 1981 that,

> A mix of legal aid that includes these centres is, I believe, appropriate for our own free society, and there is a clear need for the savings that they can bring about.[138]

Events in this period did not only aggravate the internal divisions within the profession. The unexpected rift between the private profession and the Fraser government also indicated that there was no longer any single conservative line with regard to legal aid policy. This was mostly due to the fundamental contradiction between the fiscal policies of a neo-conservative government and the recently developed preference of the profession for further state involvement in this field, understood as subsidising but not administering legal aid schemes. This suggests a basic contradiction in the welfare state to do with the advantages it affords certain occupational groups, sometimes contrary to their expectations.

Several other historical ironies ran parallel to the growing alienation between the government and private lawyers. As the previous main source of legal aid services, the private profession had been pressured by criticism of its various schemes and their failure to meet public needs. But after the large scale reforms of the Whitlam years, the perceived responsibility for legal aid services began to shift to the commonwealth. The various Law Societies even attempted to assume the role of speaking on behalf of the 'needy' and under-privileged in their protests against the Liberal government's aim of curtailed spending. The Law Council, for example, attacked the limited allocation for legal aid made in the federal Liberal budget in September, 1978, by arguing that it was a 'vital need' and further expressed its 'grave concern with the increasing number of people, many of them pensioners, now unable to obtain legal aid'.[139] This also produced the surprising result of the federal Labor opposition supporting professional criticism of proposed cuts in fees paid for legal aid referrals.[140] However, with the excessive hostility shown previously to Labor's

legal aid reforms, the private profession had mostly burned its political bridges with that party. It had instead invested hopes with the incoming Fraser government which proved unfounded.

Notes to Chapter Six

1. See generally, R. Scotton, 'The Fraser government and social expenditures', in R. Scotton and H. Ferber, Public Expenditures and Social Policy in Australia, VII, op. cit., and G. Elliott and A. Graycar, 'Social welfare' in A. Patience and B. Head (eds.), From Whitlam to Fraser. Melbourne, Oxford University Press, 1979.

2. M. Fraser, Representatives, 26/8/75, p.526.
M. Fraser, 11/11/75, Letter to Editor, LSB November, 1975, p.318.

3. J. Harkins, 'Federal legal aid in Australia', op. cit., p.33.

4. ibid.

5. Press release, Attorney-General's Department, Canberra, 28/3/76.

6. Harkins, op. cit., p.13.

7. ibid.

8. Attorney-General Durack, Senate, 23/11/79, p.2875.

9. Harkins, op. cit., p.12.

10. ibid.

11. ibid., p.13.

12. Mr. Ellicott, Representatives, 21/9/76, p.1204.

13. Harkins, op. cit., p.13.

14. ibid.

15. Senator Durack, Senate, 5/10/77, p.1068.
Commonwealth Record, 17-23/10/77, p.1444.

16. J. Gardner, 'Down for the count - Canberra hits legal aid', LSB, December, 1978, p.235.
Commonwealth Legal Aid Commission, 3rd Annual Report, 1979-80, p.11.

17. J. Gardner, op. cit., p.234.

18. Attorney-General Durack, Senate, 23/11/79, p.2875.

19. ibid.
Commonwealth Record, 20-26/8/79, p.1173.

20. Armstrong, 'Labor's legal aid scheme ...', op. cit., p.232.

21. LSB June, 1978, p.129.

22. Senator Evans, Senate, 26/9/78, p.892.
Mr. Bowen, Representatives, 26/10/78, p.2335.

23. Attorney-General Durack, Senate, 26/10/78, p.1653.

24. ibid.
Commonwealth Record, 23-29/10/78, p.1445.

25. Harkins, op. cit., p.13.
Representatives, 17/8/76, p.122.
A. Collett and E. McAdams, 'Aborigines and the law: an overview', LSB, December, 1976, p.99.
J. Fristacky, 'Crisis in the Aboriginal legal service', LSB, June, 1976, p.16.

26. LSB March, 1976, p.378.

27. P. Slade, 'The ALS funding and guidelines', LSB, December, 1976, p.144.

28. Mr. Wallis, Representatives, 4/4/79, p.1540.

29. Armstrong, op. cit., p.228.
Mr. Armitage, Representatives, 19/2/76, p.132 and 30/3/76, p.1139.

30. Armstrong, op. cit., p.229.
Mr. Ellicott, Representatives, 19/5/76, p.2252.

31. Harkins, op. cit., Appendix E.

32. ibid., Appendix E, p.1.

33. ALAO Tasmania, Circular to the profession, 29/9/77.

34. ibid., p.3.

35. 'Summary of the report by the Attorney-General's Departmental Committee on the operations of the guidelines for the ALAO on means and needs and commitment level', Attorney-General's Department, Canberra, February, 1978.

36. ibid.

37. Attorney-General Durack, Senate, 25/10/78, p.1593.
Commonwealth Record, 17-23/8/81, p.977.
Armstrong, 'The future of legal aid', in J. Goldring et al., Access to Law, op. cit., p.190.

38. Senator Evans, Senate, 8/11/78, p.1782.

39. Attorney-General Durack, Senate, 25/10/78, p.1594.

40. ibid.

41. ibid.
ALAO Tasmania, Circular to the profession, 29/9/77, p.2 and p.3.

42. Armstrong, op. cit., p.232.

43. Commonwealth Legal Aid Commission, 2nd Annual Report, 1978-79, p.13.

44. LSB June, 1981, p.113.

45. ibid., June, 1981, p.113 and p.165.

46. Attorney-General Durack, Senate, 9/4/81, p.877.

47. Green v. Daniels, ALJR 51 (1977) 463.
P. Hanks, 'School leavers, government policy, and the High Court', LSB, June, 1977, p.251.

48. Terry Murphy, Interview, 20/3/86.

49. Armstrong, 'Labor's legal aid scheme ...', op. cit., p.233.

50. Senator Ryan, Senate, 2/11/76, p.1487.

51. 'The Commonwealth Legal Aid Commission's - 1st Annual Report - 1978', ALJ, v.53, p.111.

52. 'Meeting of Commonwealth and State Attorneys-General on legal aid - 4/3/76 - Some alternative approaches to the provision of legal aid in Australia', Attorney-General's Department (no date).

53. ibid., p.1.

54. ibid., p.3.

55. ibid., p.6.

56. ibid., p.8.

57. ibid., p.11.

58. Attorney-General Durack, 'Proposed changes to the legal aid system', Comm. Record, 10-16/10/77, p.1408.
See also Attorney-General Ellicott, 'Second reading speech', Commonwealth Legal Aid Commission Act 1977, Representatives, 25/5/77, p.2032.

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60. ibid.

61. ibid.

62. ibid.

63. Attorney-General Ellicott, Representatives, 27/5/77, p.2033.

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R. Skelton, 'Legal aid in austerity dock', Age, 14/6/76.
'Legal aid: the continuing need', Age, 16/6/76.
A. Summers, 'Is legal aid meant to be easy?', National Times, 5-10/7/76.

65. Senator Baume, Senate, 22/2/79, p.205.

66. Mr. Jacobi, Representatives, 25-26/8/77, p.1900.

67. P. Hanks, 'Legal aid debate', LSB, February, 1977, p.170.
S. Armstrong, '1977 and beyond: the new legal aid ordinance', LSB, April, 1977, p.207.
A. Khan and J. Hacket, 'Legal aid: the West Australian Commission', LSB, August, 1977, p.274.
Senate, 7/12/76, p.2694.
On staff resistance generally, see R. Ackland, 'Salaried government lawyers rebel', Aust. Fin. Rev., 6/12/76.

68. Armstrong, 'Labor's legal aid scheme ...', op. cit., p.242.

69. Robert Ellicott, Interview, 24/2/86.

70. I. Medcalf, 'Observations on legal aid in Western Australia', 1976, p.519.

71. Robert Ellicott, Interview, 24/2/86.
See also M. Sexton, 'A thorny problem for Ellicott', Bulletin, 9/4/77.

72. Attorney-General Ellicott, Representatives, 6/10/76, p.1547.
Attorney-General Ellicott, Representatives, 6/10/76, p.1843.
Attorney-General Ellicott, Representatives, 19/10/76, p.2000.
Attorney-General Ellicott, Representatives, 1/6/77, p.2349.

73. Draft Legal Aid Ordinance, 1976 (ACT), S.7.
Mr. Bowen, Representatives, 16/11/76, p.2686.
Armstrong, '1977 and beyond: the new legal aid ordinance', LSB, April, 1977, p.208. This apparently followed proposals from the Law Council. But contrary to its recommendations, the chairman could be a judge.
'Comments on legal aid', LCA, 31/10/76.

74. Legal Aid Ordinance, 1977 (ACT), SS. 10, 11.

75. Armstrong, 'Labor's legal aid scheme ...', op. cit., p.244.

76. Armstrong, op. cit., LSB, April, 1977, p.209.

77. Legal Aid Ordinance, 1977 (ACT), S.10(1(m)), S.10(2(b)), S.10(2(A)), S.10((I)1).

78. Armstrong, 'Labor's legal aid scheme ...', op. cit., p.243.

79. Armstrong, '1977 and beyond: the new legal aid ordinance', op. cit., pp.208, 209 and 210.
ACOSS News release, 17/11/76, p.1.

80. ACOSS News Release, op. cit., p.2.

81. Armstrong, 'Labor's legal aid scheme ...', op. cit., p.243.
J. Ramsden, 'Inquiry into Legal Aid Office', Aust. Fin. Rev., 9/11/76.
'The biggest sweetheart deal of all', Aust. Fin. Rev., 10/11/76.
Mr. Bowen, Representatives, 10/11/76, p.2514, and Representatives, 16/11/76, p.2684.

82. Ellicott has rather weakly defended this move, by claiming it was intended only to uncover the view of the private profession, Robert Ellicott, Interview, 24/2/86.

83. Armstrong, 'Labor's legal aid scheme ...', op. cit., p.244.
'Legal Aid Commission for ACT', Commonwealth Record, 18-24/7/77, p.920.

84. Armstrong, ibid.
Despite these changes staff and welfare groups still protested at the level of private professional representation on the commission and its proposed committees.
'Comments on draft Legal Aid Ordinance, 1977', CAGEO, 6/4/77.
'Letter to Attorney-General Ellicott re: proposed ACT legal aid commission', Australian Government Lawyers' Association, 27/7/77.
'Comments on the ACT Legal Aid Ordinance, 1977', ACOSS, 1977.

85. Commonwealth Legal Aid Commission Act, 1977, Representatives, 1/6/77, p.2323.
'Commonwealth Legal Aid Commission Act - 1977', ALJ, v.51, p.602.

86. S.5.

87. S.6(a),(b),(g),(h), and (c).

88. S.6(k).

89. Part IV.
Attorney-General Ellicott, 2nd Reading Speech, Representatives, 27/5/77, p.2034.

90. 'Press release on Commonwealth Legal Aid Commission Bill', AGLA, 29/5/77.
Mr. Ruddock, Representatives, 1/6/77, p.2334.

91. Attorney-General Ellicott, Representatives, 27/5/77, p.2033.

92. Mr. Bowen, Representatives, 1/6/77, p.2350.

93. CLAC, 2nd Annual Report, 1978-79, p.13.
Durack replied to the report's claim that middle income earners were being denied assistance and that the average Australian worker was without access to justice, by arguing that it wholly 'failed to appreciate the need for restraint in the expenditure of public moneys'. 'Legal Aid Commission Annual Report', Commonwealth Record, 26/11-2/12/79, p.1817.

94. 'Replacement of Commonwealth Legal Aid Commission', press release - Attorney-General's Department, Canberra, 1/5/81.
T. Nyman, 'A funeral for the Commonwealth Legal Aid Commission', Aust. Law News, April, 1981, p.7.

'If you missed the original version ... now comes son of CLAC', Redfern Legal Centre News, May, 1981, p.2.

95. R. Tomasic and C. Bullard, Lawyers and Their Work ..., op. cit., pp.269 and 261.

96. 'Law Council puts its views on legal aid to Attorney', Law Council Newsletter, March, 1976, p.1.
Law Council of Australia - Annual Report, 1976, p.13.

97. Harkins, 'Federal legal aid in Australia', op. cit., p.12.

98. ibid., p.13.

99. Mr. A. Whitlam, Representatives, 19/10/76, p.1994.

100. Ken Kershaw, Interview, 22/12/86.

101. 'Legal aid bill unacceptable', Law Council Newsletter, November, 1976, p.11.
Law Council of Australia, Annual Report, 1977, p.19.

102. Armstrong, '1977 and beyond: the new legal aid ordinance', LSB, April, 1977, p.208.

103. (Western Australia) Legal Aid Commission Act, 1976, SS. 7 and 38.
A. Khan and J. Hacket, 'Legal aid: the West Australian Commission', LSB, August, 1977, p.274.
Armstrong, 'Labor's legal aid scheme ...', op. cit., p.247.

104. Armstrong, ibid.

105. ibid., p.244.

106. ibid.

107. Attorney-General Ellicott, Representatives, 1/6/77, p.2354.

108. Chapter Seven, p.303.

109. Chapter Four, pp.172-173.

110. Chapter Four, p.173.

111. Mr. Neil, Representatives, 19/10/76, p.1996.

112. I. Medcalf, 'Observations on legal aid in Western Australia', 1976, p.523.

113. ibid.

114. Attorney-General Ellicott, Representatives, 16/11/76, p.2688.
In the same speech the Attorney-General declared that,

> If the States engage in any commission in an attempt to destroy the salaried service, as far as I am concerned I shall be moving my Government to withdraw funds from those commissions because I am not in the business of destroying the salaried service. ibid.

115. Robert Ellicott, Interview, 24/2/86.

116. ibid.

117. ibid.

118. 'Allocation of funds for legal aid', Commonwealth Record, 11-17/9/78, p.1203.

119. J. Gardner, 'Legal aid: the pressure for reform', in G. Evans (ed.), Law, Politics and the Labor Movement. Clayton, LSB, 1980.

120. Robert Ellicott, Interview, 24/2/86.

121. Ellicott has rather revealingly declared that he 'can't recall' the reasons prompting these substantial changes to the draft legislation. ibid.

122. Senator Durack, Senate, 25/10/78, p.1594.

123. 'Opening of legal aid commission of Western Australia', Commonwealth Record, 24-30/4/78, p.435.
'Opening of the ACT legal aid commission', Commonwealth Record, 10-16/7/78, p.852.
'Speech to legal aid seminar', Commonwealth Record, 16-22/2/81, p.143.
'Opening of Queensland Legal Aid Commission', Commonwealth Record, 21-27/1/80, p.62.

124. 'Opening of Legal Aid Commission of Western Australia', Commonwealth Record, 24-30/4/78, p.435.

125. Senator Missen, Senate, 8/11/78, p.1802.
Law Council of Australia, Annual Report, 1980, p.15.

126. Report of Providing and Funding Legal Aid Conference, CLAC, June, 1981, p.14.

127. 'Opening of Queensland Legal Aid Commission', op. cit., p.62.

128. ibid.

129. R. Else-Mitchell, 'Legal aid and the judicial system', Paper to annual conference of Supreme Court judges, Canberra, 27/1/83, p.1.
Else-Mitchell, 'Address on legal aid to the ACT Law Society', Canberra Club, 11/7/78.
CLAC 3rd Annual Report 1979-80, p.6, and
Report of Providing and Funding Legal Aid Conference, op. cit., p.9.
'A day in the life of Mr. Justice Else-Mitchell', Justinian, 16/3/81, p.8.

130. Robert Ellicott, Interview, 24/2/86.

131. 'Opening of ACT Legal Aid Commission', op. cit., p.852.

132. CLAC, 3rd Annual Report, 1979-80, p.6.
Report on Providing and Funding Legal Aid Conference, op. cit., p.11.

133. Julian Gardner, Interview, 15/11/85.
The 'political' activity in question was a public demonstration of FLS staff and clients outside a Melbourne retailer, which lent money and sold goods on harsh repayment terms.

134. See Editorial, LSB November, 1975, p.285.
Reaction to the commission's scheme later centred on its likely outcome in terms of private professional control. 'If implemented in good faith, the Australian government's New Federalism may be quite appropriate in the sphere of legal aid. However, it will be most unfortunate if it preserves or strengthens, the private profession's extensive control of legal aid'. LSB March, 1976, p.350.

135. Robert Ellicott, Interview, 24/2/86.
'The Bambergering of R.J. Ellicott', Justinian, 31/8/79, p.2.

136. 'Budget allocation for legal aid', Commonwealth Record, 20-26/8/79, p.1173.
'Budget allocation for legal aid centres', Commonwealth Record, 17-23/8/81, p.976.

137. CLAC, 2nd Annual Report, 1978-79, p.13.
Report of Providing and Funding Legal Aid Conference, op. cit., p.11.
'Opening of Victorian Legal Aid Commission', Commonwealth Record, 19-25/10/81, p.1360.
See also 'Commonwealth Legal Aid Commission Conference', Aust. Law News, April, 1981, p.8.

138. ibid.

139. quoted in Senator Missen, Senate, 8/11/78, p.1802.

140. Mr. Bowen, Representatives, 27/10/77, p.2508.
Mr. Bowen, Representatives, 26/10/78, p.2349.

three nominees of the Law Society, a person who in the Attorney-General's view represented 'assisted persons' (in practice a nominee of SACOSS), as well as the service director.[41] The inclusion of the director proved important as this position was first held by Sue Armstrong, a Sydney academic lawyer and former research assistant to the Poverty Commission noted for her criticisms of the traditional private schemes, and then by Geoff Eames, a former lawyer with Fitzroy Legal Service.[42] By a 1979 amendment, the commission was increased to eleven members through the inclusion of a representative of the scheme's salaried employees in line with the Labor government's declared policy of furthering 'worker's participation' in public agencies.[43]

The Law Society bitterly attacked the clear minority status of their representatives.[44] But they were not alone in criticising the strong personal role of the Attorney-General in appointments. This view was shared with the parliamentary opposition as well as welfare groups, and voluntary legal aid lawyers.[45] Thus, the Legal Service Bulletin in June 1977, noted that in contrast with the situation in the Australian Capital Territory and Western Australia the private profession did not have a 'disproportionate voice' on this commission, but that there was an inadequate representation of consumer and welfare groups, and that,

> ... clearly the balance of power has been left with neither the profession nor the consumers of legal services but with the Attorney-General.[46]

In keeping with the brief and broad terms of this act no detailed reference was made to the establishment of legal aid or local committees. However, the commission was given a wide scope to establish committees to take applications, determine appeals, or advise the commission, and their form and composition was left open for the commission's determination.[48] Its statutory functions included the broad power to give legal assistance, and the establishment of local offices as necessary. Provision was made for advertising,

CHAPTER SEVEN

STATE DEBATES

The State Commissions

The divisions within the legal profession regarding legal aid policy which continued through the Fraser years, were also evident at the state level. Here, the pattern of mixed political fortune for the traditional leadership of the private profession was repeated in debates surrounding the establishment of new legal aid commissions in the late 1970s and the 1980s. The struggle against rival (particularly other lawyer) groups to define and most convincingly claim to represent the 'public interest' in legal aid was reproduced at this level. So too was the struggle to limit the development and input of salaried legal aid lawyers.

The extent to which these goals and the effective control of legal aid policy and administration could be reached by the various Law Societies differed between states. This particularly depended upon the degree of mobilisation of rival interests and the political outlook of each state government. But an urgent need for spending cuts and fiscal restraint was felt at the state level, especially with the lower level of commonwealth commitment to state government programmes after 1975.[1] These governments assumed a greater responsibility for meeting unmet needs as well as the daily management of legal aid services in this period of tight funding. The increasing pressure upon them to ensure an efficient allocation of available resources, or at least the autonomy of the decision-making bodies that would determine what this meant, eventually further limited the private professional influence in this field.

Western Australia

In December 1976, the Legal Aid Commission Act was passed by the Liberal state government. As this statute was based on the first Australian Capital Territory draft - drawn up in a period when the federal Liberal government was itself more sympathetic to the private profession's interests - it was a highly conservative piece of legislation. Apart from the local ALAO itself, CAGEO and AGLA, there was little organised resistance that could counterbalance the hostility of the state Attorney-General towards salaried legal aid schemes and his open support for control and delivery by private practitioners.[2]

The act provided for a seven-member commission. This was to comprise a judge or private lawyer of at least seven years standing as chairman, four nominees of the state Attorney-General including three Law Society representatives and one lay person with senior administrative experience, a lay nominee of the consumer affairs minister (not WACOSS) to represent the assisted, as well as a nominee of the commonwealth Attorney-General.[3] The commission's director was to be an ex-officio member.[4] This strong ministerial role in appointments ensured a conservative membership. A majority of members were to be current or former private lawyers.

Control of the commission's operations was reinforced by an unchallenged position on the legal aid committees established under the act.[5] These had only private lawyer members and, prior to the 1977 amendments, had wide administrative powers including the authority to allocate work between salaried officers and private practitioners and thereby determine the type and extent of work completed inhouse.[6] The commission's statutory work guidelines followed the Australian Capital Territory model in making reference to the need to develop efficient, economical and accessible services.[7] But this was outweighed by references to the importance of maintaining the independence of the profession

by allowing the assisted a choice of practitioner.[8] A provision stating that the use of salaried services was desirable only 'where appropriate' was added.[9] ALAO staff criticism that the bill reflected 'an unequivocal bias towards the vested interests of the private legal profession',fell on deaf ears.[10]

According to the act, the purpose of the new scheme was the simple delivery of legal aid. This was narrowly defined as being assistance with regard to litigious matters only.[11] As well as the usual application of a means test, access was restricted by the statutory provision requiring 'reasonableness' in every case. This test of merit required any proposed action to have a fair chance of success and to relate to a problem 'the solution to which may be obtained within the field of normal legal practice'.[12] This restricted the possibility of involvement in such non-traditional areas as law reform and group work, public interest law, and the conducting of test cases.

The statutory guidelines did make some provision for programmes of legal education and the involvement of law students in delivery.[13] But in practice the scheme was lacking in innovation regarding newer forms of service directed towards altering the social circumstances of the assisted. It thus well reflected the opposition of the state Attorney-General to 'legal activism' and his insistence that the real purpose of any scheme was to be the rendering of a conventional service to impecunious individuals and that this 'must not be submerged in any social design or plan for law reform or ulterior proceeding no matter how well-intentioned'.[14]

A duty solicitor service of narrow scope was begun in city and suburban lower courts soon after the commission began operating in April, 1978.[15] As well as this, some welfare workers were engaged on a voluntary basis, private lawyers were encouraged to contribute to a limited voluntary advice service, educational talks were given by staff to various community groups and a system of staff 'prison visits' evolved.[16] But a low priority was given to developing

these areas. This was even though for some years Western Australia had no community legal centres to engage in this form of lawyering.

The commission's second annual report declared that its principal aim was to reproduce only the range and level of legal services formerly offered by the ALAO and the state Law Society scheme.[17] But it has had a limited success in even meeting the demand for conventional services. The commission was soon hampered by a severe shortage of funds and lack of staff. Certain causes of action were excluded from its work in order to conserve resources, as had been done previously by the ALAO.[18] The sudden expansion of demand for help in matters under the commonwealth Family Law Act meant that this area soon comprised the bulk of its work, reaching 75% by 1979.[19] Financial difficulties were exacerbated by the very large proportion of work done on referral and at a high figure of 90% of full fees, in response to pressure from the private profession. Of 1946 cases dealt with in the ten weeks between 17/4/78 and 30/6/78, some 1777 were referred to private lawyers and merely 169 dealt with inhouse.[20]

Lack of resources also limited the availability of aid in criminal matters. Full assistance was generally offered in lower court matters only if a real risk of imprisonment existed. Help was not normally given in even the most serious cases of indictable crime unless the application was deemed meritorious within the test of 'reasonableness', and there was a fair chance of acquittal.[21]

This failure to provide representation in a substantial number and range of criminal matters drew criticism from civil liberties groups.[22] But the greatest embarrassment surrounding the harsh application of the test of merit came from the publicity which followed the McInnis trial in 1979. In this case a defendant accused of rape was left to conduct his own defence the day after he was suddenly refused assistance on the grounds that the application was lacking in merit.[23] The defendant's conviction was upheld on an appeal to the High Court,

but not without some stinging criticisms of the commission's mode of operation from Mr. Justice Murphy.[24] As well as the problem of restricted resources, the private profession's earlier success in securing a strong position within the commission's organisation put strict limits on the extent to which new areas and forms of delivery could be developed.

The commission's very high rate of private referrals was apparently opposed by the director, Roberts-Smith, who wanted his staff involved in more complex and interesting work.[25] Because of the expensiveness of this practice, his position was supported by both CLAC and the federal Liberal government.[26] This drew out the important differences between the views of the Fraser government and those of the state government which ~~better~~ favoured the interests of the private profession. Due to Ellicott's insistence, a 1977 amendment was added that reduced the private lawyers' influence on committees allocating legal aid work.[27] Federal pressure also led the commission to reduce the level of fees payable on referred work to 80%.[28]

This political pressure on the commission to change its work patterns has continued in the Hawke years. Staff lawyer numbers had risen from twenty-one in 1979 to twenty-seven by 1981.[29] But in 1983 the federal Labor government assured the commission of funds to employ more staff on condition that the proportion of work referred be reduced.[30] This offer and the earlier pressures did have an effect. The level of work completed inhouse grew from 14% in 1978/79 to 30% in 1984/85 and continued to increase afterwards.[31] The number of legal staff rose to thirty-four in 1984 and thirty-eight in the following year.[32] This expansion made possible the opening of two new regional offices (to total four) in 1984; a development that was much overdue in a large state that could not be adequately serviced by only a very small number of offices and the occasional work of the 'flying lawyer'.[33] A research section was also proposed.[34] But the commission's work is still strongly focused upon meeting

the high levels of demand in such areas as family law and serious criminal matters.

South Australia

Support and opposition to Ellicott's state commissions scheme did not always follow party lines. It was a major disappointment for ALAO staff and allied groups expressing resistance to the scheme, when the Dunstan Labor government in South Australia in mid-1976 announced its intention to establish such a commission.[35] The reasons for this unexpected move have been unclear. But Attorney-General Duncan saw a ready opportunity to end the problems of duplicated service with a more comprehensive scheme, and to restructure the state's inadequate system of legal aid in a way that 'completely broke Law Society control'.[36] The need to bring about such organisational change was more pressing in that South Australia had only two offices of the ALAO, and this service was also regarded by Duncan as rundown and of poor quality.[37]

Although Ellicott's scheme was followed in South Australia, the eventual structure and organisation of the commission was a major setback for the private profession. In September, 1976, the state government established a working party to report on the commission proposal.[38] It included several Law Society representatives. These had proposed a commission of nine, with a judge or private lawyer as chairman and four Society nominees, giving the private profession an effective majority.[39] This proposal and that of alternate legal and welfare groups including SACOSS for a strong representation of consumers by lay members, were rebuffed by the government.[40]

The Legal Services Commission Act of 1977 provided for a ten-member commission. This comprised a judge or legal practitioner (not necessarily private) of at least five years standing as chairman, one nominee of the commonwealth Attorney-General, three nominees of the state Attorney-General,

community legal education, the involvement of law students in delivery, as well as the engagement of interpreters, counsellors and social workers on the lines of the Australian Capital Territory model.[49] Additionally, a clause providing for public interest work was included.[50]

The commission began operating in January, 1979, with a staff of seventy-five including nineteen lawyers.[51] Its broad power to grant assistance was in practice mitigated by a continuous shortage of funds, especially to deal with the expanding demand in federal family law matters. As in other states, guidelines were imposed which restricted aid in certain causes of action, including divorce applications, custody and access disputes, conveyancing and simple probate, and most traffic matters, unless special circumstances could be shown.[52] On occasion, the service was forced by low funds to refuse help to some applicants who were otherwise eligible.[53] This situation worsened such that in 1982-83 for the first time the commission reported a lower number of applications for assistance.[54] This did not reflect any decrease in demand but followed on from a higher rejection rate (rising from 16.2% in 1980-81 to 19.7% in 1981-82) and less advertising of the service.[55]

The bulk of the commission's work comprised family law and criminal matters. But a serious effort was also made to engage in less orthodox areas and means of lawyering. It operated a lower court duty lawyer service similar to that established under other schemes, and began a service for prisoners in 1981.[56] There were some innovative developments in community legal education and the use of paralegal staff. A unique programme of self-help divorce classes was set up.[57] The community education goal was furthered by the full-time employment of a research officer, the production of pamphlets on common legal problems, and a South Australian version of the Legal Resources Book.[58]

The commission sought to economise its resources and make its services more accessible by employing paralegal staff to perform work including giving

general advice.[59] The decision to recruit a full-time social worker as funds permitted, was made in 1982-83.[60] Test cases have also been conducted regularly. This is usually in 'federal matters' so that the expense of any complex or protracted litigation would be met by the commonwealth.[61]

The commission's work guidelines followed the Australian Capital Territory model in referring to the requirements of efficiency, economy, accessibility, free choice of practitioner, maintenance of the independence of the private profession as well as the desirability of staff handling full legal work as was 'reasonably practicable'.[62] Against opposition warnings of a likely intrusion into the work of the private profession, this provision was strengthened by the 1979 amendments which stipulated the desirability of staff engaging in full litigation to protect and develop their professional expertise.[63]

Relations with the Law Society, still angered by its lack of influence on the commission, were poor from the ootset. This situation was exacerbated by a series of disputes regarding the commission's operation. Fees paid for referrals were at first held to the level of 80% that had been formerly paid by the private scheme. But against much protest payments were reduced to 75% of normal fees in order to meet substantial debts allegedly inherited from the Law Society scheme.[64] Apparent plans to expand the number of commission offices and the use of salaried staff, were also attacked.

With the administration's view that the salaried model was more economical and its publication of figures to support this claim, a commitment to increase the level of inhouse work was reached.[65] The level of work dealt with by staff - the highest of any combined state legal aid commission in the early 1980s - rose from 25% to 30% in 1983-84 and reached 33% by 1985.[66] As well as reflecting commission policy, this rise was due to the support of the new commonwealth Labor Attorney-General Gareth Evans, for this practice. Evans provided the commission with additional funds in 1983 in order to recruit more

staff (rising from sixty-eight to eighty-four that year) and to establish two new regional offices.[67] Law Society protests against these developments were disregarded.

Queensland

Despite the political conservatism of Queensland's long-ruling National party government, there was a marked early reluctance towards Ellicott's commissions scheme. This stemmed not only from a mistrust regarding the commonwealth's financial terms, but more unexpectedly, from the wide popularity of the regional offices of the ALAO in country areas.[68] The state government resolved to pass legislation while it was still negotiating financial terms with the commonwealth. But the public popularity of the ALAO, and the state government's support for the retention of a minimal salaried service did not mean that the resulting commission was intended to be progressive in either its structure or work.

The Legal Aid Act of 1978 provided for a seven member commission comprising a judge or private lawyer as chairman, a nominee of the Bar Association, two nominees of the Law Society, a nominee of the commonwealth Attorney-General, as well as two nominees of the state Attorney-General one of whom was viewed as 'appropriate to represent the interests of assisted persons'.[69] The service director was given observer status on the commission.[70] A majority of commissioners were former or current private lawyers. As in Western Australia, there was a lack of organisational opposition to the private control of legal aid schemes. Most consumer and welfare groups were ~~effectively~~ locked out of the commission by the conservative use of the ministerial power to appoint the member representing the assisted. The first appointee for this position was a member of a religious charity.[71]

The strong presence of the private profession on the commission was reproduced at other levels. The various legal aid committees were to comprise the director or an ex-officio member, a lay representative who might be appointed, and any number of private lawyers as the commission determined.[72] A prominent position was also secured on the various appeal committees which had a cross-membership with the legal aid committees.[73] Any local consultative committees which the Attorney-General might appoint were to comprise private lawyer majorities as well as persons conducting a local 'business, profession or trade' apparently intended to represent small business interests rather than those of legal aid recipients.[74]

The commission's work guidelines also followed the pattern of the revised Australian Capital Territory draft in referring to the need to balance efficiency, accessibility, and the desirability of staff developing their professional expertise, with the aims of allowing a free choice of counsel and protecting the independence of the private profession.[75] These provisions sat as a statutory recognition of the mixed model of delivery, and a minimal guarantee that legal work was to be both referred and completed inhouse.

The statutory functions of the commission included the power to establish local offices, determine priorities of need, provide duty solicitor services, engage in community legal education, involve law students in delivery, make law reform recommendations, and also to secure the services of interpreters, counsellors and welfare officers.[76] The commission had no statutory mandate to conduct test cases and engage in public interest work.

The service began operating in December 1979, with a staff of twenty-five lawyers and forty-seven non-lawyers.[77] The private profession's influence was evident in the very high referral rates for the first few years. CLAC figures for applications approved in Queensland in 1979 indicate that only 542 matters were dealt with by staff and 7,927 referred.[78] This margin narrowed

slightly in 1980-81. That year 1,089 matters were handled inhouse and 10,618 referred.[79] This practice placed a considerable strain on the resources of the service, particularly as it experienced a sharp increase in the demand for aid in the early 1980s. Public demand was reported as almost doubling in the three years between 1980/81 and 1983/84.[80]

As in Western Australia, the high referral rate led to an internal conflict between the commission and the Director of the service who wanted more staff involvement in full legal work.[81] Its apparent costliness also led to federal criticism. With this pressure, a policy of raising the level of inhouse work was adopted. In 1983/84 this rose by 90%.[82] This was a dramatic rise, but the service still has a low inhouse ratio as compared to other states. In 1984/85 21% of approved matters were handled by staff lawyers.[83]

Despite the conservative composition of the commission and high demand in conventional areas, the service eventually had some surprisingly progressive features in its operation. These were apparently due to the efforts of its early Directors, Barry Smith and Kerry Dillon, the former head of the Tasmanian ALAO. A prisoner's advice service was begun in 1980/81 and a social worker employed in the same year.[84] A Family Court duty lawyer scheme commenced in 1981/82.[85] Increased federal support from 1983 made possible the development of a much overdue lower court duty lawyer service, the funding of community legal centres, and the establishment of a research and education section of the commission.[86]

Victoria

The Victorian government also at first took a cautious attitude towards the establishment of a state commission. But in 1976 the private profession in this state produced a joint submission of the Law Institute and the Bar Association regarding the proposed changes. This was a basically conservative

document which proposed a commission of nine, chaired by a private lawyer and with two nominees each from the Bar Association and the Law Institute.[87] Even though a representative of VCOSS was included, a clear majority of private professionals was planned. Some support for the idea of salaried storefront offices was also declared with the claim that,

> Whatever earlier views might have been entertained, it is now almost universally accepted within the profession that a salaried service is required.[88]

But it was also evident in this submission that a limited, mostly referring role was envisaged for salaried staff.[89]

This document was extensively criticised by ALAO staff, welfare groups, and alternative and voluntary legal service lawyers, particularly from Fitzroy Legal Service. All attacked the proposed private lawyer majority, the narrow, orthodox conception of needs, assistance and delivery, as well as the absence of provisions for both activist work and community participation.[90] These groups variously proposed a larger commission with greater consumer, and even staff, representation. This criticism was further reinforced by a Melbourne conference of voluntary services in October 1976, organised from Fitzroy to help mobilise against the private profession's proposals.[91]

With this unexpectedly vocal opposition the Law Institute established a working party to reconsider its views. The policy reports of some of this bodies' members were still highly conservative.[92] But the effect of the inclusion of more liberally-minded members including David Jones and Julian Gardner, a member of FLS, as well as a probable calculated decision to compromise with the opposition, was evident in the second joint submission published in May, 1977.[93]

This proposed a further lay representative giving a commission of ten members.[94] Legal aid was more broadly defined and the need for new forms of 'activist' lawyering and delivery through both a developed salaried sector and

experimental community legal centres was accepted in principle.[95] An effective control over any legal aid committees was still proposed, but the real exception to this shift in the profession's attitude came from the more conservative Bar Association. The latter insisted that these committees should, as in Western Australia, have a wide power to allocate work between salaried and outside lawyers, thus giving them a substantial control over the commission's staff.[96]

Despite this compromise and a Liberal state government, the profession failed to have its proposals regarding the membership of the commission accepted. The Legal Aid Commission Act of 1978, provided for a commission of nine, with a legal (but not necessarily private) practitioner of at least seven years standing as chairman, one nominee each from the Law Institute and the Bar Association, one nominee of the commonwealth Attorney-General, the service director (a practitioner of at least five years standing), a nominee of VCOSS (appointed by the minister of Social Welfare), as well as three nominees of the state Attorney-General including one person to represent voluntary services and another to represent the assisted.[97] The private profession was left in a clear minority. Interestingly, the Liberal government followed the same course as the Labor government in South Australia in giving itself a strong input into the commission with a sizeable number of ministerial appointees.

The private profession's plans to have a strong presence on the commission's organisation at other levels were also rebuffed. The legal aid committees were to comprise five members each; these being one representative each from the Law Institute and the Bar, one from community legal centres, and two lay members appointed by the Attorney-General.[98] The private profession did not even have a guaranteed majority over the proposed local committees which could be established as the minister determined.[99]

The commission's work guidelines followed the Australian Capital Territory model with their reference to the requirements of efficiency, economy

and accessibility, the desirability of a free choice of practitioner, and the need to protect the independence of the private profession as well as the expertise of salaried staff - through the conduct of litigation and full legal work.[100] This last provision was reinforced by a further reference to the 'desirability' of salaried services being used 'where appropriate in the provision of legal assistance services'.[101]

The statutory functions of the commission included the power to grant assistance, determine priorities of need, establish local offices and allocate work between staff and private lawyers.[102] The commission could also advertise its services, administer programmes of legal education, involve law students in delivery, secure the services of counsellors and welfare officers, as well as conduct research and make law reform recommendations.[103] But the inclusion of these latter provisions did not mean that the government intended that the commission would engage in any substantial amount of activist work or develop an expertise within non-traditional areas of law.

The opposition proposed amendments that would give an explicit mandate to take up test cases and public interest actions, especially in environmental and consumer law.[104] But these were rejected outright with the explanation that the idea of any 'trail blazing group action' would receive no support as,

> ... the Government sees as the commission's primary role the provision of legal aid to persons who need legal aid and cannot afford it. That may be too narrow a restriction in the law, but a real one when we get to the realities of the situation. We do not see it as a means for environmental groups and others to raise matters of important significance; we see its primary role as that of assisting people who need legal aid.[105]

It was ironic that the conservative state government firstly rejected the private profession's proposal regarding the composition of the commission, opting for a strong 'state' representation rather than a strong private professional or alternate and welfare membership, and then also rejected the more liberal views

expressed in the profession's second submission regarding the work pattern of the proposed commission.

The Victorian legal aid commission began operating in September 1981, after an almost two-year delay caused by protracted financial negotiations with the commonwealth. Its Director, former Fitzroy Legal Service lawyer Julian Gardner, headed a staff of one hundred and seventy-eight including fifty-eight lawyers.[106] This service also experienced difficulties with a rapidly increasing demand for assistance; applications for help rose by around 10% annually in its first few years of operation.[107] Because of factors including the comparatively small scale of the ALAO in Victoria, the commission had only four regional offices.[108] The early pressure on the service and its funds was apparently made worse by a high level of private referrals - particularly to barristers in criminal committal hearings. CLAC figures for 1981/82 indicate that only 1,821 approved matters were dealt with by staff and 22,181 referred that year.[109] This practice appears to have been partly the result of staff shortages.[110]

The commission established a prisoners advice service, and a duty lawyer service in Melbourne family, magistrates' and children's courts in 1981/82. This was extended to country courts in 1983.[111] Despite an explicit statutory directive, the commission has involved itself in such new areas as administrative law, giving aid in freedom of information matters and social security appeals.[112] It also has a strong emphasis on community legal education. A position for one education officer was created in 1981/82, but five staff were working in this area by 1986.[113] Another notable feature of the service has been its support of the Victorian community legal centres where several of its professional staff originated. These were allocated $200,000 in 1981/82, $300,000 in 1982/83, and $400,000 in 1983/84.[114]

Increased federal support in 1983 made an expansion of activities possible. A fifth regional office opened that year.[115] Staff numbers rose to two hundred

and five (including seventy-three lawyers) in 1983 and two hundred and forty-three (including ninety-two lawyers) in 1984.[116] With this additional staff, the ratio of work completed inhouse rose from 13% to 18.8% in 1983/84.[117] However, in 1985/86 this still stood at the comparatively low level of 23.8% of all applications approved.[118]

New South Wales

In New South Wales the fortunes of the private profession with regard to legal aid policy in the 1970s, depended very much on the political outlook of the state government. In 1967 the Law Society approached state Liberal Attorney-General McGaw seeking the right to collect interest on solicitor's trust accounts for its own purposes. The Attorney-General agreed to this, but on condition that the Society begin its own legal aid scheme to supplement the work of the Public Solicitor.[119] This scheme was begun by a then reluctant and disinterested Council in 1971.[120] In January 1973 the Law Society made a further submission to the state government suggesting minor extensions to its scheme.[121] In reply, McGaw requested that it take on the entire superior court civil work of the much older Public Solicitor's scheme so that could expand its involvement in criminal legal aid.[122] The Law Society obliged and accepted this civil work. This may have partly been because the Society would inherit some of the more lucrative negligence and third party work of the Public Solicitor.[123] But the offer also coincided with the beginnings of a concerted effort by the Society to expand its involvement in legal aid, and to forestall the further development of the salaried sector with a demonstration of the viability of private delivery.[124] This drive came to be accompanied (especially under the leadership of Loxton) by an ideological campaign against salaried delivery which even the conservative state Commissioner for Legal Aid Services in 1975 described as a distorted and 'quite serious attack' when drawn to defend salaried

officers against the repeated charge that they were lacking in professional independence.[125]

With this agreement reached, in late 1973 the Attorney-General announced a review of legal aid and then secured cabinet approval for legislative change.[126] Under the Legal Aid (Miscellaneous Provisions) Act of 1974, the major part of the Public Solicitor's civil work was transferred to the private scheme.[127] At the same time, the Public Solicitor's office was given power to offer assistance in lower court criminal matters.[128] This act also created the office of Commissioner for Legal Aid Services, an independent public official required to report annually regarding these changes and on legal aid in the state generally.[129]

The Attorney-General argued that these changes were implemented to widen the availability of legal assistance as the Public Solicitor's office could expand its lower court criminal work and even take on a larger staff and open regional offices.[130] There were denials of an arranged 'takeover' of the civil field by the private profession. But an ideological motivation for the changes was suggested by the approving comments of government members. These referred to the importance of the act in allowing more legal aid work to be handled by 'free' professionals without a conflict of duty, and in forestalling the type of 'socialised legal control' being advocated by the Whitlam government.[131]

This act was attacked by the parliamentary opposition, press, salaried legal aid and academic lawyers, as a piecemeal reform that would only expand access for some applicants in the criminal scheme, at the same time as blocking assistance to many others seeking help through the private civil scheme.[132] These changes were also criticised as being without adequate state government financial support and as running contrary to the international trend towards a greater responsibility of the state for legal aid with the reduction of the private professional control of delivery.[133] These changes were actually followed by a

small expansion of the salaried Public Defenders; their number increasing from six to eight.[134] But the still limited resources of the salaried services and the high demand they faced, meant that the extension of aid for indictable matters was quite limited and a planned lower court duty solicitor scheme was delayed. A plan to expand the Public Solicitor's office through a system of regional offices never materialised.[135]

Although the Law Society scheme undertook to retain the more liberal Public Solicitor's means test for the transferred civil work so as not to prejudice any applicant, legal assistance in this field became much harder to obtain. The Law Society scheme was a poorly advertised and highly centralised service with a cumbersome method of handling applications.[136] Despite the general lack of information surrounding its operation, it evidently also had a low scale and expenditure and was very inefficient. This was reflected in unusually high administrative costs. Although it was not an 'inhouse' operation, in the year prior to June 1974 the scheme paid out only $30,332 in legal fees at the same time as spending $117,752, or eighty percent, of its budget on salaries and administration.[137]

The Public Solicitor's means test was nominally retained for the transferred work. But applicants now also faced the more harsh test of merit applied by the private scheme. The fact that a much greater proportion of civil legal aid applicants were refused help because of the higher rejection rate of the private scheme is evident in figures for the scheme's operation in the year 1974-5 to 1975-6. Rejection on the basis of means, merit, and for 'other reasons', rose by 190%, 143%, and 553% respectively, whereas the number of applications received increased by only 56% in the same period.[138] Overall, 778 of 5,415 applications were rejected.[139] The major results of the 1974 reforms were to increase direct private professional control over legal aid and to render help in civil matters less accessible.

The 1974 legislation represented a high point in the drive to control legal aid administration. But the private profession met a series of disappointments through the rest of the decade. As noted above, financial problems and a limited voluntary effort restricted the expansion of the Law Society scheme.[140] The Society also experienced increasing criticism of its own scheme by a growing number of academic and voluntary legal service lawyers; the ranks of the latter being swelled by the establishment of the Redfern Legal Centre in 1977.[141] It fared poorly in a press debate concerning legal aid funding in New South Wales and against the release of figures by the Public Solicitor's office alleging that private delivery was comparatively inefficient.[142] But the real end to the society's ambitions in this area came with the election of a Labor state government in 1976 and the appointment of the new Attorney-General, Walker. He was quite critical of the private scheme and keen to expand salaried delivery.

In September 1976, the Attorney-General announced a major expansion of the Public Solicitor's office.[143] Five new regional offices were opened in early 1977 to make a total of seven.[144] A further thirteen solicitors were employed, representing a one-third increase in legal staff.[145] This staff increase made it possible to upgrade the limited duty solicitor scheme commenced under the 1974 legislation into a wide-ranging service that was unique in Australia.[146] This gave clients continuous and full representation for defended hearings and appeals. The scheme covered almost all criminal matters in all lower courts in the Sydney region. Its scope was such that between March and August 1977 it assisted a total of 8,791 clients in 25 courts.[147]

These moves were criticised by the Law Society for 'duplicating' existing services and furthering the conflict of duty experienced by government officers.[148] The society did save some face by its own implementation of a country duty solicitor scheme with a commonwealth grant in 1978.[149] However,

the state government's changes signalled that the private profession might not fare well in the related debate surrounding the establishment of a state legal aid commission.

Attorney-General Walker had publicly accused the Fraser government of dodging its political responsibility and seeking to abolish the ALAO in an indirect way through the new federal scheme.[150] But with his dissatisfaction with the state of legal aid in New South Wales, he remained determined to rationalise its administration. If necessary this would be by the establishment of a separate commission outside of the federal scheme and with responsibility for all state matters. In October, 1976, Walker announced plans for such a commission.[151] A proposal regarding its composition and operation was circulated in 1977.[152] The first draft proposal was drawn up by the Commissioner for Legal Aid Services, who suggested a small co-ordinating commission with a strong private professional and no welfare representation.[153] This was followed by a plan from the Attorney-General's department for a large commission with a diverse membership and only a small private professional representation.[154] This had the general support of salaried staff, academic, voluntary legal service lawyers, Labor lawyers and welfare groups, despite their internal differences regarding the levels of voluntary, lay, and staff representation.[155]

The Law Society and Bar Association replied to this with virtually reactionary submissions. These advocated a commission with a controlling majority of private lawyers, and a wholly private membership of review and legal aid committees that could be delegated wide powers by the commission.[156] The lay membership of the commission was to be minimal, and the representation of various 'pressure groups' was rejected.[157]

However, the political outlook of the state government and (as in Victoria) the relatively advanced mobilisation of welfare, academic, salaried and legal

service lobby groups, made the adoption of these proposals highly unlikely. The Legal Services Commission Act of 1979, provided for a commission of eight.[158] These were a legal practitioner appointed by the Attorney-General as chairman, a nominee of the state Attorney-General, a nominee each of the Bar and Law Society, a nominee of the Labor Council of New South Wales (as suggested by Labor lawyers), two people appointed by the Attorney-General of whom one was to represent 'consumer and community welfare interests' and the other (as suggested by Redfern Legal Centre) was to represent voluntary services, as well as the full-time Deputy Chairman.[159] The last would also be appointed by the Minister.[160] Although the Law Society's service was to be absorbed into the new scheme, the positions of Public Solicitor and Public Defender were retained within the act.[161] A position of Referrals Director to handle the allocation of work to the private profession, was created.[162] Staff were to be employed as public servants as the existing salaried staff of the Public Solicitor's office had wanted.[163]

The commission was given the statutory power to provide services, determine applications and the matters in which assistance could be given, establish local offices, advertise, conduct research and education programmes, establish consultative committees, and to advise the Attorney-General on any matter relating to its functions.[164] Although it was not to be part of the new federal scheme, its work guidelines also resembled the Australian Capital Territory model in referring to the requirements of efficiency, economy, accessibility, and the maintenance and protection of existing salaried services.[165] The private profession's interests were covered more weakly by a reference to the desirability of allowing a choice of counsel as was reasonably practicable, and the requirement to use private services 'where appropriate'.[166]

The minority position of the Law Society on the commission represented a major defeat to its ambitions in legal aid policy. This produced opposition

attacks alleging an anti-professional bias in the bill and the calculated insult involved in giving an equal representation to lay groups and voluntary services.[167] Despite its weak position on the actual commission, private professionals were to comprise a majority, being three of five, of the members of the legal aid committees that could determine applications and perform other functions as directed.[168] These committees would each have only one lay member. Private lawyers were also well placed on the various review committees on which they would comprise two of five members.[169] But this did little to calm the bitter feelings regarding the composition of the commission.

The limited overall power of the private profession did not mean that the commission fell to the control of community, welfare and legal service nominees instead. In fact, even more so than in South Australia, the body's structure gave a strong personal influence to the state Attorney-General. As well as appointing the full-time service officials, the minister appointed at least half of the commission's members. Despite opposition protests, members were not given statutory tenure of office.[170] This personal influence was enhanced by a provision which drew widespread criticism from opposed lobby groups including the Law Society, welfare groups and legal service and academic lawyers, referring to either its 'socialist' or 'bureaucratic' and centralist nature according to their own political outlook.[171] For the first year of its operation the commission was to be subject to the 'control and direction' of the minister.[172] The Attorney-General supported these provisions with the claim that they would help keep the commission 'independent of sectional interests', in a restatement of the liberal view that the state could effectively mediate as an independent arbiter between the plurality of interest groups outside it.[173]

The Legal Services Commission of New South Wales commenced operations in December 1979, with the former Public Solicitor John White as Deputy Chairman, and a staff of one hundred and nineteen, including eighty

lawyers.[174] In practice, this proved to be a fairly effective and progressive legal aid service. Despite experiencing some financial pressures in the early 1980s, it inherited the considerable resources of the Public Solicitor's office (including its regional offices) and has had a high level of state government support. New South Wales government funding of legal aid far exceeds that of any other state government; in 1985/86 it provided $13.8 million of the $19.7 million spent by these governments.[175] The commission has also reaped the apparent financial benefits of a high level of work being completed inhouse. Until very recently, the bulk of approved matters have been dealt with by staff, in 1984/85 totalling 52% of cases.[176] This practice and the commission's ability to determine its own work patterns, survived the threat posed by a legal challenge in 1981. In Stephens's case the Supreme Court reversed a lower court finding in favour of a legal aid applicant who claimed the right to choose his own private counsel in a matter where he had been granted assistance by the commission.[177]

The commission has retained and extended the duty solicitor service begun by the Public Solicitor's office. It gives free legal advice, and has been quite successful in providing help in serious criminal matters. A high proportion of its work is also in civil areas.[178] A strong effort has been made to expand assistance for various groups. The Law Society's children's scheme was retained, supported and eventually upgraded into a specialised salaried service in 1985.[179] Pilot legal services for prisoners and the mentally ill were begun in 1981, and these have also expanded and become specialised sections of the commission.[180] A full-time research and education officer was appointed in 1981. The commission's first social worker was employed in the same year, and another in 1983/84. The number of these will soon total eight.[181]

As in Victoria, the commission has close links with community legal centres. Funds granted to these totalled $467,000 in 1984/85.[182] The

commission has run numerous test cases in equal opportunity and discrimination matters. Its involvement in public interest law has been extended by support for the establishment of a Public Interest Advocacy Centre in 1982 and the Environmental Defenders Office in 1984.[183]

Relations between the former Law Society staff and the rest of the commission were surprisingly cordial. However, considerable conflict emerged between the Commission and the Public Solicitor's section - the entire former government department retained as a physically separate part of the service.[184] This was the principal reason for the restructuring of the commission in 1985. Under the Legal Services Commission (Amendment) Act of 1985 its name was altered to the Legal Aid Commission of New South Wales and the positions of Public Solicitor and Referrals Director were abolished. Divisions based on areas of law, not modes of delivery, were made possible and distinct children's, prisoners, civil and other sections were established. These reforms came at the same time as a programme of expansion. By late 1985 the commission had a total staff of two hundred and fifty, including one hundred and fourteen lawyers.[185]

The election of the current federal Labor government also made an eventual merger with the New South Wales ALAO more likely. This was foreshadowed by a joint task force set up in April 1984 to consider this issue, and supported by the 1985 Richardson review of the state commission.[186] A final merger agreement between the federal and state governments took effect in April, 1987.

Tasmania

In June 1977, the Tasmanian Liberal government announced that it accepted Ellicott's commission's scheme in principle, and the Attorney-General established a committee of inquiry chaired by Crown-Solicitor Driscoll, to report

on the future direction of legal aid in that state.[187] The inquiry received submissions including one from the Law Society's sub-committee on legal aid. This was a conservative document advocating a clear private lawyer majority on any commission, private control of regional legal aid committees, minimal employment of salaried staff and a high rate of private referrals that was supposedly justified by the relatively small scale of services in Tasmania.[188] This view was fairly successfully contested by groups including the staff of the Tasmanian ALAO. The inquiry reported in late 1977. Accepting the new federal proposal so as to end the duplication of services in that state, it recommended the establishment of a commission with lay representation and a clear private professional minority, and with supporting legislation on the revised Australian Capital Territory model.[189]

However, the failure of the federal Liberal and a succession of Tasmanian state governments to agree on financial terms, has meant that no such commission has ever been established, although negotiations have been re-opened with the Hawke Labor government. The apparent lack of pressure to establish an independent commission may reflect the late development and smaller size of the alternative and voluntary legal service sector in Tasmania. In other states, this has functioned as an important catalyst involving welfare and community groups in legal aid policy. Thus, Tasmania is the last Australian state where a private Law Society scheme still exists and where the ALAO still survives as a separate legal service.

The Scheme's Outcome

In retrospect, the implementation of the state commissions scheme both exacerbated the internal divisions of the profession regarding legal aid policy and led to several further unexpected setbacks for the Law Societies at the state level. The latter secured controlling majorities of their representatives on

only two commissions - the West Australian and Queensland bodies. Elsewhere, the balance of power rests with a diverse range of community, welfare and government nominees. The Law Societies also failed ultimately to roll back that development of the salaried legal aid sector which had resulted from the reforms introduced by the Whitlam government. For a while the position of staff lawyers in Western Australia was under serious threat as the new commission emerged. But the number of salaried lawyers in each state held steady and then underwent some marginal growth in the 1980s as part of the general effort to increase the economic efficiency of each commission by measures including raising the level of legal aid work dealt with inhouse. Control over both policy and the management of legal services varies by state, but private lawyer influence is limited overall and has decreased with time. This is not only because of the representation given to other groups on each commission. Service directors and their senior legal staff oversee and control the daily administration of each scheme.

There are several reasons for these setbacks for the private profession. The probably unexpected election of Labor governments in South Australia and New South Wales soon after Whitlam's fall, meant that the Law Societies in those states faced unsympathetic administrations. In New South Wales, this undermined the purpose of the Law Societies' brief but determined effort to expand its own legal aid scheme. In Western Australia and Queensland there was only limited opposition. But in the two major states - New South Wales and Victoria - it was both more organised and on a much larger scale. In these states this field had been politicised by the involvement of welfare organisations and new groups of lawyers. Here, the greater development of the legal services lobby was tied to the earlier establishment and larger number of community legal centres and voluntary services along the lines of the neighbourhood law firms movement in other countries. Both Fitzroy and the Redfern Legal Centre

had very vocal roles in the debates regarding the establishment of these commissions. In New South Wales, the long history, size and political influence of the Public Solicitor's office also added to this opposition to the Law Society.

Financial pressure also reduced the influence of the private profession on the state commissions. This came either from the federal sphere as pressure to contain spending, or locally as a simple lack of adequate funds made worse by the political accountability of the states for meeting the growing demand for public legal services. It was partly these concerns regarding efficiency and accountability which motivated the strong Attorney-General influence over appointments to the commissions in South Australia, New South Wales and Liberal-governed Victoria. Even when the Labor government lost office in South Australia, the succeeding conservative appointees were concerned with financial restraint and efficiency as against representing the material interests of private lawyers.[190] It was the primacy of this 'economic imperative' which ultimately protected salaried staff and muted Law Society demands regarding fee payments and referred work, even in commissions with private lawyer majorities. As put by Armstrong in 1986,

> No government is now prepared to give a blank cheque to the private profession, whatever its ideological persuasion ... it's no longer really a choice.[191]

These Law Society setbacks have not meant that very progressive modes of operation now characterise the state legal aid commissions. The pattern of this varies considerably by state and most commissions have some progressive features; for example, the concentration on community legal education in South Australia and Victoria, or the involvement with marginal social groups in New South Wales. But policy debates are now more about saving dollars than meeting needs, and the overriding goal of operations has been satisfying the vast demand for services in orthodox areas.

Law reform work has become the domain of specialist bodies around the country.[192] There is no regular pattern of involvement with test cases and public interest work within several commissions. Much of this work has instead been left to community and specialist legal centres which are given financial support. Similarly, these centres are increasingly the main focus of the debate regarding non-lawyer and community involvement in the management and delivery of legal services. Some of the state commissions were given the statutory power to establish consultative committees. But these have only been significant in New South Wales where quite active lay committees on areas of special interest (rather than representing local regions) have developed.[193]

Lastly, the spectre of the ALAO looms also at other levels. Despite recent rises in inhouse ratios, all the state commissions except New South Wales conduct schemes which refer the bulk of their work to private practitioners. The Whitlam government's service became the apparent Australian prototype of the model of mixed delivery on a large-scale adopted by all the new commissions seeking to balance private lawyer and other interests in legal aid.

Legal Services and Policy Control

The 1970s were marked by a major increase in the scale of state activity in legal aid, that was largely set off by the initiative of the Whitlam government in developing federal salaried schemes. To the irritation of the succeeding federal Liberal government and several state governments, this increasingly expensive involvement proved to be irreversible. This was due to factors including the stimulation of a higher demand and raised public expectations regarding legal aid services, and the mobilisation of welfare and lawyer groups lobbying for a more adequate provision of assistance.

The catalytic effect of developments in the Whitlam years is well reflected in the figures for government legal aid spending in this decade. From

an annual budget of around one-quarter of a million dollars, federal spending reached a figure of $13.7 million in the last Labor budget in 1975-76.[194] The Fraser government failed to block this growth in spending, as $18 million was allocated in 1976-77, $20 million in 1977-78, $22 million in 1978-79, and $25.6 million in 1979-80.[195] By 1981-82, $36 million was allocated for legal aid (of which $14 million went to the remaining ALAO).[196] In 1985-86 this rose to $66.9 million, and the current estimate for 1986-87 is $92.4 million (including $12.8 million for the ALS).[197]

Total national expenditure has undergone a similar expansion. In 1979-80, $47.5 million was spent from federal and state sources on legal aid.[198] By 1981-82 this figure reached $70 million.[199] In 1983 it totalled $91.1 million and exceeded the $100 million mark in the following year.[200] The estimated national total for 1985-86 was $141.9 million.[201]

The positive result for applicants of this increased spending, can be gauged from figures which suggest the expanded scale of assistance given. Exact figures for the various schemes operating at the beginning of the decade are not available. But CLAC figures for 1979-80 indicate that 187,864 interviews were conducted nationally that year by major schemes.[202] By 1985-86 this figure had grown to 217,658.[203]

This increase in the number of persons receiving legal assistance does not mean that adequate services are now available in all areas and to all groups and individuals seeking help. A CLAC summary of the availability of legal aid published in 1982 clearly showed strict eligibility criteria, tests of means and merit, and the requirement of contributions, are extensively applied by Australian schemes.[204] Despite the earlier claims that the commission's scheme would rationalise services, and the monitoring role given to CLAC during its brief history, there is very little uniformity between these guidelines, tests, and the classes of people eligible for assistance in different states, and considerable

state by state disparities in per capita spending on legal aid.[205] Certain causes of action are still also excluded by the major schemes. Help is still not generally available for marriage dissolutions in the civil area, and in the criminal field, defendants in many committal hearings and the bulk of summary cases continue to go unrepresented.[206]

Legal aid lobbyists have attacked the charitable aspects of the earlier, mostly private schemes, and there is a wider acceptance of the claim that there is an extensive unmet legal need among the poor and disadvantaged, and even 'middle income' groups. But it would be inaccurate to claim that legal aid is now anywhere in Australia, available as of right. In fact, a considerable body of opinion still exists among the judiciary (as suggested by the majority judgment in McInnis), the profession, politicians and legal aid officials, that this should never be the case.[207] This has been particularly so throughout the early 1980s with the administration of areas of welfare including legal aid, still being viewed in economically conservative terms.

There has been no change to this basic priority of finding means to restrain legal aid spending with the election of a new federal Labor government in late 1982. It is also because of its concern with restraint, rather than needs, that this government has taken measures that are unpopular with the private profession. The new Labor Attorney-General Evans, in 1983 established a government task force for the specific purpose of finding more cost-effective ways of delivering legal aid.[208] Much of this concern stems from a growing tendency, not isolated to Australia, for substantial increases in government funding to be absorbed within the legal aid system and to give only a marginal increase in the actual number of clients assisted.[209]

Between 1980 and 1983 legal aid payments to private lawyers for referred commonwealth matters rose nationally by 80.2%.[210] In the same period, the number of cases dealt with grew by only 27.1%.[211] Most of these were in the

family law area. In 1982-83 these disputes comprised 63% of commonwealth matters and cost $20.3 million of the $32.4 million spent on referrals.[212]

The Labor government reacted to this with a plan to increase the number of salaried lawyers employed by the state commissions, and by declaring a target national average inhouse ratio of 26.2% of all work for 1983-84 - well above the figure of 17.3% for 1982-83.[213] New fee scales in family law matters were introduced, and alternative means of settling these disputes were sought.[214] Federal funds for community legal centres were doubled to $1 million in 1983, increased to $1.25 million in 1984-85, reached $1.49 million in 1985-86 and were estimated at $1.93 million for 1986-87.[215] But this is still only a very small proportion of all funds- and the marginal growth in support has barely covered the expense of their rapidly increasing number. The 1986 federal allocation was shared by sixty-one centres and services in all states and the Australian Capital Territory.[216]

The national total of referred matters dropped temporarily in 1985.[217] However, these measures did not reduce either total payments to private practitioners or the increasing costliness of legal aid for the commonwealth, described recently by Attorney-General Bowen as having reached 'critical proportions'.[218] This situation has been made worse by another failing of the state commissions scheme. Despite the claim that its implementation would spread the burden of financing legal aid services, the bulk of support still derives from the commonwealth and there is an uneven input by state governments.

In 1981-82 these governments allocated $13 million for legal aid. $7 million of this derived from New South Wales, $2 million from Victoria, $2.5 million from Queensland, and the remaining states all provided less than $1 million each.[219] In 1984-85 New South Wales set aside $13.7 million of the national total of $19.5 million.[220] The Victorian government allocated no funds

that year. Despite commonwealth criticism, the states have mostly remained reluctant to increase their share of expenditure. It is ironic that the major input has been from New South Wales (allocated $13.8 million of $19.7 million in 1985-86), and this state has only very recently established a joint commission.[221]

The increasing costliness of legal aid services and a general government reluctance to accept direct financial and political responsibility for them, have been seen as important factors motivating the development of formally independent statutory legal aid commissions. In this view, their establishment has helped to deflect criticisms of the insufficiency of services and public funding, and has redirected the lobbying of welfare and legal groups regarding forms of aid and delivery away from various governments. Thus, Hanks was led to comment in 1980 that,

> There is an inevitability about this obscurity, this refusal to articulate specific goals and objectives, this buck-passing of the hard and critical questions to the experts.... Essentially policy-makers at the Commonwealth and State level have been more than grateful for the chance to fudge the issues, to speak in platitudes, to work on the basis that everyone knows what legal aid is about and to leave the difficult problem of determining objectives or deciding directions for legal aid to the commissions (even if these decisions are unconscious), and to leave to the commissions the problems of surviving the inevitable criticisms.[222]

Theoretically, government moves to establish these commissions could be regarded as an attempt to deal with a form of 'legitimation crisis' through the transference of political responsibility to various quasi-autonomous public bodies. As described by political theorists in the 1970s, such crises have arisen from the contradictory demands made on the state in the advanced capitalist nations to secure capital accumulation at the same time as satisfying the rising widespread expectation of an extended and accessible welfare system.[223]

The recent history of Australian legal aid suggests a clear example of this tendency. But it cannot be assumed that this government disavowal of

responsibility and efforts to depoliticise this field have been very successful. Cooper notes that the relative independence of such bodies internationally has limited the possibility of political interference in casework and allowed some degree of independence regarding forms of assistance and delivery.[224] More unexpectedly, these bodies have sometimes assumed a 'buffer function' when their autonomy has been sufficient to allow them to mount a resistance to conservative political attacks on legal aid services and attempts to dismantle or financially undermine them.[225] The survival of the United States Legal Services Corporation as an autonomous statutory authority which could ward off attacks by the Nixon and Reagan administrations, is the best known example of this.[226] This function appears to exacerbate, rather than contain, the tendency towards legitimation crisis.

Australian legal aid commissions have only a limited independence - governments retain broad control over budgets and policy. However, they do not simply reproduce government views on legal aid. CLAC's unexpected criticisms of Fraser government cuts in the late 1970s suggest this.[227] More generally, the development of these commissions has had an important 'snowball' effect on legal aid policy and spending. To some extent these have become a form of local institutional base for disparate groups of lawyers who favour increased or maintained services. The involvement of voluntary legal service and welfare groups has been formalised and made more permanent.

Nationally, the commonwealth now faces a series of organised commissions which stress its financial responsibility for the area. As the Commonwealth Legal Aid Task Force noted in its 1985 report, within the current structure the commonwealth is still held responsible for legal aid finance but has little control over the allocation of its own funds. It concluded that the commission system has not protected the commonwealth's own interests and proposed measures including the establishment of a stronger national legal aid

body.[228] This view that the commonwealth lacks control over legal aid spending and operations has been reinforced by the direct embarrassment resulting from the 1983 budget 'blowout' of the Australian Capital Territory commission and the subsequent inquiry into the workings of that body.[229] In May 1985, Attorney-General Bowen announced that the Commonwealth Legal Aid Council would be abolished.[230] In December 1986, he announced the future establishment of two new national bodies - the National Legal Aid Advisory and Representative Councils - but their proposed composition was not detailed.[231]

The commission's scheme has failed to cut legal aid costs or to result in a comprehensive system of delivery. To the extent to which it was intended to shift responsibility or to depoliticise this field of welfare this strategy has backfired. The shift from direct delivery by the commonwealth has meant a reduced control of policy for it. It may have been the fear of commissions assuming a too independent course on matters which the state governments are responsible for, which motivated several administrations to ensure they controlled a large proportion of commission appointments.[230]

This outcome has had mixed results for the legal profession and its various segments. The newer, relatively more open form of the administration of legal aid, has meant an end to exclusive private control. The Law Societies incurred several defeats in the commission debates, and overall they have had a declining influence in policy. Their position has been challenged by welfare and legal service groups which often forcefully argued that they were no longer an appropriate judge of legal needs or representative of the public interest.[232]

But despite these setbacks, not all has been gloom for the private lawyers. The rapid development of salaried services in the early 1970s ended quickly. Public salaried lawyers still comprise only a small fraction of the entire profession. By 1985-86 only five hundred and four lawyers (of 1,206 total staff) were employed by the various legal aid commissions across Australia.[233] The

'judicare' element has become a permanent feature of delivery. Its minority or shared-power position on the commissions has meant that the private profession has lost or traded control of legal aid in return for the ongoing public subsidisation of the private legal market. The implementation of the commission's scheme has apparently led to increased spending and, as the bulk of complex matters are still referred, most legal aid dollars still end up in private lawyer pockets. National expenditure in 1984-85 totalled $116.4 million. Of this sum, $73 million comprised payments to private practitioners.[234] Other benefits of this expansion in the number of assisted include the removal of most of the voluntary onus formerly placed on private lawyers to meet at least some of the legal requirements of the poor and disadvantaged.

For the profession as a whole, this increased activity has widened career prospects and further enhanced the social importance of the legal order with the subjection of a greater number of problems and disputes to resolution through legal means.

Notes to Chapter Seven

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4. S.9(9).

5. A. Khan and J. Hacket, 'Legal aid: the West Australian commission', LSB, August, 1977, p.274.
Armstrong, 'Labor's legal aid scheme ...', op. cit., p.247.

6. S.38(1).

7. S.15(a) and (b).

8. S.15(g(II)).

9. S.15(g(I),(II) and (III)).

10. 'Letter to Council of Professional Associations', A. Munro, Federal Secretary, CAGEO, 17/1/77.
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11. S.12(3).

12. S.37(4(a)).

13. S.15((h) and (k)).

14. I. Medcalf, op. cit., p.525.

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17. ibid.

18. ibid., p.8.

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20. Legal Aid Commission of Western Australia - 2nd Annual Report 1978-79, op. cit., p.7.

21. (Western Australia) Legal Aid Commission Act, 1976, S.37(2(b)).

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27. Robert Ellicott, Interview, 24/2/86.

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31. Legal Aid Commission of Western Australia, Eighth Annual Report, 1984-85, p.3.

32. ibid., p.14. Legal Aid Com. [illegible] Bulletin [illegible] 1986 p.24 ([illegible])

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34. Eighth Annual Report, 1984-85, p.14.

35. LSB, June, 1976, p.27.

36. Peter Duncan, Interview, 17/10/86.

37. ibid.

38. (South Australian) Law Society Bulletin, September, 1976, p.1.

39. ibid., July, 1976, p.1.

40. LSB, June, 1977, p.262.

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43. (South Australian) House of Assembly, 14/2/79, p.2613.
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45. Mr. Goldsworthy, House of Assembly, 18/4/77 (3rd Reading Speech), p.2.
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47. Peter Duncan, Interview, 17/10/86.

48. (South Austraian) Legal Services Commission Act, 1977, S.12 and S.13.

49. S.10 and S.11.

50. S.10(2(a)).

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53. Legal Services Commission of South Australia, 3rd Annual Report, 1980-81, p.1.

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61. Sue Armstrong, Interview, 21/3/86.

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CHAPTER EIGHT

THE ORIGINS OF LEGAL AID:

THE STATE AND SOCIAL CHANGE AMONG AUSTRALIAN LAWYERS

It was noted above that the bulk of the academic literature on professions and the state has been dominated by an 'interventionist' paradigm in which the state is depicted as a unitary agency with an increasing contemporary tendency to encroach upon the autonomy of professional groups.[1] This intervention is regarded as deriving from within the state and having only post facto effects upon the structure, work and political balance of the professions. This external regulation will undermine professional monopolies, status and privileges, and may eventually result in the demise of the 'true' professions conceived on the model of the ideal-type of the free-market professional.

Some of the flaws in this perspective have been overcome by a more recent emphasis on the vital role of the state in the construction and maintenance of professional monopolies.[2] Professional autonomy, it is argued, is always in some degree partial, but the resulting threat to the power and privilege of professionals varies widely according to historical circumstances. The theorisation and analysis of the relations between the professions and the state, and their effects upon each other, can be advanced further if the unitary conceptualisation of the categories 'state' and 'profession' is displaced by a recognition of the complex, internally divided and contradictory nature of these entities and their historical interaction. This is particularly so with the divided response of professional groups to the contemporary expansion of public welfare systems in the advanced capitalist nations.

The Australian debates regarding, and developments in, the legal aid field in the 1970s exemplify this. The major increase in state activities in legal aid

in this decade ran parallel to and reinforced fundamental divisions within the profession. These include the formation of new professional segments with their own work, clientele and culture, and a shift in the political balance of the profession. The complexity of state-profession relations and their mutual effects, with professional groups mobilising to determine matters of public policy and even reconstruct whole sectors of the state, suggests that the question as to whether 'intervention' is the cause or the effect of divisions and change within the profession, is misconceived and formulates the problem too narrowly.

The real boost for Australian legal aid in this period was the development of the ALAO in the Whitlam years. This service had an internal state origin - suggesting a form of benign interventionism with the state's ready creation of work and markets on behalf of certain lawyer groups. But this and other recent reforms can instead be regarded as characterised by a more complex process of state engagement in which the overall result of the interaction between sectors of the state and segments of the profession reproduced the conditions necessary for the maintenance of the profession's autonomy and survival in a new, evolving form.

The creation of new work opportunities for both private practitioners and salaried lawyers in public legal aid schemes, occurred at a time of growing professional concern with expanding the legal market. But the divisions within the profession, and the shift in and extension of its relations with the state in this period, can also be more broadly understood as a consequence of major changes in the form of Australia's class structure and the state's role in its reproduction.

The 1970s witnessed a marked expansion in Australia of the size and influence of the new middle class of tertiary-educated professionals and technocrats that were increasingly important to the operation of both corporate capital and the state bureaucracy.[3] The accelerated development of this social

class was made possible by the wider availability of tertiary education with a greater Commonwealth commitment in the 1960s and in the Whitlam era.[4] The focal point of this development within the legal profession has been the changes made to its training and education.

The system of articled clerkships kept training directly in private lawyer control, but was increasingly regarded by law firms as uneconomic. Its demise has paralleled the quick development of new university law schools, particularly in Victoria and New South Wales. The most obvious result of this has been a large increase in student enrolments and the number of law graduates seeking entry to the profession. The number of Australian law students increased sixfold between 1954 and 1975 from 1445 to 7950.[5] Most of this followed the opening of law schools since the 1960s at ANU, Monash, UNSW, Macquarie, NSWIT, QIT and RMIT.[6]

In Victoria, there was a 60.3% growth in admissions to legal practice between 1968 and 1980; most of them being university graduates.[7] In New South Wales, a planning committee convened by the Chief Justice of the Supreme Court in 1966 anticipated a future 'shortage' of lawyers and in response to a growing demand for legal education, recommended the further establishment of university law schools.[8] With these established, the student intake for law in New South Wales doubled between 1970 and 1979, and through a higher rate of admissions the profession expanded by 25.7% in the five years between 1971 and 1976.[9] The overall number of practising lawyers in Australia grew from 6500 in 1966 to over 11,000 in 1976, with an expected annual increase of more than one thousand largely attributed to expanding student numbers.[10]

This trend has resulted in a much younger profession.[11] For example, by 1978 most of the lawyers in Victoria were under thirty-five years of age.[12] But as Goldring observes in his studies which follow-up the work of Anderson and Western, the predominantly high-status social backgrounds of Australian law

students have remained unaltered in this period of expanded entry to university law studies.[13] Those with high-income, professional and managerial families benefit most from the increased 'access' to this mode of entry to the profession.

Nevertheless, the social cohesion of the profession has been disturbed by the law schools' apparent failure to reproduce all of the exclusionary practices of traditional legal training. This is most evident in the rapidly expanding number of women law students and practitioners in this period, being but one part of the recent growing level of women's participation in the Australian workforce.[15] The 1970s witnessed a dramatic growth in the number of women studying law at university. For example, the proportion of women studying law at the University of Sydney rose from 12% to 39% between 1970 and 1981, and at Melbourne University rose from 19% to 42% between 1970 and 1982.[16]

In the nine law schools studied by Mathews, in 1980 women on average comprised more than one-third of students.[17] By 1982 the national average had passed 40% and numbers were approaching 50% in several law schools.[18] Women lawyers comprise a quickly growing proportion of the profession, although they are clearly overconcentrated in such low-status and more lowly paid areas of work as family law and legal aid.[19]

The rapid growth in the number of graduates and certified practitioners has raised alarm regarding an apparent 'overproduction' of lawyers, at a time of a lack of sufficient vacancies in the private legal market.[20] This has been reinforced by concern regarding the alleged low level of increase in lawyers' incomes as against those of other professional groups.[21] There have been resulting calls both for a reduction in the number of students permitted to study law, directed towards protecting the profession's market monopoly by a stricter control over the number of suppliers, and for further course 'relevance' to practice.[22] The extensive recent debate regarding the most appropriate form of

professional legal education, usually expressed as the division between liberal 'academic' and job-oriented 'practical' training, has reflected this concern with protecting the profession's position in the legal market.[23] But additionally, this debate suggests the ambivalence with which groups of private lawyers, and the various Law Societies, regard the trend towards the study of law at university.

It is only very recently that law teaching has developed as a full-time career in Australia, with the proportion of private lawyers participating in teaching dropping substantially. Similarly, the number of legal academics who engage in legal practice has declined; in 1978 they totalled less than 25% nationally.[24] Thus, a new and influential segment, with its own representative body - the Australian Universities Law Schools Association (AULSA), has emerged with the major responsibility for the education of the profession. The ambivalence, and occasional open hostility, felt by private lawyers towards the academic sector, is one part of the general ambivalence and divisions of the profession in regard to its further reliance upon the state as patron, employer and teacher in facing contemporary occupational threats.

The private profession still retains a measure of control over the content of law courses - this must be approved by the Supreme Court judges in all states except Western Australia where the Law Society assumes this role.[25] The private profession has also reasserted itself with the development of compulsory legal practice courses (either existing or proposed in all states by the late 1970s) and a greater involvement in legal education policy.[26] This involvement has been encouraged by the profession's establishment of the Australian Legal Education Council (ALEC) in 1977, and the support of the 1979 findings of the (Bowen) Committee of Inquiry into Legal Education in New South Wales which recommended the establishment of a private-lawyer dominated Council of Legal Education to both approve course content and formulate general policy.

But these measures have not reversed the increasing dependence upon the

university law school and the salaried academic lawyer. The profession has become less and less capable of profitably imparting the skills and values to its initiates that are necessary for its own reproduction. Its continued social status has also come to rely upon the growing number of lawyers who possess university degrees. Perhaps less obviously, the profession has become at least partly dependent on this sector for the maintenance of an adequate market for legal services. As Whitmore observes, the private lawyer call for greater 'practicability' in legal education, in its most conservative expression, is tied to a narrow expectation of teaching only in what are currently lucrative fields of legal practice.[28] But the academic segment now assumes a vital role in the development of new professional markets, more work and new career paths.

Many legal academics focus their work on the development and extension of markets with wealthy and privileged client groups. However, the recent major efforts to expand legal work, as the important role of academic lobbyists in the legal aid suggests, has surrounded the highlighting of previously neglected areas of unmet 'legal needs' among the poor and a range of disadvantaged groups, and the petitioning of the state to meet them by the deployment of professionals backed with public finance. Once implemented, this again increases reliance on the state and exacerbates the internal divisions of the profession. These are divisions not only regarding the allocation of resources for legal aid and its form of delivery, but also, divisions of professional consciousness.

Academic pleas for extended access to the law for the underprivileged, and the state's assumption of responsibility for this, have been generally accompanied by what is termed a 'social perspective' which rejects formalist and positivist currents in legal teaching and acknowledges the class bias in the operation of the law.[29] The rise of this perspective (overlapping with a period of student political activism in the early and mid-70s), parallels and has

reinforced the recent development of a substantial and vocal minority of lawyers who are openly disillusioned with the existing legal system. These lawyers have placed considerable pressure upon the traditional professional elites by attacking the failure of both private legal aid schemes and the existing distribution of professional services to meet public needs. In doing so, they have often relied on a literal interpretation of the profession's ethical precepts regarding service and communal duty.

The rise of the academic sector, and student subjection to what one commentator has called 'way-out' courses of radical 'indoctrination', have been blamed by conservative figures for this growth of diverse groups of alternative radical and progressive lawyers with their own nascent professional subculture.[30] Most of these groups have been involved in some part of the legal services field - government legal aid, the aboriginal legal services or the recently expanded number of independent legal centres in Australia. Through the forum of their own publications and organisations, such as the Australian Legal Worker's Group, they have also taken a critical stance on a wide range of professional matters including the general regulation, control and discipline of the profession.[31]

The conservative attacks upon these lawyer groups, their social reformist goals, and their involvement in legal aid services, parallel those made against the 'ideological vigilantes' among legal service lawyers in the United States.[32] They also more generally resemble those accounts of the new middle class which warn of the rise of an educated 'new class' of radical and liberal intellectuals, undermining the position of traditional political elites through their advocacy of the interests of the oppressed and the 'public' in the advanced capitalist nations.[33]

There is evidence that legal aid work in Australia has become an employment base for a new middle (or new class) segment of the profession. If government employment has in the past been an avenue of social mobility for

lawyers with lower-status backgrounds, this appears to be ending.[34] The vast majority of university (particularly law) students are from middle class and bourgeois families.[35] Figures for ALAO staff recruits between 1976 and 1985 cited above, indicate a high proportion of the young and women in this group, as well as a very high proportion of the tertiary-educated - comprising 93.1% of all appointments in this period.[36] Observers within the state commissions support this view of their own staff as typically young, middle-class and well-educated.[37]

However, just as many of these above accounts of the 'new class' appear to exaggerate the extent of radical, or even critical outlooks, among groups of professionals and technocrats, so too have attacks on radical lawyer groups exaggerated the extent of their influence, and the level of commitment to radical social change among the new generation of tertiary-educated practitioners.[38] The intolerance with which they are regarded, as well as the recent efforts by traditional professional elites through the Law Societies to reassert moral control over practitioners in such instances as the Basten and Bacon cases by the disciplining of political misfits, reflects a conservative longing for the previous quite high degree of social and ideological conformity among Australian lawyers.[39]

The internal divisions of the profession have been continually reinforced by the effect of external forces. The employment problems attributed to the rise in graduate numbers have been aggravated by the general economic decline in the late 1970s and 1980s, especially as this has affected such traditional areas of work as property and conveyancing. The profession has successfully held off threats from other occupations and groups that have a direct role in legal production and delivery. The limited occupational mobilisation of legal assistants in the private sector (recently forming their own organisations) has not changed their subordinate position.[40] In the public sector, the situation is

similar. Although once viewed as a radical measure, the employment of paralegal staff, in a controlled form has become an acceptable means of attempting to reduce firm or agency costs.[41]

A dire prognosis for bureaucratic professionals - entailing deprofessionalisation or even 'proletarianisation' in the form of rationalised work, deskilling and lay control - is given in much of the recent literature on the professions.[42] But lawyers have held their own in legal aid organisations, surviving their marginal status and threats to work autonomy (ironically from other lawyers in the form of Law Society attacks), skill (in the form of high referral levels and simple casework), and the internal control of work allocation. In legal aid departments, including the Australian Legal Aid Office and the state commissions which succeeded it, legal staff determine policy and management above both general staff and the small number of less powerful 'helping professionals' - such as counsellors and social workers.[43] Despite the strength of the ideology of 'community', lawyers in community legal centres admit to their dominant position above non-lawyers, lay workers and clients.[44] The possible exception to this pattern is some of the various Aboriginal Legal Services; these have a more easily identified client community and management committees comprised of non-lawyer aboriginal majorities.[45]

Legal aid lawyers in such fields as administrative law have even had success in encroaching upon the terrain of other powerful occupations, insisting upon principles of legality and the right to representation in the 'hidden courts' which handle such matters as social security appeals and mental health hearings.[46] But at what has been termed the 'hard end' of the legal market dealing with commercial and property matters, the external threat from accountants, tax agents, land agents, trustee companies and so on, has been far greater.[47] This is especially so in view of the widespread recent criticism of the profession's monopoly in such lucrative fields as (in some states) conveyancing

and accident compensation.[48] The threat posed by the proposals, following the Woodhouse report, which recommend that compensation cases be settled within a deprofessionalised forum, and recent developments in the arbitration of commercial disputes, far exceeds that comprised by limited efforts to settle social disputes between non-wealthy citizens without intervention by lawyers by such means as family counsellors and community justice centres.[49]

All of these forces lead to the pursuit of what has been termed a strategy of 'demand creation' by the legal profession in a situation of producer over-supply and weakened control over a contracting legal market.[50] Interest in the creation of more and new areas of work has led to calls for a greater degree of specialisation of practice, efforts to increase the employment of lawyers in commerce beyond current low levels, and a relaxation of Law Society restrictions on advertising and touting in several states.[51] Private lawyers have also joined with legal aid lawyers in developing an interest in programmes of community legal education which may raise levels of consumption; for the most part misleadingly spoken of as 'preventive' law.[52] Proposals have also been made for the development, with legislative approval, of class actions in civil matters of 'public interest'.[53] But this has received only marginal support in a profession that is still closely allied to business interests. The representation of diffuse interests by 'public interest' firms has not advanced far in Australia.[54] Nor have efforts to establish group legal services.[55]

The most successful attempts to develop new areas of work and construct new clienteles are still those which lead to a greater degree of state engagement. These include the meeting of needs in orthodox areas including family and criminal law by such means as duty solicitor schemes, or the development of aid services in such fields as welfare, administrative and environmental law. Even attempts to evolve novel modes of delivery and practice in 'independent' community legal centres, have come to increasingly rely upon public finance for their survival.

There is always a degree of state resistance to the process of engagement by professional groups and other lobbyists. Sectors of the state and different political administrations have their own aims and effects on policy. This is suggested both by recent conservative and Labor government efforts to cut legal aid expenditure and, at state level, to ensure the accountability of commissions by providing for a high number of government appointments to them. But this has been a faltering resistance. The establishment of semi-autonomous commissions has in general only reinforced the pressure to extend legal aid services, and the search for more economical means of delivery, may just favour one segment of the profession (such as salaried lawyers) above others. Furthermore, reliance upon the state in work creation has led to a turnabout in private lawyer attitudes to expanded government aid altering from a general opposition to an objection to any reduction in private delivery. The experience of the Fraser era, with the general failure of government efforts to contain legal aid spending, suggests that once developed, public schemes will tend to gather a wide range of support, increasing the political pressure for a continuing subsidisation of the legal market.

As already noted, this state engagement further divides the profession by work and culture, with new groups of salaried and marginal lawyers deriving their livelihood from it.[56] But it also reinforces the general complexity and the closeness of the profession's relations with the state. The increasing commitment to, and involvement of, the state in matters of legal service delivery and legal education that is encouraged by certain lawyer groups, leads to a greater level of state interest and scrutiny in such formerly closed professional matters as the general structure and regulation of the profession, and the admission and discipline of its members.

The recent reports of public inquiries into the legal profession in New South Wales and Western Australia, reflect this. In 1976, following the English

and Scottish examples, Attorney-General Walker announced that the New South Wales Law Reform Commission would conduct an inquiry into the profession in that state, with wide terms of reference including its structure, organisation, regulation, monopolies including conveyancing, the issues of fusion, fees, specialisation, advertising, admission, professional liability, complaints and discipline.[57] This report was highly critical of many aspects of the profession's organisation and work, especially the manner in which it handled public complaints against lawyers.[58] Its recommended reforms included the general regulation of the profession by a statutory council that would have a non-private lawyer majority, and measures to enhance 'lay participation'.[59]

Despite the conservative and defensive tone of its early submissions to the inquiry, and the unremitting resistance of the Bar Association, whose president described the commission's proposals as 'a step towards anarchy', the Law Society exercised the political skills it developed in the legal aid debate and countered some of the criticism by implementing its own reforms.[60] Some lay representation on the professional disciplinary tribunal and other committees was permitted, restrictions on advertising relaxed, and a professional insurance scheme begun.[61] The Western Australian inquiry in its 1982 report also recommended greater control of fees, the development of a professional insurance scheme, and lay participation in the disciplinary process and handling of complaints.[62] The Law Society reacted to this in a limited way by accepting the principle of lay participation in the matter of complaints.[63]

These reports, the level of debate and criticism in several states regarding the closed control of the profession, and an apparent more 'public' voice in professional affairs, appear to comprise a substantial threat to the profession's autonomy in fundamental matters and have led some commentators to suggest an impending 'crisis' of the profession.[64] This has the immediate appearance of a contest that is mostly between the private profession and an intervening state

which threatens its independence. But in reality, the process of stage engagement has meant a conflict principally between private lawyer groups, as represented by the traditional Law Societies, and those lawyers who have petitioned, penetrated, and in effect, captured and reconstructed sectors of the state - university law faculties, legal aid departments, commissions and various quangos - in the pursuit of their distinct interests.

In regard to legal aid policy, the battle lines may be blurred. There can be a three-way division over reforms. Salaried government lawyers have favoured a high level of state involvement (including direct delivery) and control. A different form of engagement, with the state funding but not controlling services, has been sought by both the Law Societies and voluntary community legal services. 'Independence' can mean autonomy from the state bureaucracy, the profit imperative, or both.

But a broader legal services segment comprising salaried government, alternative and marginal private lawyers in the legal aid field, with shared critical views of traditional practice and the older legal aid schemes, does exist. In the related debate regarding professional regulation, these lawyers have objected to the extent of Law Society control over legal work and the presumed representation of all practitioners. As with legal aid, this is expressed as a contest to define and articulate the community or public interest. This debate is not a straightforward example of either state 'intervention' or a widespread 'public' exchange involving lay groups and clients. Although fought on new terrain, this conflict reflects internal changes within the profession and an altering political balance. The alleged 'crisis' and the predicted decline in the influence of the profession, is a crisis of lost influence for only some lawyer groups. The recent history of the legal profession suggests a durability and adaptability that should not be underestimated.

Legal Aid: Hegemony or Legalisation?

Recent left and critical accounts of the 'welfare state' have focused interest on the contemporary extension of state responsibility for the provision of welfare services in the advanced capitalist nations.[65] Although some of these, most notably Gough's The Political Economy of the Welfare State, emphasise the relative autonomy of the state from capital, in the major part of this work it is contended that this has a directly repressive outcome.[66] These services fill the needs of capital both by ensuring the reproduction of a healthy, trained workforce, and by the control of downtrodden groups with the minimal satisfaction of their basic social wants.[67] Despite their origin as mostly Labor and social democratic initiatives, welfare reforms have a false appearance of effecting income redistribution between classes and creating equality of social opportunity.[68] The end result of this is the political quietude of the exploited and oppressed, and possibly also, a greater degree of faith in the existing social order. This perspective balances the overwhelmingly positive stress of liberal accounts of welfare services.[69] But its lacunae include an analysis of the actual means by which a hegemonic state is attained, and a consideration of its historically contingent and unstable form.

The shifting and contested form of bourgeois political rule has been stressed in a related literature from such theorists as O'Connor, Habermas and Offe, which has studied the growth and evolution of welfare services in contemporary capitalist societies through an analysis of what has been termed 'legitimation crisis'.[70] This concedes that the overall maintenance of these welfare services have become essential to the reproduction of capitalism. But at the same time, they can satisfy and stimulate wants with contradictory results. The growing public demand for, and expectation of, these services as a 'right' of citizenship, places a considerable strain on state resources.

This strain becomes exacerbated in periods of government restraint, such

as the last decade, where the state cuts spending to stabilise the capitalist economy in a recession to ensure the necessary conditions for capital accumulation. Welfare services have become a vital element of social reproduction in contemporary capitalism, but their expensive maintenance and expansion also threatens the workings of the capitalist economy. In Offe's words, '... while capitalism cannot coexist with, it neither can exist without the welfare state'.[71] In these circumstances, the 'fiscal crisis' of the state will tend to become a political crisis of legitimation. In pursuing this aim the state will visibly fail in its professed duty to the social needs of its citizens.[72] This will reinforce disillusion with existing welfare services and political administrations, and mobilise pressure groups who will resist policies of restraint.[73]

This body of theory especially points to the contradictory results of extended welfare services for ruling groups, and the difficult, always partial, nature of the attainment of hegemony. But it also generally treats as pregiven these welfare needs which the state is pressured to satisfy, and, in its most simple presentation, suggests a mechanistic state response to any rise in public expectations or disillusion with these services as they are expanded or curtailed.[74] The origin of this contemporary tendency towards legitimation crisis can be better understood if the role of expanding professional groups in the construction of welfare needs and in the articulation and direction of the 'public' interest, is also considered.

The pattern of development of legal aid systems, and the direction of legal aid policy, in Australia in the 1970s and 1980s suggest that the market and work conditions, as well as the political and ideological divisions of the legal profession, have been of central importance. In this period of extended state engagement, new professional segments, emphasising the responsibility of the state, as well as the duty of the profession, to satisfy unmet legal needs, have developed and expanded under both Labor and conservative administrations. In

their advocacy role, these lawyers have pressed authorities to work towards substantive, rather than merely formal, equality before the law through expanded programmes for the poor and underprivileged. The extensive public subsidisation of the legal market or the large-scale employment of salaried professionals are costly measures, and several conservative judges still refer to the alleged wastefulness and 'nuisance' effect of legal aid schemes, causing court delays and frivolous arguments.[75] But state authorities - including politicians, bureaucrats and judges - can only reject these claims at a cost to their own legitimacy and that of an ostensibly just legal system.

In a more local example of this phenomenon, legal aid lawyers and activists have challenged the position of old elites within the profession, generally represented by the Law Societies. Their criticisms of professional assistance schemes and of the political resistance mounted against new measures to meet the needs of the underprivileged which peaked in the Whitlam era, illustrated the gap between professional ethics (stressing the ideals of service and communal duty) and the organisation of the bulk of the profession's work in favour of more privileged groups. For the most conservative elements in the profession, expanded salaried aid epitomised the threat of state encroachment to 'independent' legal practice. But the alleged public benefits in this particular free-market independence have undergone continuous challenge.

However, this crisis of legitimation for some lawyer groups does not alter the overall positive results of expanded work, and new markets and clienteles. As new groups of lawyers have penetrated various state agencies dispensing legal aid, the resulting closeness to the state means that the state's legitimation crisis in this field is always to some extent the profession's crisis; both the state and profession have assumed a greater and now overlapping responsibility for legal aid. But despite a fairly diverse representation and Law Society defeats on the various state commissions which deliver most assistance, it is lawyers per

se who still control and direct legal aid at every level. In part, it is the recency of non-private lawyer groups in this field which allows them to more readily appear to represent something other than legal interests.

Some Law Society officers still criticise their salaried colleagues and claim that private lawyers are more competent in their work. For example, Law Council president Cornell, recently argued that legal aid jobs attract the 'flotsam and jetsam' of the profession.[76] However, there has been a general mellowing of attitudes in the last decade - the shared interest in extended services with mixed delivery is now more obvious. It is also generally accepted that salaried legal staff should participate in full legal work. A serious decline in the work conditions and status of any segment of the profession will adversely affect its overall status. Furthermore, the career mobility of many legal aid lawyers - often moving on to private practice and the bar - has meant that this field is now more highly regarded and the 'legal services' and private lawyer segments of the profession are less polarised.[77] In fact, this moderation in professional attitudes to legal aid services appears to have led to a higher stage of legitimation crisis where a wider and more powerful lobby that includes mainstream lawyers, the Law Societies, and even state governments, is opposed to federal fiscal restraint in this sphere.

As some commentators have noted the overall benefits which lawyers derive from the development of legal aid schemes, extend beyond the material.[78] The Law Societies and private lawyers have sometimes had their public image tarnished by criticism of their neglect of unmet needs. But these critiques, which mostly derive from other lawyers, are overwhelmingly laden with the notion that social justice is still attainable by legal means. In this perspective, schemes to further the access of the underprivileged to law and lawyers, and any related spread of a consciousness of legal rights among clients, all enhance the social status of the legal profession as a key institution in any fair and democratic society.

To argue that the legal profession has in the above ways benefited from the development of legal aid schemes, or that the tendency towards legitimation crisis in this sphere is intimately connected to the interests and politics of the profession, does not necessarily imply a conscious strategy of occupational self-interest. Ideology means more than the contrived reformulation of particular goals and interests as universal ones.[79] Professional control and direction in this field is the most likely result of the general application of those professional modes of practice which appear, at least among lawyer groups, as the most appropriate solution to the problems of those groups and individuals they perceive to be 'in need' of them.

In conclusion, although the interest of lawyers in extended legal aid schemes and the spreading of legal ideology is very evident in this period, the issue of political rule and the social control of client groups is not an irrelevant one. The left and radical critics of legal aid discussed above, have criticised assistance schemes as a means by which oppressed groups in neo-capitalist society are politically incorporated.[80] Their problems and claims are individualised, reformulated and narrowed as legal matters, ensuring some degree of dependence upon the 'expert' help of lawyers.[81] This incorporation is also seen as a more indirect result of the general legitimation of the legal system and existing political order through the appearance of social equality which legal aid schemes reinforce.[82] Critics of this view note that the close experience of the legal system by less privileged groups is mostly disillusioning and often enhances disrespect for the law, and that belief in the justness of law is most extensive among privileged groups, particularly lawyers.[83]

This observation appears to be correct, but the argument too easily equates respect for the law with control or non-control by the legal system. Despite expanded access to legal representation, the law and legal procedures have not lost their directly repressive elements.[84] Left and radical accounts

might not specify the actual process by which a hegemonic state is attained, but the contemporary push towards substantive equality for the underprivileged is also an apparent example of a transition to forms of welfare-administrative and technocratic control in which newly constructed 'status groups' are incorporated into the political order of monopoly capitalism.[85] These forms of containment and control can be seen as replacing the formally equal treatment of 'free' individuals by the state in adjudicative legal forums.

This partial demise of legal formalism and the primacy of the bourgeois juridical subject in state-citizen relations, is described in some exaggerated accounts as signalling the end of the 'rule of law'.[86] But the contemporary extension of legal aid on the basis of specific social characteristics (poverty, disadvantage) is a case standing between the polarities of formally-legal and administrative-bureaucratic rule, an example of this transition internal to the legal order itself - legalising the claims and rights of new groups in a system still mostly characterised by individualist and adjudicative modes, but often available only as a bureaucratic welfare entitlement.

Despite the quasi-legal character of contemporary legal aid schemes, from this corporatist perspective the definition of the needs and rights of these underprivileged groups and the construction and ordering of their political identity suggests an exercise of power more fundamental than the mere containment of political claims by their redirection into a cumbersome legal system. This view is reinforced by a further body of social theory - deriving principally from Foucault and Donzelot - which conceives of this historical transition within relations of social power as a move from 'strategies' of direct, intensive repression to those of indirect, non-punitive control.[87] These strategies of social regulation are exercised particularly at the local, institutional level (in prisons, courts, schools, hospitals, asylums etc.) within a field of diffuse and shifting power relations. The entire social body is pervaded

by these relations in a subtle manner. Power is not conceived in the negative 'juridical' form of state commands and directives, but results especially from the production of discourses of knowledge about given subjects and social groups.[88] The needs, interests and entire identity of certain groups and troublesome or problematic social types (the sick, mad, perverted, criminal, etc.) are derived from these discourses which 'produce' them.[89]

This transition to technocratic-administrative or therapeutic modes of social control may seem to be a consequence of some ideal process emanating from within the state bureaucracy - driven by the reified logic of technological change or bureaucratic rationalisation, or some unexplained historical change in a field of diffuse power relations.[90] But as the above discussion of the existing literature on the state, bureaucracy and organisations implies, this development can also be viewed through its connection to changes in the class structure and occupational order of contemporary capitalism, in particular the rise of new bureaucratic professions and segments of professions with a complex, inter-dependent relation to the state.[91] The therapeutic, reforming ideologies and practices of the so-called 'social professions' are a vital element in these evolving strategies of regulation and control, and the production of knowledge about the nature and needs of certain social groups.[92]

An important mechanism of this form of social control is the claim of groups of intellectuals to speak truthfully about or on behalf of others in privileged discourse.[93] A major feature of lawyers' debates regarding legal aid has been the claim to represent and protect the needs of underprivileged groups as well as the 'community' or 'public' interest in legal services. Successful efforts to construct and articulate these subjective categories provide an ideological lever against rival groups and interests, both within and without the profession, and can veil lawyer dominance in policy and the direction of schemes.

This results in a politics of agency and representation. These professionals presume not only to express the interests of the oppressed, but also, in an example of the creative or 'productive' aspect of power, to define and express their social identity.[94] The legalisation of the problems of legal aid clients has accompanied a tendency to categorise them as either part of an amorphous, and by implication classless, mass of the 'poor' or underprivileged, or an increasingly wide array of socially marginal groups whose needs are discovered and described as best resolved by professionals.[95]

The above theoretical work on discourse and social power has detached itself from the search for any transcendent, socially enlightened intellectual perspectives and favours localised struggles by the oppressed. But this politics of agency between intellectuals and the oppressed can also be seen as a key factor in the possible attainment of a democratic society in which something approximating a general societal interest or non-technocratic social needs can be communicated and known free of distortion by the interests of privileged groups.[96]

The apparent ubiquity of these power relations may also give rise to political pessimism. However, this form of control is also never total. Ambiguous and even positive results may follow the discursive construction of social identity. The contemporary rise of new social movements in the advanced capitalist nations suggests a reaction to this process from within several marginal groups.[97] Regarding legal aid, the experience of such groups as aborigines, prisoners, and psychiatric patients suggests that the mobilisation of interests through law can also be accompanied by and reinforce a political mobilisation of these oppressed groups with a more positive self-identity - often eventually resisting professional control and definition of needs and identity.[98]

Similarly, any radical critique of either the hegemonic outcome of the spread of legal ideology and the growth of legal aid services or the professional

interest in these developments, should not lead to a denial of the more short-term but real benefits of expanded assistance for such client groups as criminal defendants, juveniles, welfare claimants, and so on. Legal aid is currently delivered in an overwhelmingly professional-dominated and often alienating form. But its critics must be careful not to be co-opted by neo-conservative attacks on public welfare services, or to wholly discard the language of legality and justice in popular political struggles.[99] These contradictory local outcomes of expanded legal aid that are overlooked in both liberal and ultra-left accounts, suggest the need for an ongoing reflexivity as to how and when the interests of these professionals and their clients may either coincide or directly conflict.

Notes to Chapter Eight

1. Chapter One, p.11.

2. Chapter One, pp.13-17.

3. P. Beilharz, 'Theorizing the middle class', Arena, 1985, v.2, p.92.

4. See generally D. Anderson and A. Vevoorn, Access to Privilege, Canberra, ANU Press, 1983.

5. J. Disney et al., Lawyers, op. cit., p.86.

6. J. Goldring, 'Admission to law courses in Australia', Vestes, 19, (1977), 61.

7. P. Balmford, 'Changing patterns in enrolments at Victorian law schools and their consequences for the profession', LIJ (August, 1981), 516.

8. Legal Education in New South Wales: report of committee of inquiry (Bowen), December, 1979, p.47.

9. ibid., p.49, p.55.

10. 'Impact of overcrowding of the legal profession on employment of law graduates', ALJ, 50 (1976), 610.

11. Disney et al., op. cit., p.82.

12. M. Hetherton, op. cit., p.11.

13. Goldring, op. cit., p.64.
See also J. Goldring, 'An updated social profile of students entering law courses', Aust. Universities Rev., 29 (1986), 38.

14. See generally A. Game and R. Pringle, Gender at Work, Sydney, George Allen and Unwin, 1983.

15. Judge J. Mathews, 'The changing profile of women in the law', ALJ, 56 (1982), 634.

16. ibid., p.635.

17. ibid., p.636.

18. Justice M. Kirby, 'The women are coming', Aust. Law News (June, 1982), p.10.

19. Hetherton, op. cit., p.132.

20. J. Bowen, 'Supply and demand - facts, myths and fictions', in J. Bowen, Legal Labour Market, op. cit., p.8.
I. Campbell, 'Analysing the employment of solicitors', Law Soc. Jnl. (August, 1977), 221.
D. Barr, 'Employment in the legal profession', Law Soc. Bulletin (South Australia), (March, 1978), 8.

C. Pincus, 'Future employment of lawyers', Qld. Law Soc. Jnl. (February, 1980), 45.
R. Stewart,'Employment of newly admitted solicitors', Law Soc. Jnl. (April, 1977), 89.
'Lawyers - chronic oversupply or poor marketing?', Law Soc. Jnl. (December, 1977), 373.

21. 'Survey: young lawyers' incomes', Law Soc. Jnl. (June, 1982), 309.
'Composition of the profession', Law Society of New South Wales, Paper to legal profession inquiry, November, 1978, p.17.

22. Legal Education in New South Wales: report of committee of inquiry, op. cit., p.242 and p.247.

23. See generally the discussion from the 1976 national conference in Legal Education in Australia, Melbourne, Aust. Law Council Foundation, 1978.
'National conference on legal education, Sydney 15-20/8/76', ALJ, 50 (1976), 495.
C. Thomson, 'Objectives of legal education - an alternative approach', ALJ., 52 (1978), 83.
P. Derham, 'An overview of legal education in Australia', ALJ, 50 (1976), 577.
R. Stewart, 'Legal education', ALJ, 51 (1977), 470.
T. Butler, 'Legal education for professional practice: proposals for change', LIJ (May, 1981), 276.
For a critique of this conference as ignoring the need for community legal education see 'Editorial', LSB, June, 1976, p.1 and August, 1976, p.31.
The strong link, in Australia and elsewhere, between the legal services field and 'clinical legal education', suggests that the emphasis on work skills cannot be too readily equated with the most conservative forces in legal education. See C. Bartlett, 'Towards professional competence - clinical legal education', LIJ (March, 1982), 121,
R. West, 'Law graduates with a difference', Law Soc. Jnl. (February, 1982), 470.

24. C. Thomson, op. cit., p.89.
See generally H. Tarlo, 'Law schools and law teachers in Australia: 1946-1974', Univ. of Qld. Law Jnl., 9 (1975), 26.

25. See G. Samuels, 'Control of admission and legal education' in Legal Education in Australia, op. cit., p.669.

26. ibid., VII, pp.483-569.
G. Nash, 'Changes in legal education', LIJ (November, 1974), 463.

27. 'Establishment of the Australian Legal Education Council', ALJ, 52 (1978), 117.
Legal Education in New South Wales: report of committee of inquiry, op. cit., p.241.
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For a critique of the Bowen report, see A. Fraser, 'Legal education: planning for the past', LSB (April, 1980), 38.

28. H. Whitmore, 'Are the needs of the community for legal services being met by our universities?', ALJ., 49 (1975), 317.
An example of this view would be the declared opposition of the Bowen committee to any training geared towards the meeting of 'unmet needs' in new areas, ibid., p.243.

29. R. Cranston, 'Law and society: a different approach to legal education', MULR 5 (1978), 54.
J. Wallace and J. Fiocco, 'Recent criticisms of formalism in legal theory and legal education', Adelaide Law Rev., 7 (1980), 309.

30. Mr. Justice F. Hutley, 'What's wrong with the legal profession?', Law Soc. Jnl. (February, 1982), 15.
See also A. Tay, 'Law, the citizen and the state' in E. Kamenka et al. (eds.), Law and Society: the crisis in legal ideals, London, Edward Arnold, 1978.

31. 'Formation of Australian Legal Workers' Group', LSB (December, 1979), 260.
S. Ross, The Politics of Law Reform, op. cit., p.43.

32. See S. Agnew, 'What's wrong with the Legal Services Program?', Assoc. J., 58 (1972), 930,
and the reply by J. Falk and S. Pollock, 'What's wrong with attacks on the Legal Services Program?', Assoc. J., 58 (1972), 1287.

33. See generally A. Gouldner, The Future of Intellectuals: the rise of the New Class, London, Macmillan, 1979,
P. Steinfels, Neo-conservatives, New York, Simon-Schuster, 1979.

34. Tomasic and Bullard's 1977 survey of New South Wales lawyers found that a disproportionate number of government lawyers had lower-status backgrounds and were less likely to have been to university - only 23.1% had tertiary degrees. R. Tomasic and C. Bullard, Lawyers and Their Work in New South Wales, op. cit., p.23 and p.145.

35. See D. Anderson and J. Western, 'Social profiles of students ...', op. cit.
J. Goldring, 'Admission to law courses in Australia', op. cit.,
Goldring, 'An updated social profile ...', op. cit.

36. See Appendix A.

37. Alan Nicol, Interview, 15/11/85.
Mark Richardson, Interview, 27/2/86.

38. A. Fraser, 'Legal education and the culture of critical discourse', Paper to critical legal studies conference, San Francisco, November, 1979.
I. Szelenyi, 'The legal profession and the New Class', Paper to conference on comparative study of the legal profession, Bellagio, Italy, July, 1984.

39. See generally 'John Basten and the Bar Council', LSB, August, 1981, p.167,
'The end of the Basten affair', LSB, February, 1982, p.40.
'Wendy Bacon and the bar', LSB, February, 1981, p.1.
New South Wales Bar Association v. Livesey, NSWLR, 2 (1982), 231.

40. C. Dickeson, 'Paralegals: Institutes of legal executives in Australia and their training programmes', Paper to national conference on legal education, Sydney, August, 1976.
'The institute of legal executives', LIJ (September, 1973), 373.

41. See generally J. Basten and J. Disney, 'Representation by special advocates', UNSWLJ, 1 (1975), 168.
P. Hanks, 'Improved access to law - without lawyers', in J. Goldring et al., Access to Law, Canberra, ANU Press, 1980.
Life Without Lawyers, London, LAC, June, 1978.
Compare the support of Mr. Justice Hutley in 'Training of para-professionals' in Legal Education in Australia, VII, op. cit., p.433 for their employment. However, a level of conservative opposition to their use also remains, see 'Roles for non-lawyers', Law Society of New South Wales, Paper to legal profession inquiry, September, 1979, and, R. Ball, 'The role of the layman', ALJ, 53 (1979), 456.

42. Chapter One, p.21.

43. See generally Negotiating the Law: social work and legal services, London, RKP, 1978,
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E. Chamberlain and J. Graff, 'Introducing social work to legal aid', Aust. Social Work, June, 1982, p.7,
K. Ross, 'Welfare delivery - without lawyers', LSB, December, 1977, p.384,
A. Kenneth Pye, 'Law, lawyers and social welfare', Parts I and II, LSB, January, 1975, p.139 and May, 1975, p.188.
Most of this literature advocates a 'team' approach to problem resolution and downplays inter-occupational conflict. Co-operation with social agencies is also poor, see P. Hanks et al., Relationship Between Legal Aid Agencies and Social Agencies, Canberra, AGPS, 1983.

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APPENDIX A

EXT/1252
PROMOTIONS & TRANSFERS TO ALAC

Source: Planning and Statistics Service Section, Commonwealth Public Service Board, 1986.

SEX	AGE AT APT	DATE OF BIRTH	DATE OF APPT	CLASSIFICATIO PRIOR TO ALAC	LEV	DATE TO ALAC	MOVEMENT TYPE	CLASSIFICATIO TO ALAC	LEV	EDUCAL LEVEL	EDUCAL GROUP
MALE	19	140357	300875	CLERIC ADMIN	3	301080	PROMOTION	CLERIC ADMIN	4	HSC	0
MALE	20	240348	50868	CLERIC ADMIN	7	190779	PROMOTION	LEGAL OFFICER	0	BACHELOR-ORDI	LAW
MALE	21	170858	210780	CLERIC ADMIN	3	280285	PROMOTION	LEGAL OFFICER	0	HSC	0
MALE	21	50142	290463	PRIN LEGAL OF	0	60778	TRANSFER	SNR LEGAL OF	0	MEM OF A PROF	LAW
MALE	23	210251	200175	LEGAL OFFICER	0	20677	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	ARTS/HUMANITI
MALE	23	141250	120674	LEGAL OFFICER	0	100277	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	LAW
MALE	23	30156	31279	LEGAL OFFICER	0	10885	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	SCIENCE
MALE	24	101250	20175	LEGAL OFFICER	0	190876	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	LAW
MALE	24	291152	300577	LEGAL OFFICER	0	271080	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	LAW
MALE	24	170451	300675	CLERIC ADMIN	1	200177	PROMOTION	LEGAL OFFICER	0	MEM OF A PROF	LAW
MALE	24	250252	160376	LEGAL OFFICER	0	80181	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	LAW
MALE	25	281147	20773	LEGAL OFFICER	0	81184	GAZETTAL TRANS	LEGAL OFFICER	0	HSC	0
MALE	25	40452	40777	LEGAL OFFICER	0	20379	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	ARTS/HUMANITI
MALE	25	291255	30681	SNR LEGAL OF	0	121185	TRANSFER	LEGAL OFFICER	0	BACHELOR-ORDI	LAW
MALE	25	231052	110778	LEGAL OFFICER	0	100780	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	LAW
MALE	25	20754	251079	CLERIC ADMIN	1	220580	PROMOTION	LEGAL OFFICER	0	BACHELOR-ORDI	LAW
MALE	26	31049	280476	LEGAL OFFICER	0	190876	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	LAW
MALE	26	200950	50477	LEGAL OFFICER	0	260680	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	LAW
MALE	26	160848	90974	LEGAL OFFICER	0	280777	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	ARTS/HUMANITI
MALE	26	270652	90579	LEGAL OFFICER	0	130380	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	ARTS/HUMANITI
MALE	27	130847	140475	LEGAL OFFICER	0	140777	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	LAW
MALE	27	70248	291075	LEGAL OFFICER	0	270976	TRANSFER	LEGAL OFFICER	0	BACHELOR-ORDI	LAW
MALE	27	111156	311084	LEGAL OFFICER	0	10885	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	ECONOMICS/COM
MALE	28	70846	280775	SNR LEGAL OF	0	220580	PROMOTION	PRIN LEGAL OF	0	BACHELOR-ORDI	ECONOMICS/COM
MALE	28	150346	20974	LEGAL OFFICER	0	280777	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	LAW
MALE	28	191050	50479	LEGAL OFFICER	0	10885	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	ARTS/HUMANITI
MALE	28	211052	131081	LEGAL OFFICER	0	10885	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	ECONOMICS/COM
MALE	29	81052	31281	LEGAL OFFICER	0	70285	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	LAW
MALE	29	110254	150283	LEGAL OFFICER	0	70285	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	ARTS/HUMANITI
MALE	29	211245	180975	LEGAL OFFICER	0	90976	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	LAW
MALE	30	230746	101276	LEGAL OFFICER	0	301080	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	LAW
MALE	30	130147	171077	SNR LEGAL OF	0	60386	PROMOTION	PRIN LEGAL OF	0	BACHELOR-ORDI	ARTS/HUMANITI
MALE	30	41050	60481	LEGAL OFFICER	0	30983	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	LAW
MALE	31	240844	200476	SNR LEGAL OF	0	210377	TRANSFER	LEGAL OFFICER	0	BACHELOR-ORDI	ARTS/HUMANITI
MALE	32	251141	280574	CLERIC ADMIN	1	140777	PROMOTION	CLERIC ADMIN	3	HSC	0
MALE	36	20440	231276	LEGAL OFFICER	0	80580	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	LAW
MALE	38	10242	60280	LEGAL OFFICER	0	80181	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	LAW
MALE	39	140335	301274	SNR LEGAL OF	0	250877	PROMOTION	PRIN LEGAL OF	0	BACHELOR-ORDI	LAW
MALE	43	270936	240180	LEGAL OFFICER	0	100682	PROMOTION	SNR LEGAL OF	0	BACHELOR-HONO	LAW
MALE	46	40530	40177	CLERIC ADMIN	1	10977	PROMOTION	LEGAL OFFICER	0	BACHELOR-ORDI	ARTS/HUMANITI
FEMALE	24	210151	61075	LEGAL OFFICER	0	240878	PROMOTION	SNR LEGAL OF	0	BACHELOR-HONO	LAW
FEMALE	24	170353	260477	CLERIC ADMIN	4	90481	PROMOTION	LEGAL OFFICER	0	BACHELOR-ORDI	ARTS/HUMANITI
FEMALE	25	50554	40280	CLERIC ADMIN	1	90481	PROMOTION	LEGAL OFFICER	0	BACHELOR-ORDI	LAW
FEMALE	25	140559	311084	LEGAL OFFICER	0	10885	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	LAW
FEMALE	25	120257	110283	LEGAL OFFICER	0	70285	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	LAW

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APPOINTMENTS & REAPPOINTMENTS

	SEX	AGE AT APP	DATE OF BIRTH	DATE OF APPT	CLASSIFICATIC AT APPOINTMEN	LEV	MOVEMENT TYPE	PREVIOUS MOVEMENT TYPE		EQUAL LEVEL	EQUAL GROUP
	FEMALE	31	101153	10785	SNR LEGAL OF	0	APPT-PROF,TECH,ETC		0	BACHELOR-ORDI	LAW
same person	FEMALE	32	300844	151176	PRIN LEGAL OF	0	RE-APPT FORMER ALAO	TRAN TO STATE ALAO		BACHELOR-ORDI	LAW
	FEMALE	32	260653	290785	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		0	BACHELOR-ORDI	ARTS/HUMANITI
	FEMALE	32	300844	151176	PRIN LEGAL OF	0	APPT-PROF,TECH,ETC		0	BACHELOR-ORDI	LAW
TO	49	49	49	49	49	49	49	49	49	49	49

EXT/1252
APPOINTMENTS & REAPPOINTMENTS

	SEX	AGE AT APP	DATE OF BIRTH	DATE OF APPT	CLASSIFICATIC AT APPOINTMEN	LEV	MOVEMENT TYPE	PREVIOUS MOVEMENT TYPE		EQUAL LEVEL	EQUAL GROUP
	MALE	22	170843	10166	CLERIC ADMIN	11	RE-APPT FROM APPEND	PROM ON APPENDIX		HSC	C
	MALE	22	290154	41076	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		C	BACHELOR-ORDI	LAW
same person	MALE	22	170843	10166	CLERIC ADMIN	3	APPT-PROF,TECH,ETC		D	HSC	D
	MALE	22	170843	10166	SNR LEGAL OF	0	SEP ACT LEGAL AID CO	PROMOTION		HSC	C
	MALE	23	210554	60977	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	LAW
	MALE	25	200752	251077	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		C	BACHELOR-ORDI	ARTS/HUMANITI
same person	MALE	25	240351	130876	SNR LEGAL OF	0	RE-APPT FROM NTPS	SEP TO NTPS		BACHELOR-ORDI	LAW
	MALE	25	240351	130876	LEGAL OFFICER	0	SEP TO NTPS	APPT-PROF,TECH,ETC		BACHELOR-ORDI	LAW
	MALE	25	220460	120685	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	LAW
	MALE	25	240351	130876	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	LAW
	MALE	26	220458	41284	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	ARTS/HUMANITI
	MALE	27	190940	120268	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		C	BACHELOR-ORDI	LAW
	MALE	27	130847	140475	PRIN LEGAL OF	0	RE-APPT FORMER ALAO	PROM ON APPENDIX		BACHELOR-ORDI	LAW
	MALE	27	190940	120268	PRIN LEGAL OF	0	AUST TELECOM COMM	DEPT NAME CHANGE		BACHELOR-ORDI	LAW
	MALE	27	130847	140475	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	LAW
	MALE	27	191255	100193	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	LAW
	MALE	28	140948	10277	SNR LEGAL OF	0	APPT-PROF,TECH,ETC		D	BACHELOR-HONO	LAW
	MALE	29	11055	151084	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		D	BACHELOR-HONO	LAW
	MALE	30	111253	280384	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		C	BACHELOR-ORDI	LAW
	MALE	30	281046	10977	SNR LEGAL OF	0	APPT-PROF,TECH,ETC		C	BACHELOR-ORDI	ARTS/HUMANITI
	MALE	30	30549	170779	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	LAW
	MALE	30	40252	30692	SNR LEGAL OF	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	LAW
	MALE	30	160446	10377	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		C	BACHELOR-ORDI	LAW
	MALE	31	50646	230677	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	LAW
	MALE	31	130653	210585	SNR LEGAL OF	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	LAW
	MALE	31	50646	230677	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	LAW
	MALE	32	40344	11176	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	LAW
	MALE	32	30844	191076	SNR LEGAL OF	0	APPT-PROF,TECH,ETC		C	BACHELOR-ORDI	LAW
	MALE	34	291044	20779	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	LAW
	MALE	34	210649	100484	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	ARTS/HUMANITI
	MALE	35	150141	121176	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	LAW
	MALE	35	20944	170979	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	LAW
	MALE	36	300541	50777	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	LAW
	MALE	37	71036	170576	SNR LEGAL OF	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	LAW
	MALE	37	191238	20276	PRIN LEGAL OF	0	APPT-PROF,TECH,ETC		D	MASTER	LAW
	MALE	40	20236	280676	SNR LEGAL OF	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	LAW
	MALE	46	50729	180676	SNR LEGAL OF	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	LAW
	MALE	53	260423	60177	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	LAW
	MALE	53	101122	290676	SNR LEGAL OF	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	LAW
	FEMALE	24	150260	121184	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	ARTS/HUMANITI
	FEMALE	25	10259	131284	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	LAW
	FEMALE	26	190852	251078	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	LAW
	FEMALE	26	161249	150976	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	LAW
	FEMALE	27	160549	71276	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	ARTS/HUMANITI
	FEMALE	30	140748	310778	LEGAL OFFICER	0	APPT-PROF,TECH,ETC		D	BACHELOR-ORDI	ARTS/HUMANITI

EXT/1252
PROMOTIONS & TRANSFERS TO ALAC

	SEX	AGE AT APT	DATE OF BIRTH	DATE OF APPT	CLASSIFICATIC PRIOR TO ALAC	LEV	DATE TO ALAC	MOVEMENT TYPE	CLASSIFICATIO TO ALAC	LEV	EDUAL LEVEL	EDUAL GROUP
	FEMALE	25	70758	220535	LEGAL OFFICER	0	10885	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	LAW
	FEMALE	26	151051	280678	LEGAL OFFICER	0	181079	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	LAW
	FEMALE	26	91151	190678	LEGAL OFFICER	0	170180	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	LAW
	FEMALE	27	270857	311084	LEGAL OFFICER	0	10885	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	ARTS/HUMANITI
	FEMALE	28	91048	170177	SNR LEGAL OF	0	10885	PROMOTION	PRIN LEGAL OF	0	BACHELOR-ORDI	ARTS/HUMANITI
	FEMALE	28	60655	151193	LEGAL OFFICER	0	31194	GAZETTAL TRANS	LEGAL OFFICER	0	BACHELOR-HONO	ARTS/HUMANITI
	FEMALE	29	310735	141064	CLERIC ADMIN	6	150580	PROMOTION	LEGAL OFFICER	0	BACHELOR-ORDI	ARTS/HUMANITI
	FEMALE	29	10154	150283	LEGAL OFFICER	0	70285	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	LAW
	FEMALE	29	100256	30785	LEGAL OFFICER	0	10885	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	ARTS/HUMANITI
	FEMALE	31	101049	270151	SNR LEGAL OF	0	90791	GAZETTAL TRANS	SNR LEGAL OF	0	BACHELOR-HONO	LAW
	FEMALE	32	250248	310380	LEGAL OFFICER	0	201284	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	LAW
	FEMALE	47	290928	200876	LEGAL OFFICER	0	250578	PROMOTION	SNR LEGAL OF	0	BACHELOR-ORDI	ARTS/HUMANITI
TO		57	57	57	57	57	57	57	57	57	57	57

APPENDIX B

Appendix

EXPENDITURE OF COMMONWEALTH FUNDS BY THE ALAO AND COMMISSIONS 1979-80

State	*NSW*	*Vic.*	*Tas.*	*NT*	*Old*	*Old*	*Old*	*SA*	*WA*	*ACT*	*Central Office ALAO*	*Cwlth [illegible]*	
Organisation	*ALAO*	*ALAO*	*ALAO*	*ALAO*	*ALAO*	*Commission*	*Combined*	*Commission*	*Commission*	*Commission*			*Tot*
Period of operation	*12 Months*	*12 Months*	*12 Months*	*12 Months*	*5 Months*	*7 Months*	*12 Months*	*12 Months*	*12 Months*	*12 Months*	*12 Months*	*12 Months*	
	$	$	$	$	$	$	$	$	$	$	$	$	$
Average annual staffing													
Lawyers	48	22	9	8	18	N/Av.	N/A	19	21	12	5	4	N/A
Non-lawyers	57	37	13	10	31	N/Av	N/A	46	43	21	6	15	N/A
Total	105	59	22	18	49	N/Av.	N/A	65	64	33	11	19	N/A
Staffing at 30 6 80													
Lawyers	47	23	9	9	—	25	N/A	19	22	12	5	4	[illegible]
Non-lawyers	58	38	13	10	—	47	N/A	46	44	21	6	14	[illegible]
Total	105	61	22	19	—	72	N/A	65	66	33	11	19	[illegible]
Salaries and related payments	1 674 254	831 850	306 698	257 319	321 657	375 457	697 114	706 970	718 460	636 776	232 360	340 876	[illegible]
Administrative expenses	417 177	124 691	80 954	79 479	115 730	109 801	225 531	185 477	259 451	163 063	43 643	216 615	[illegible]
Payments to private practitioners	3 660 710	3 638 856	829 511	222 990	1 044 647	1 273 992	2 318 629	1 487 146	1 854 202	719 994	5 518	—	[illegible]
Total	5 752 141	4 595 397	1 217 163	559 788	1 482 034	1 759 240	3 241 274	2 379 593	2 832 113	1 519 831	281 521	557 490	[illegible]

Note Where part-time staff are employed the staff numbers have been adjusted to reflect the full man year effect of those part-time staff

N/A = not applicable.

N/Av = not available

Source: Commonwealth Legal Aid Council, Annual Report, 1979-80, pp. 21, 24, 25.

INCOME OF MAJOR LEGAL AID SCHEMES 1979–80

State/Territory	New South Wales						
Organisation	AJAO	Aboriginal Legal Aid	Law Society[a]	Public Defender	Legal Aid[b] Commissioner	Legal Services Commission	Total NSW
Period of operation	12 Months	12 Months	5 Months	12 Months	5 Months	7 Months	
Commonwealth grant/funding	5 720 227	1 142 000	130 000	—	—	—	6 992 227
State grant/funding	—	—	—	567 020	510 411	3 100 000	4 177 431
Statutory interest	—	—	879 000	—	—	1 138 000	2 017 000
Interest on investments	—	—	75 477	—	—	170 628	246 105
Client contributions	23 672	—	91 577		—	93 571	209 820
Recovered costs	6 797	—	1 154 628[c]	—	—	1 077 510[d]	2 238 935
Other revenue	1 445	—	128 292	—	—	104 757	234 494
Total	5 752 141	1 142 000	2 458 974	567 020	510 411	5 684 166	16 115 012

State/Territory	South Australia			Western Australia		
Organisation	Commission	Aboriginal Legal Aid	Total SA	Commission	Aboriginal Legal Aid	Total WA
Period of operation	12 Months	12 Months		12 Months	12 Months	
Commonwealth grant/funding	2 017 765	400 000	2 417 765	2 987 800	828 149	3 815 949
State grant/funding	441 457	—	441 457	374 200	—	374 200
Statutory interest	301 842	—	301 842	337 431	—	337 431
Interest on investments		—		22 400	—	22 400
Client contributions	77 322	—	77 322	120 913	—	120 913
Recovered costs	140 446	—	140 446	32 263	—	32 263
Other revenue	45 041	—	45 041	128	—	128
Total	3 023 873	400 000	3 423 873	3 875 135	828 149	4 703 284

(a) Operated until 20 December 1979 when incorporated into Legal Services Commission
(b) A statutory position created under the N.S.W. Legal Assistance Act 1943 which granted aid until incorporated into Legal Services Commission on 21.12.79
(c) Includes a full year of the Public Solicitors Office and the operations of the Law Society Legal Assistance Scheme from 21 December 1979
(d) Ceased to operate on 2 December 1979 when incorporated into the Legal Aid Office (Old)
(e) Includes $720 884 being a portion of clients' verdicts and settlements retained to cover costs
(f) Includes $603 008 being a portion of clients' verdicts and settlements retained to cover costs

Victoria					Queensland					
ALAO	Aboriginal Legal Aid	Law Institute	Public Solicitor	Total Vic	ALAO[a]	Aboriginal Legal Aid	Law Society[a]	Public Defender	Commission	Total Qld
12 Months	12 Months	12 Months	12 Months		5 Months	12 Months	5 Months	12 Months	7 Months	
4 432 295	406 700	—	—	4 838 995	1 474 184	1 047 499	—	—	2 346 700	4 868 383
—	—	—	1 705 550	1 705 550	—	—	—	1 541 132	—	1 541 132
—	—	2 373 609	—	2 373 609	—	—	700 000	—	727 000	1 427 000
—	—	—	—	—	—	—	67 468	—	212 192	279 660
5 132	—	1 083 373	—	1 088 505	4 559	—	—	—	20 863	25 422
113 578	—	407 441	—	521 019	3 291	—	117 855	—	50 244	171 390
44 392	—	—	—	44 392	—	—	—	—	3 480	3 480
4 595 397	406 700	3 864 423	1 705 550	10 572 070	1 482 034	1 047 499	885 323	1 541 132	3 360 479	8 316 467

Tasmania				ACT	Northern Territory			
ALAO	Aboriginal Legal Aid	Law Society	Total Tas	Commission	ALAO	Aboriginal Legal Aid	Total NT	Total
12 MONTHS	12 Months	12 Months		12 Months	12 Months	12 Months		
1 193 295	122 260	—	1 321 555	1 396 800	546 234	1 036 818	1 583 052	27 234 726
—	—	90 696	90 696	—	—	—	—	8 330 466
—	—	—	—	—	—	—	—	6 456 882
—	—	—		—	—	—	—	548 165
7 369	—	20 927	28 311	43 422	10 643	—	10 643	1 603 358
10 479			10 479	103 936	2 911	—	2 911	3 221 379
—	—	—	—	6 246	—	—	—	333 781
1 217 163	122 260	111 618	1 451 041	1 550 404	559 788	1 036 818	1 596 606	47 728 757

Appendix

OPERATIONS OF MAJOR LEGAL AID SCHEMES 1979–80

Organisation	Staffing		Number of Interviews	Advice given by Private Profession		Approved Applications for Aid			Duty Lawyer Service				
						Assigned to Staff Lawyers	Referred to Private Practitioners		Staff Lawyers		Private Practitioners		
	Lawyers	Non-Lawyers		Number	Estimated Cost $	Number	Number	Estimated Cost $	Interviews	Court Appearances	Interviews	Court Appearances	Estimated Cost $
New South Wales													
ALAO	47	58	53 250	29	617	3 138	13 111	4 090 632	5 484	6 564	N/A	N/A	N/A
Law Society[a]	N/Av	N/Av	N/A	N/A	N/A	N/A	1 726	N/Av	N/A	N/A	N/Av	8 952	383 782
Legal Services Commission[b]	78	55	22 832	N/A	N/A	4 252	2 378	N/Av	N/Av	19 709	N/Av	11 734	N/Av
Victoria													
ALAO	23	38	13 721	111	2 387	2 044	12 053	4 158 285	N/A	N/Av	N/A	N/A	N/A
Law Institute	10	24	21 277	N/A	N/A	(9 344)		2 392 279	3 165	4 211	N/A	195	15 224
Public Solicitor	N/Av	N/Av.	1 123	N/A	N/A	1 059	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Queensland													
ALAO	18	31	8 010	5	108	316	2 924	997 04	N/Av	N/Av	N/A	N/A	N/A
Law Society	N/Av	N/Av	N/A	N/Av	37 497	N/A	N/Av	N/Av	N/A	N/A	N/Av	N/Av	46 405
Public Defender	(57)		N/Av	N/A	N/A	(2 043)		N/Av.	N/A	N/A	N/A	N/A	N/A
Legal Aid Commission	25	57	14 552	4 407	83 364	542	7 927	1 811 580	N/A	N/A	N/Av	N/Av	66 805
South Australia													
Legal Services Commission	19	46	16 914	N/A	N/A	2 123	7 643	2 330 043	1 184	2 927	N/A	N/A	N/A
Western Australia													
Legal Aid Commission	22	44	16 208	N/A	N/A	1 802	6 300	2 783 883	N/A	N/A	810	9 408	84 963
Tasmania													
ALAO	9	13	10 764	N/A	N/A	1 750	3 395	899 675	N/Av	N/Av	N/A	N/A	N/A
Law Society	Nil		N/A	N/A	N/A	N/A	534	N/A	N/A	N/A	N/A	N/A	N/A
ACT													
Legal Aid Commission	12	21	6 102	N/A	N/A	682	1 236	667 440	N/Av	N/Av	N/A	N/A	N/A
Northern Territory													
ALAO	9	10	3 051	N/A	N/A	1 275	550	232 100	N/Av	N/Av.	N/A	N/A	N/A

(a) Covers the period 1 7 79 to 21 12 79 when incorporated into Legal Services Commission
(b) Includes full year of Public Solicitors' Office

APPENDIX C

INCOME OF MAJOR LEGAL AID BODIES 1981/82 — TABLE 2

STATE	POPULATION ESTIMATE AT DEC. 1981 '000	ORGANIZATION	COMMONWEALTH						STATE								TOTAL '000	
			FUNDING		OTHER INCOME		TOTAL		STATE GOVT.		STATUTORY INT.		OTHER INCOME		TOTAL			
			TOTAL	PER CAPITA	TOTAL	PER CAPITA	TOTAL	PER CAPITA	TOTAL	PER CAPITA	TOTAL	PER CAPITA	TOTAL	PER CAPITA	TOTAL	PER CAPITA	TOTAL	PER CAPITA
			$m	$	$m	$	$m	$	$m	$	$m	$	$m	$	$m	$	$m	$
N.S.W.	5.270	A.L.A.O.	8.982 (1)	1.70	.533	0.10	9.515	1.80	-	-	-	-	-	-	-	-	9.515	1.81
		Legal Services Commission	-	-	-	-	-	-	6.503	1.23	4.434	0.84	5.534	1.05	16.471	3.12	16.471	3.12
		Public Defender	-	-	-	-	-	-	.801	0.15	-	-	-	-	801	0.15	801	0.15
Total			8.982	1.70	.533	0.10	9.515	1.80	7.304	1.38	4.434	0.84	5.534	1.05	17.272	3.27	26.787	5.08
VICTORIA	3.971	A.L.A.O. (2 mths.)	2.761 (2)	0.71	0.093	0.02	2.854	0.73	-	-	-		-	-	-	-	2.854	0.72
		Legal Aid Commission (10mths)	5.411 (2)	1.36	.917	0.23	6.328	1.59	1.583	0.40	5.097	1.28	1.530	0.40	8.210 (3)	2.06	14.538	3.66
		Legal Aid Committee (2 mths)	-	-	-	-	-	-					.302	0.08	.302	0.08	.302	0.08
		Public Solicitor (2 mths)	-	-	-	-	-	-	0.627	0.16	-	-	-	-	.627	0.16	.627	0.16
Total			8.172	2.06	1.010	0.25	9.182	2.32	2.210	0.56	5.097	1.28	1.832	0.48	9.139	2.30	18.321	4.62
QUEENSLAND	2.386	Legal Aid Commission	3.973 (4)	1.67	.189	.08	4.162	1.75	-	-	1.876	0.79	.674	0.28	2.550	1.07	6.712	2.80
		Public Defender	-	-	-	-	-	-	2.449	1.02	-	-	.024	0.01	2.473	1.03	2.473	1.03
Total			3.973	1.67	.189	.08	4.162	1.75	2.449	1.02	1.876	0.79	.698	0.29	5.023	2.10	9.185	3.85
SOUTH AUSTRALIA	1.326	Legal Aid Commission	3.207 (5)	2.48	.408	0.31	3.695	2.79	.400	0.30	.603	0.45	.123	0.09	1.126	0.85	4.821	3.64
WESTERN AUSTRALIA	1.318	Legal Aid Commission	4.421 (6)	3.35	.584	0.44	5.005	3.80	.694	0.53	.625	0.47	.183	0.14	1.502	1.14	6.507	4.94
TASMANIA	.429	A.L.A.O.	2.110 (7)	4.92	.115	0.27	2.225	5.19	-	-	-	-	-	-	-	-	2.225	5.19
		Law Society	-	-	-	-	-	-	.001	-	.189	0.44	.020	.005	.210	.49	.210	.49
Total			2.110	4.92	.115	0.27	2.225	5.19	.001	-	.189	0.44	.020	.005	.210	5.08	2.435	5.68
A.C.T.	.228	Legal Aid Commission	1.385	6.07	.411	1.80	1.796	7.87	-	-	-	-	-	-	-	-	1.796	7.87
N.T.	.126	A.L.A.O.	.942 (8)	7.48	.054	0.43	.996	7.91	-	-	-	-	-	-	-	-	.996	7.91
TOTAL	15.054		33.272	2.21	3.304	0.22	36.576	2.43	13.058	.087	12.824	.085	8.390	0.56	34.272	2.27	70.848	4.71

Source: Commonwealth Legal Aid Council, Annual Report, 1981-82, Tables 2 and 6.

TABLE 5

OPERATIONS OF MAJOR LEGAL AID SCHEMES 1981/82

ORGANIZATION	Staffing		Number of Interviews	Advice Given by Private Profession		Duty Lawyer					Approved Applications For Aid		
						Staff Lawyer		Private Practitioner					
	Lawyers	Non Lawyers		No.	Estimated Cost $m	Interviews	Court Appearance	Interviews	Court Appearance	Estimated Cost $	Assigned to Staff Lawyers	Assigned to Private Practitioners	
												No.	Estimated Cost $m
N.S.W.													
A.L.A.O.	50	63	63,982	44	.001	7,695	7,362	Not Applicable			4,107	14,955	6.416
Legal Services Commission	92	72	25,324	Not Applicable		Not Available	21,506	Not Available	31,875	1.170 m	6,049	5,046	Not Available
Public Defender	15	3	Not Available	Not Applicable		Not Applicable		Not Applicable			Not Available		
VICTORIA													
A.L.A.O. (2 months)	24	34	1,900	15	.001	298	355	Not Applicable			81	2,639	1.632
Law Society (2 months)	13	25	1,596	Not Applicable		243	80	Not Applicable			-	1,875	Not Available
Public Solicitor (2 months)	Not	Available	Not Available	Not Applicable		Not	Available	Not Available				Not	Available
Legal Aid Commission (10 months)	59	120	18,620	Not Applicable		1,474	6,733	Generally Not Applicable			1,821	22,181	11.002
QUEENSLAND													
Legal Aid Commission	28	51	26,928	6,943	.137	4,790	962	14,078	2,310	190,213	1,129	11,971	Not Available
Public Defender	21	40	Not Available	Not Applicable		Not	Applicable	Not Applicable			(2,416) No Dissection Available		
SOUTH AUSTRALIA													
Legal Services Commission	22	39	18,265(1)	Not Applicable		8,386	6,758	Not Applicable			1,927	738	2.086
WESTERN AUSTRALIA						No Dissection Available							
Legal Aid Commission	27	50	18,189	Not Applicable				11,607	10,222	104,534	1,561	6,928	4.110
TASMANIA													
A.L.A.O.	10	12	9,723	Not Applicable		Not	Applicable	Not Applicable			1,695	4,197	1.427
Law Society	Not	Applicable	Not Available	Not Applicable		Not	Applicable	Not Available			Not Applicable	(2) 500	Not Available
A.C.T.													
Legal Aid Commission	14	19	7,982	Not Applicable		Not Available	800	Not Applicable			787	1,170	701
N.T.													
A.L.A.O.	6	11	3,198	Not Applicable		248	361	Not Applicable			678	637	309

(1) The Commission also gave telephone advice in 13,572 instances. In a significant number of cases people would have been advised to come into the office and if they did so would be counted under personal interviews.

(2) Estimate only.

APPENDIX D

EXPENDITURE OF MAJOR LEGAL AID BODIES 1982/83

STATE	ORGANIZATION	Salaries and Related Payments		Administrative Costs		Payments to Private Practitioners								TOTAL	
						Advice		Duty Lawyer		Case Work		Total			
		$m	%	$m	%	$m	%	$m	%	$m	%	$m	%	$m	%
N.S.W.	A.L.A.O. Legal Services Commission Public Defender	3.287 4.219 .892	26.2 21.3 90.8	1.122 1.371 .090	8.8 6.9 9.2	.001 -	-	- 1.497 -	- 7.5	8.269 12.709 -	65.0 64.3 -	8.270 14.206 -	65.6 71.8	12.679 19.876 .982	100 100 100
Total		8.398	29.0	2.583	7.7	.001		1.497	4.4	21.050	62.8	22.596	67.2	33.537	100
VICTORIA	Legal Aid Commission	4.561	17.7	1.582	6.0	-		.012	-	19.696	76.3	19.709	76.3	25.811	100
QUEENSLAND	Legal Aid Commission Public Defender	2.011 1.331	19.2 48.2	.775 .371	7.4 13.4	.216 -	2	.346 -	3.3	7.151 1.057	68.1 38.4	7.803 1.057	73.5 38.4	10.589 2.759	100 100
Total		3.342	25.0	1.146	8.6	.216	1.6	.346	2.6	8.200	61.5	8.860	66.4	13.348	100
SOUTH AUSTRALIA	Legal Services Commission	1.562	31.4	.511	10.3	.009	.02	.003	-	2.884	58.1	2.896	58.3	4.969	100
WESTERN AUSTRALIA	Legal Aid Commission	1.833	23.7	.556	7.2	.080	.8	.173	2.2	5.123	66.1	5.356	69.1	7.745	100
TASMANIA	A.L.A.O. Law Society	.595	23.6	.217	8.7	-		-		1.700	67.7	1.708	67.7	2.520	100
		Figures not available.													
Total		.595	23.6	.217	8.7	-		-		1.700	67.7	1.708	67.7	2.520	100
NORTHERN TERRITORY	A.L.A.O.	.560	45.5	.196	15.9	-		-		.476	38.6	.476	38.6	1.232	100
A.C.T.	Legal Aid Commission	1.031	52.4	.215	10.9	-		-		.722	36.7	.722	36.7	1.968	100
TOTAL		21.882	24	6.966	7.6	.246	.313	2.031	2.2	59.875	65.7	62.282	68.3	91.13	100

Source: Commonwealth Legal Aid Council, Annual Report, 1982-83, p.26.

APPENDIX E

EXPENDITURE OF MAJOR LEGAL AID SCHEMES 1983/84

STATE	ORGANIZATION	SALARIES AND RELATED PAYMENTS		ADMINISTRATIVE COSTS		PAYMENTS TO PRIVATE PRACTITIONERS								TOTALS	
						ADVICE		DUTY LAWYER		CASE WORK		TOTAL			
		$M	%	$M	%	$	%	$	%	$	%	$	%	$	%
N.S.W.	A.L.A.O.	2.942	21.2	.877	6.3	.001	-	-	-	10.044	72.5	10.045	72.5	13.864	100
	LEGAL SERVICES COMMISSION	4.858	21.7	1.799	8.0	-	-	1.690	7.5	14.058	62.7	15.748	70.3	22.405	100
	PUBLIC DEFENDER	.997	82.2	.211	17.8	-	-	-	-	-	-	-	-	1.208	100
TOTAL		8.797	23.47	2.887	7.7	.001	-	1.690	6.5	24.102	64.3	25.793	68.83	37.477	100
VICTORIA	LEGAL AID COMMISSION	5.921	19.5	2.295	7.6	-	-	.037	0.1	22.052	72.86	22.089	72.9	30.305	100
QUEENSLAND	LEGAL AID COMMISSION	2.383	18.0	1.704	12.9	.283	2.2	.442	3.3	8.421	63.6	9.146	69.1	13.233	100
	PUBLIC DEFENDER	1.206	38.5	.547	17.5	-	-	-	-	1.374	43.9	1.374	43.9	3.127	100
TOTAL		3.589	21.9	2.251	13.8	.283	2.2	.442	3.3	9.795	59.8	10.520	64.3	16.360	100
SOUTH AUSTRALIA	LEGAL SERVICES COMMISSION	1.865	29.3	1.106	17.9	.012	.19	NOT AVAILABLE		3.376	53.09	3.388	53.28	6.359	100
WESTERN AUSTRALIA	LEGAL AID COMMISSION	2.010	22.5	1.268	14.2	.028	.3	.188	2.1	5.432	60.9	5.648	63.3	8.926	100
TASMANIA	A.L.A.O.	.524	20.95	.192	7.68	-	-	-	-	1.785	71.37	1.785	71.37	2.501	100
	LAW SOCIETY	FIGURES NOT AVAILABLE								FIGURES NOT AVAILABLE					
A.C.T.	LEGAL AID COMMISSION	1.171	45.7	.297	11.6	.001	-	-	-	1.092	42.6	1.092	42.6	2.560	100
N.T.	A.L.A.O.	.452	38.83	.197	16.92	-	-	-	-	.515	44.24	.515	44.24	1.164	100
TOTALS		24.329	23.02	10.493	9.93	.325	.31	2.357	2.23	68.149	64.5	70.83	67.04	105.652	100

Source: Commonwealth Legal Aid Council, Annual Report, 1983-84, p.28.

APPENDIX F

F.1 : OPERATIONS MAJOR LEGAL AID BODIES 1984-85

Organisation	Staffing		Number of Interviews	Advice Given by Private Profession		Duty Lawyer					Approved Applications for Aid and Costs Incurred			
						Staff Lawyer		Private Practitioner			Assigned to Staff Lawyers	Assigned to Private Practitioner Estimated Cost		Payment of Applications Relating to:
	Lawyers	Non Lawyers		No	Estimated Cost $M	Interviews	Court Appear	Interviews	Court Appear	Estimated Cost $M		No.	$M	Civil Matters	Criminal Matters
N.S.W.														
A.L.A.O.	71	86	73,001	Not	Applicable	10,549	10,337	N/A	5,149	N/A	2,953	13,004	9,363	17	83
Legal Aid Commission	97	91	22,893	Nil	-	N/A	26,987	N/A	40,276	N/A	5,167	6,742	N/A	52	48
	168	177	95,894	-	-	10,549	37,364	-	45,425	-	8,120	19,746	9,363	29	71
Victoria															
Legal Aid Commission	114	198	28,200	Not	Applicable	1,880	13,986	132	1,490	Not Applicable	3,994	26,993	21,230	23	77
Queensland															
Legal Aid Commission	48	79	30,261	12,910	.286	9,926	N/A	N/A	N/A	N/A	3,694	14,291	.286	21	79
Public Defender	25	36	-	Not	Available	N/A	N/A	N/A	N/A	N/A		(3,984)		-	-
											(No Dissection Available)				
South Australia															
Legal Services Commission	31	60	25,408	Nil	Nil	6,410	5,349	281	557	N/A	4,071	8,273	4,412	33	67
Western Australia															
Legal Aid Commission	38	67	18,222	Not	Applicable	4,576	15,589			N/A	2,905	6,936	6,026	30	70
						(No Dissection Available Between Staff + Private Lawyers)									
Tasmania															
A.L.A.O.	12	14	11,350	Not	Applicable	-	-	N/A	-	N/A	2,123	4,532	1,804	32	68
A.C.T.															
Legal Aid Commission	18	24	3,949	259	.013	328	2,139	Not Applicable		-	868	1,170	1,116	43	57
N.T.															
A.L.A.O.	6	11	6,374	Not Applicable		430	937	N/A	3,203	N/A	506	575	.239	57	43
TOTALS	460	666	217,658	13,169	.299	34,093	75,301	913	50,675	-	30,321	82,316 (39841)	44,476	27	73

Source:
Commonwealth Legal Aid Council, Annual Report, 1984-85, pp. 29, 30, 31.

21.8 : INCOME MAJOR LEGAL AID BODIES 1984-85

State	Population Estimate At December 1984	Organisation	COMMONWEALTH						STATE								TOTAL	
			Funding		Other Income		Total		State Govt		Stat Int.		Other Income		Total		'000	
			Total $M	Per Cap $	Total $M	Per Cap $	Total $M	Per Cap $	Total $M	Per Cap $	Total $M	Per Cap $	Total $M	Per Cap $	Total $M	Per Cap $	Total $M	Per Cap $
N.S.W.	5,437	A.L.A.O.	15,142	2.785	1.353	.249	16,495	3.034	-	-	-	-	-	-	-	-	16,455	3.034
		Legal Aid Commission	NIL	NIL	-	-	-	-	12.100	2.225	7.756	1.427	8.467	1.557	28.323	5.209	28.323	5.209
		Public Defenders	-	-	-	-	-	-	1.634	0.301	-	-	-	-	1.634	0.301	1.634	0.301
TOTAL			15,142	2.785	1.353	.249	16.495	3.034	13.734	2.526	7.756	1.427	8.467	1.557	29.957	5.510	46.452	8.544
Victoria	4,097	Legal Aid Commission	14.618	3.568	.447	.109	15.065	3.677	-	-	12.436	3.035	7.889	1.925	20.325	4.960	35.390	8.638
Queensland	2,525	Legal Aid Commission	9.983	3.950	.015	.01	9.998	3.96	-	-	2.749	1.09	1.910	.76	4.659	1.85	14.657	5.81
		Public Defender	-	-	-	-	-	-	3.444	1.36	-	-	.050	.02'	3.494	1.38	3.494	1.38
TOTAL	-		9.983	3.950	.015	.01	9.998	3.96	3.444	1.36	2.749	1.09	1.960	.78	8.153	3.23	18.151	7.19
South Australia	1,357	Legal Services Commission	5,360	3.90	.348	.26	5,708	4.21	.660	.49	.718	.53	.283	.21	1,661	1.23	7,369	5.44
Western Australia	1,393	Legal Aid Commission	6,970	5,000	.514	.37	7,484	5.37	1.753	1.26	.481	.35	.138	.10	2.372	1.71	9,856	7.08
Tasmania	.439	A.L.A.O.	2.625	5.979	.150	.342	2.775	6.321	-	-	-	-	-	-	-	-	2,775	6,321
A.C.T.	.248	Legal Aid Commission	2.107	8,496	.365	1.472	2.472	9.968	-	-	-	-	-	-	-	-	2,472	9.968
N.T.	.141	A.L.A.O.	1.326	9.404	.080	.568	1.406	9.972	-	-	-	-	-	-	-	-	1,406	9.972
TOTAL	15,637		58.131	3.717	3.272	.209	61.403	3.926	19.591	1.253	24.140	1.544	18.737	1.198	62.468	3.995	123.871	7.922

21.9 : EXPENDITURE : MAJOR LEGAL AID BODIES 1984-85

State	Organisation	Salaries and Related Payments		Administrative Costs		Payments to Private Practitioners								TOTAL	
						Advice		Duty Lawyer		Case Work		Total			
		$M	%	$M	%	$M	%	$M	%	$M	%	$M	%	$M	%
N.S.W.	A.L.A.O.	4.46	27.04	1.525	9.25	.001	.006	N/A	-	10.509	99.994	10.510	63.71	16.495	100
	Legal Aid Commission	5.235	32.29	3.903	42.71	NIL	-	2.098	11.97	15.436	88.03	17.534	65.74	26.672	100
	Public Defenders	0.973	59.55	0.661	40.45	-	-	-	-	-	-	-	-	1.634	100
TOTAL		10.668	63.66	6.089	36.34	.001	.003	2.098	7.46	25.945	92.51	28.044	63.60	44.801	100
Victoria	Legal Aid Commission	5.526	18.152	2.781	9.135	-	-	.085	.384	22.050	99.616	22.135	72.713	30.442	100
Queensland															
	Legal Aid Commission	3.280	23.33	1.726	12.29	.286	2.03	.405	2.88	8.359	59.47	9.050	64.38	14.056	100
	Public Defender	1.565	40.95	.499	13.06	-	-	-	-	1.758	46.00	1.758	46.00	3.822	100
TOTAL		4.845	27.10	2.225	12.45	.286	2.65	.405	3.75	10.117	93.60	10.808	60.45	17.878	100
South Australia	Legal Services Commission	2.253	30.36	1.564	21.07	.013	.36	.005	.14	3.587	99.50	3.605	48.57	7.422	100
Western Australia	Legal Aid Commission	2.714	29.60	.938	10.23	NIL	NIL	.196	3.55	5.320	96.45	5.516	60.17	9.168	100
Tasmania	A.L.A.O.	.701	25.26	.325	11.71	-	-	N/A	-	1.749	100	1.749	63.03	2.775	100
A.C.T.	Legal Aid Commission	1.256	50.39	.468	18.97	.0135	1.71	-	-	.774	98.89	.789	30.64	2.572	100
Northern Territory	A.L.A.O.	.690	49.07	.300	21.34	-	-	N/A	-	.416	100	.416	29.59	1.406	100
TOTALS		28.693	24.64	14.71	12.67	.3135	.045	2.789	3.82	69.96	95.75	73.06	62.73	116.47	100

APPENDIX G

HISTORY OF GRANTS TO COMMUNITY LEGAL CENTRES 1974/5 - 1984

YEAR	N.S.W.	VIC.	QLD.	S.A.	W.A.	TAS.	N.T.	A.C.T.	TOTAL
74/75	10,000	23,000				36,000			69,000
75/76		24,760							24,760
76/77		34,000							34,000
77/78		80,000							80,000
78/79		21,000							21,000
79/80	29,000	112,500	12,000	21,500					175,000
80/81	94,000	147,500	11,000	17,500					270,000
81/82	124,000	201,000	33,000	42,000					400,000
1982 1/7-31/12	62,000	95,500	16,000	21,000					194,500
1983	149,500	241,000	42,000	47,500	25,500				505,500
1984	289,000	411,000	93,000	95,000	77,000	20,000		15,000	1,000,000

Table prepared by Attorney-General's Department,
Legal Aid Policy & Research Branch.

February 1984.

Source: Legal Aid Clearinghouse Bulletin, February, 1984, p.6.

APPENDIX H

21.1 Operations: Major legal aid bodies 1984–85

Organisation	Staffing: Lawyers	Staffing: Non-lawyers	Advice given by private profession: Number of interviews	Advice given by private profession: No. Estimated cost	Duty lawyer: Staff interviews	Duty lawyer: Court	Duty lawyer: Private pract. interviews	Duty lawyer: Court appearances	Approved applications for aid Assigned to: staff lawyers	Assigned to: private pract.	Estimated cost	Percentage of applications assigned to: Staff lawyers	Private pract.
				$					No.	No.	$		
N.S.W.													
ALAO	71	86	73 001	Not applicable	10 549	10 377	n/a	3 149	2 993	15 004	9.363	'17	83
Legal Aid Commission	97	91	22 833	nil —	n/a	26 987	n/a	42 276	5 167	4 742	n/a	52	48
Total	168	177	95 834	— —	10 549	37 364	—	45 425	8 160	19 746	9.363	29	71
Victoria													
Legal Aid Commission	114	198	28 200	Not applicable	1 880	13 986	132	1 490	7 994	26 993	21.230	23	77
Queensland													
Legal Aid Commission	48	79	30 261	12 910 .286	9 924		n/a		3 694	14 291	.286	21[2]	79[2]
Public Defender	25	36	—	— n/a	—	—	n/a	—	(3 984)[1]	—	—	—	
South Australia													
Legal Services Commission	31	60	23 408	nil nil	6 410	5 349	781	557	4 071	8 273	4.412	33	67
Western Australia													
Legal Aid Commission	38	67	18 222	Not applicable	4 576[1]	15 589[1]	—	—	2 905	6 936	6.026	30	70
Tasmania													
ALAO	12	14	11 350	Not applicable	—	—	n/a	—	2 123	4 532	1.804	32	68

Source: Legal Aid Clearinghouse Bulletin, September-December, 1985, pp. 172, 182.

Organisation	Staffing		Advice given by private profession			Duty lawyer				Approved applications for aid Assigned to			Percentage of applications assigned to	
	Lawyers	Non-lawyers	Number of interviews	No.	Estimated cost	Staff interviews	Court	Private pract. interviews	Court appearances	staff lawyers	private pract.	Estimated cost	Staff lawyers	Private pract.
					$					No.	no.	$		
A.C.T. Legal Aid Commission	18	24	3 949	259	.013	328	2 139	Not applicable		868	1 170	1,116	43	57
N.T. ALAO	6	11	6 374	Not applicable		430	937	n/a	3 203	506	375	239	57	43
Totals	460	666	217 658	13 169	.299	34 097	75 364	913	50 675	30 321 (3 984)	82 316	44,476	27	73

n/a = not available
[1] = No dissection between staff lawyers and private practitioners available
[2] = No dissection between Old Legal Aid Commission and Public Defender available

Commonwealth of Australia
Legal Aid Budget 1985/86 - 1986/87

State	Actual Net Outlays 1985/86	Estimated Net Outlays 1986/87
	$	$
New South Wales		
-ALAO	15,816,429	7,899,000
-Commission	-	12,889,000*
Victoria	17,566,731	19,925,500
Queensland	11,174,204	12,534,500**
South Australia	6,194,499	7,107,500**
Western Australia	8,359,712	9,930,500**
Tasmania	3,049,448	3,272,500
Northern Territory	1,133,593	1,300,000
Australian Capital Territory	2,298,677	2,833,127
Aboriginal Legal Service	12,094,420	12,806,200
Community Legal Centres	1,490,000	1,932,000
Total	79,977,713	92,429,827

* Proposed commencement from 5 January 1987
** Includes estimated surplus funds at 30 June 1986

APPENDIX I

COMMUNITY LEGAL CENTRES

APPROVED FUNDING 1986

TOTAL COMMONWEALTH ALLOCATION FOR 1986

N.S.W	467,700
VIC	639,850
QLD	193,200
WA	168,600
SA	166,300
TAS	60,450
A.C.T.	33,900
TOTAL	$1,730,000

NEW SOUTH WALES

Name of Centre	C'wealth	State	TOTAL
Redfern Legal Centre	69,795	61,190	130,985
Macquarie Legal Centre	69,795	61,190	130,985
Marrickville Legal Centre	68,175	59,600	127,775
Women's Legal Resources Centre	77,032	35,523	112,555
Inner City Legal Centre	35,019	30,474	65,493
Tenants Union of NSW	17,631	15,115	32,746
Environmental Defenders Office	16,038	15,638	31,676
Kingsford Legal Centre	17,091	14,585	31,676
Public Interest Advocacy Centre	17,091	14,585	31,676
Illawarra Legal Centre	33,995	13,067	47,062
Blue Mountains Legal Centre	30,000	-	30,000
Interagency Migration Group	16,038	14,033	30,071
TOTAL	467,700	335,000	802,700

VICTORIA

Action Resource Centre	15,800	15,100	30,900
Broadmeadows Community Service	43,400	41,600	85,000
Coburg Legal Service	43,700	42,000	85,700
Federation of Victoria Community Legal Centres	-	64,200	64,200
Consumer Credit Legal Service	11,400	34,200	45,600
Doveton & District Legal Service	30,000	28,800	58,800
Fitzroy Legal Service	80,300	77,000	157,300

Source: Legal Aid Clearinghouse Bulletin, May-August, 1986, p.124.

Name of Centre	C'wealth	State	TOTAL
Flemington Community Legal Service	27,100	25,900	53,000
Frankston North Legal Service	39,050	37,600	76,650
Monash-Oakleigh Legal Service	6,900	6,600	13,500
North Melbourne Legal Service	36,000	34,500	70,500
Nunawading & Eastern Suburbs Community Legal Service	55,700	53,300	109,000
Southern Communities Legal Service	5,150	4,850	10,000
Springvale Legal Service	42,500	40,700	83,200
St.Kilda Legal Service	44,600	42,800	87,400
Sunshine Legal Service	900	800	1,700
Tenants Union Legal Service	16,000	47,500	63,500
West Heidelberg Community Service	41,700	40,000	81,700
Western Suburbs Legal Service	41,250	39,650	80,900
Women's Legal Resources Group	29,700	28,400	58,100
Geelong Community Legal Service	28,700	27,500	56,200
TOTAL	639,850	733,000	1,372,850
QUEENSLAND			
South Brisbane Legal Service	30,267	4,000	34,267
Women's Legal Service	13,997	6,500	20,497
Youth Advocacy Centre	36,330	5,000	41,330
Welfare Rights Centre	19,830	13,000	32,830
Caxton Street Legal Service	57,335	6,900	64,235
Toowoomba Legal Centre	29,431	-	29,431
Petrie Community Legal Centre	3,610	-	3,610
Sunshine Coast Community Legal Service	2,400	-	2,400
TOTAL	193,200	35,400	228,600
WESTERN AUSTRALIA			
WA Community Law Centres	-	2,500	2,500
Gosnells District Information Centre	54,700	4,500	59,200
TLC Emergency Welfare Foundation of WA (Inc.)	42,000	9,000	51,000
Tenants Advice Service (WA)	31,400	-	31,400
Sussex St Community Law Service	19,000	4,500	23,500
North Perth Migrant Resource Centre	21,500	4,500	26,000
TOTAL	168,600	25,000	193,600

SOUTH AUSTRALIA			
Bowden-Brompton Community Legal Service	38,333	23,667	62,000
Noarlunga Community Legal Service	27,634	23,606	51,240
Norwood Community Legal Service	38,333	23,667	62,000
Parks Legal Service	32,000	35,000	67,000
Mitchell Park (Marion) Community Legal Service	30,000	-	30,000
South Australian Council of Community Legal Services (SACCLS)	-	8,686.49	8,686.49
TOTAL	166,300	114,626.49	280,926.49
TASMANIA			
Hobart Community Legal Service	34,000	-	34,000
Tenants Union of Tasmania Inc.	11,000	-	11,000
Child and Family Service	13,000	-	13,000
Debt Help	2,000	-	2,000
Tas. University Referral Service	450	-	450
TOTAL	60,450	-	60,450
A.C.T.			
Welfare Rights Centre (Canberra)	29,500	-	29,500
Canb. Community Legal Centre	4,400	-	4,400
TOTAL	33,900	-	33,900

APPENDIX J

Table A

Commonwealth Referrals to Private Practitioners 1985/86

State	No of Family Law Referrals	% Family Law	No per 1,000 Population	No. of Other Referrals	%	Total No. of Referrals
NSW	10,405	68.7	1.9	4,736	31.3	15,141
VIC	3,491	22.2	0.8	12,205	77.8	15,696
QLD	4,933	53.1	1.9	4,362	46.9	9,295
SA	2,060	25.8	1.5	5,939	74.2	7,999
WA	2,658	47.7	1.8	2,909	52.3	5,567
TAS	1,414	30.7	3.2	3,185	69.3	4,599
ACT	577	49.3	2.3	593	50.7	1,170
NT	106	25.5	0.7	310	74.5	416
TOTAL	25,644	42.8	1.6	34,239	57.2	59,883

Source: Legal Aid Clearinghouse Bulletin, May-August, 1986, Table A.

APPENDIX K

Source: Legal Aid Clearinghouse Bulletin, May-August, 1986, pp. 124, 135.

OPERATIONS MAJOR LEGAL AID BODIES 1985/86

BODY	STAFFING		ADVICE GIVEN		DUTY LAWYER				ASSIGNMENTS		PERCENTAGE OF ASSIGNMENTS TO	
					Staff Lawyers		Private Lawyers					
	Lawyers	Support Staff	Staff Lawyers	Private Lawyers	Advice	Court	Advice	Court	Staff Lawyers	Private Lawyers	Staff Lawyers	Private Lawyers
N. S. W.												
-A. L. A. O.	67	86	62,620	-	*	11,639	-	-	2,939	15,142	16.3%	83.7%
% Var.	-5.6%	0.0%	0.3%			12.2%			-1.5%	0.9%		
-L. A. C.	117	112	25,985		*	29,248	*	32,051	3,411	5,999	36.2%	63.3%
% Var.	20.6%	23.1%	13.5%			8.4%		-24.2%	-30.0%	20.5%		
Sub Total	184	198	88,605	-	-	40,887	-	32,051	6,350	21,141	23.1%	76.9%
% Var.	9.5%	11.9%	3.3%			9.4%		-24.2%	-22.2%	7.1%		
V. I. C.												
-L. A. C.	114	200	31,547	-	2,546	16,605	483	2,412	8,687	27,864	23.8%	76.2%
% Var.	0.0%	1.0%	11.8%		35.1%	13.6%	226.4%	46.6%	8.7%	3.2%		
Q'LAND												
-L. A. C.	51	88	30,582	12,917	*	9,179	*	31,187	3,241	13,086	19.9%	80.1%
% Var.	6.3%	11.4%	1.1%	0.1%		**		**	-12.3%	-8.4%		
-P. D. O.	37	37	-	-	-		-	-	3,793	1	***	***
% Var.	48.0%	2.8%							-4.8%			
Sub Total	88	125	30,582	12,917	-	9,179	-	31,187	7,034	13,086	***	***
% Var.	20.5%	8.7%	1.1%	0.1%		**		**	-8.4%	-8.4%		
S. A.												
-L. S. C.	39	60	24,502	-	624	2,882	84	333	3,645	9,823	27.9%	72.1%
% Var.	25.7%	0.0%	1.4%		-41.2%	-46.1%	-62.5%	-40.2%	-11.0%	16.0%		
N. A.												
L. A. C.	40	69	15,519	5,969	3,084	3,854	1,527	12,474	3,218	6,921	31.7%	68.3%
% Var.	5.3%	3.0%	**	**	**	**	**	**	10.8%	-0.2%		
TAS.												
-A. L. A. O.	12	13	10,647	-	-	-	-		1,645	4,599	26.3%	73.7%
% Var.	0.0%	-7.1%	-6.2%						-22.5%	1.5%		
A. C. T.												
-L. A. C.	18	26	5,720	358	*	2,147	-	-	998	1,170	85.9%	54.1%
% Var.	0.0%	0.0%	-20.4%	38.2%		0.4%			9.8%	0.0%		
N. T.												
-A. L. A. O.	9	13	6,437	-	*	1,632	-	-	518	416	55.5%	44.5%
% Var.	50.0%	18.2%	1.0%			74.2%			2.4%	10.9%		
OVERALL TOTAL	504	702	***	***	***	77,186	***	78,457	***	***	***	***
% Var	9.6%	5.4%				**		**				

* Information not available.
‡ Included under staff lawyers.
** Data not provided previously.
*** Insufficient data

INCOME: MAJOR LEGAL AID BODIES 1985/86

STATE/ TERRITORY	COMMON/ HEALTH INPUT	STATE INPUT				SELF GENERATED INCOME				OVERALL INCOME
		GRANTS	SPECIAL TRUST AND STATUTORY INTEREST	OTHER	TOTAL INPUT	CONTRIB. & REC. COSTS	INTEREST	OTHER	TOTAL	
	$	$	$	$	$	$	$	$	$	$
N. S. W.										
-A. L. A. O.	17,439,435	-	-	-	-	142,822	-	-	142,822	17,582,257
% Var.	15.2%					8.1%			8.1%	15.1%
-L. A. C.	-	12,361,000	6,822,196	-	19,183,196	8,386,638	2,190,096	22,008	10,598,742	29,781,938
% Var.		2.2%	5.6%		3.4%	-0.7%	69.0%	-12.8%	8.6%	5.2%
-P. D. O.	-	1,531,000	-	-	1,531,000	-	-	-	-	1,531,000
% Var.		-6.3%			-6.3%					-6.3%
Sub Total	17,439,435	13,892,000	6,822,196	-	20,714,196	8,529,460	2,190,096	22,008	10,741,564	48,895,195
% Var.	15.2%	1.2%	5.6%		2.6%	-0.5%	69.0%	-12.8%	8.6%	8.1%
VIC.										
-L. A. C.	17,266,000	-	14,201,283	-	14,201,283	4,788,965	1,885,960	1,352	6,676,277	38,143,560
% Var.	18.1%		16.0%		16.0%	16.1%	63.7%	-91.1%	26.1%	18.6%
Q'LAND										
-L. A. C.	11,143,200	-	6,523,022	-	6,523,022	1,609,174	1,249,113	65,105	2,923,392	20,589,614
% Var.	11.6%		137.3%		137.3%	38.6%	76.0%	702.4%	55.6%	40.9%
-P. D. O.	-	3,162,383	2,537,500	-	5,699,883	48,055	-	-	48,055	5,747,938
% Var.		-8.2%			65.5%	-3.4%			-3.4%	64.5%
Sub Total	11,143,200	3,162,383	9,060,522	-	12,222,905	1,657,229	1,249,113	65,105	2,971,447	26,337,552
% Var.	11.6%	-8.2%	229.7%		97.4%	36.9%	76.0%	702.4%	54.1%	45.5%
S. A.										
-L. A. C.	6,145,000	757,000	1,516,522	-	2,273,522	359,289	474,863	21,415	855,567	9,274,089
% Var.	14.6%	14.7%	34.3%		27.1%	3.2%	81.2%	4.8%	35.7%	19.2%
W. A.										
-L. A. C.	7,874,000	1,942,000	661,516	-	2,603,516	619,504	171,138	37,465	878,607	11,356,123
% Var.	13.0%	10.8%	37.5%		16.5%	20.6%	1.4%	26.8%	16.9%	14.1%
TAS.										
-A. L. A. O.	3,371,335	-	-	-	-	69,618	-	-	69,618	3,440,953
% Var.	28.4%					17.3%			17.3%	28.1%
A. C. T.										
-L. A. C.	2,339,000	-	275,000	-	275,000	352,760	16,347	2,927	372,534	2,986,534
% Var.	11.0%					5.5%	2.5%	-79.9%	2.0%	20.8%
N. T.										
-A. L. A. O.	1,356,453	-	-	-	-	113,823	-	-	113,823	1,470,231
% Var.	2.3%					63.1%			63.1%	5.4%
OVERALL TOTAL	66,934,428	19,753,383	32,537,039	-	52,290,422	16,490,648	5,988,017	200,772	22,679,437	141,904,287
% Var.	15.1%	0.8%	41.1%		22.6%	8.2%	66.1%	31.3%	19.4%	18.5%

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