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The Feasibility of Achieving Fair and Effective Access to Law in the Australian Welfare State

The lessons of revisiting
the post-war experience of legal aid

A thesis submitted for the degree of Doctor of Philosophy of
The Australian National University

Donald Ian Fleming
February 1999

Statement of Candidate

This thesis and its investigations are entirely my own original work.

Donald Ian Fleming
February 1999

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Abstract

In the 1970s Australia, like a number of comparable countries, reorganised the provision of legal aid. Within a few years, however, new 'problems' had emerged in 'access to justice'. In 1993, the Federal Government responded by charging a committee to identify 'solutions', some of which were adopted in mid-1995. Yet, the 'problems' of 'access to justice', and access to law, remain.

This thesis considers whether these problems are capable of resolution. It begins by posing a general question: is fair and effective access to law a feasible expectation of citizens or governments in the Australian welfare state? In addressing this question, the thesis takes a 1990 official report into the problems facing legal aid in Australia as its starting point. This report left a legacy of unanswered questions. In retrospect, moreover, its questions highlighted the ongoing social significance of the problems in access to law for governments, business and citizens in post-war Australian society.

The opening contention is that revisiting the origins and significance of the post-war experience of legal aid holds the key to determining the feasibility of achieving fair and effective access to law. The thesis nominates two major justifications in support of this contention. First, it asserts that revisiting the post-war experience will improve our understanding of 'why' Australia acted to enhance access to legal aid in the 1970s. Secondly, the thesis asserts that improving our understanding of the legal aid response will improve our capacity to understand the 'access to justice' response, and thereby the feasibility of any future reforms towards fair and effective access to law.

Part I begins by explaining the history behind the national legal aid scheme, the reasons why it emerged in 1973-76 and its ideological context in modern Australian society. In doing so, it answers some of the unanswered questions of the 1990 report. However, Part II also demonstrates the limitations of institutional and ideological history in explaining the post-war experience, concluding that 'missing' parts of the story remain to be told. Thus, Part II begins by revisiting - in a cross-national context - the existing ideas which explain the post-war experience. It develops an alternative theory of the origins and significance of modern legal aid, which it proceeds to apply in revisiting - in the context of the Western world - the origins and significance of its post-war development.

Part III proceeds to demonstrate 'why' and 'how' the lessons of revisiting the post-war experience enable us to better assess the feasibility of achieving fair and effective access to law. It begins by applying the insights, 'benchmarks' and analytical methodology of Part II to reconsider the origins of the new 'problems' in 'access to justice', the jettisoning of the legal aid response and the significance of the 1993 'access to justice' response. Part III concludes by briefly considering the implications of the thesis for the feasibility of achieving fair and effective access to law in the contemporary Australian welfare state.

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Chapter One
Introduction

In 1976, Australian governments agreed in principle to combine to establish a joint Commonwealth-State national legal aid scheme. This agreement had been preceded by the changes to legal aid policy announced by the Whitlam Federal Government in mid-1973, which reversed the 'hands-off' approach of the Commonwealth towards participation in national and comprehensive provision of legal aid for its citizens.[1] This approach had been followed by successive national governments since 1950. The Whitlam Government acted quickly to translate its new legal aid policies into administrative reality. In 1974-75, it rejuvenated the scheme administered by the Legal Service Bureaux, thereby transforming it into a comprehensive national legal aid scheme providing legal representation and advice in matters of Federal law, and in Commonwealth proceedings. The Whitlam Government also acted to give Federal grants to supplement the funding available to the State and Territory public and law society schemes. Its interventions were intended as interim measures whilst it overcame the political, constitutional and financial obstacles which blocked the establishment of a national Commonwealth statutory legal aid scheme.

This scheme was not to be. On 13 December 1975, a national Liberal/National Country Party coalition government led by the Rt Hon Malcolm Fraser was elected. The new, conservative Federal government had different ideas about Commonwealth participation in national legal aid and very quickly translated those ideas into the revised policies which stimulated an 'in-principle' Commonwealth-State agreement in 1976 to establish a joint national scheme. By 1979, the essential premises of this agreement had been converted into the machinery of a national scheme of legal aid. Australia had finally joined Britain, Canada, Denmark, Finland, France, The Netherlands, Norway, Sweden, the United States and other welfare capitalist countries which had restructured arrangements for legal aid in the post-war period.[2]

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1 The Whitlam Government - the first Australian Labor Party national government since 1949 - had been elected in late 1972.

2 The first of the post-war schemes was established in the United Kingdom in 1949. The Netherlands were next in 1957, followed by the United States in the mid-1960s. By the early 1970s, Austria, Canada, Denmark, Finland, France, Norway, Sweden and other welfare capitalist countries had restructured national arrangements for legal aid. Generally see F H Zemans (ed), *Perspectives on Legal Aid: An International Survey*, (1979); E Blankenburg & J Cooper, "A Survey of Literature on Legal Aid in Europe" (1982) 2 *Windsor Yearbook on Access to Justice* 263 at 276-277; R L Abel, "Law Without Politics: Legal Aid Under Advanced Capitalism" (1985) 32 *UCLA Law Review* 474 at 475; M Cappelletti & B Garth (eds.), *Access to Justice*, Vol 1 Bk 1 (1978) at x-xi. Reforms to the provision of legal aid also occurred in other Western and Westernised countries in the post-war period. For instance, Germany, India, Israel and South Africa: H R Lieberman, "Israel's Legal Aid Law: Remedy for Injustice?" (1974) 3 *Israel Law Review* 413 at 417-423; N Abramowitz, "Legal Aid in South Africa" (1960) 77 *The South African Law Journal* 351; D L Carey Miller, "Some Aspects of Legal Aid in Criminal Proceedings" (1972) 89 *South African Law Journal* 71 at 77-80; G O Koppell, "Legal Aid in India", (1966) 8 *Journal of the Indian Law Institute* 224; Blankenburg & Cooper, above at 276. The Western experience also inspired developments in some Developing World Countries: Committee on Legal Services to the Poor in

The national scheme was the first organised response of post-war Australian governments to improve popular access to the legal system. High hopes were held for its success, none the more so than by Senator L K Murphy, QC, Attorney-General in the first Whitlam Government and the person responsible for the initial changes in Commonwealth legal aid policy. In mid-1973, Senator Murphy told the Commonwealth Senate that he foresaw that the changes would make legal aid "readily and equally available to citizens everywhere in Australia".[3] Many of his ministerial contemporaries, others interested in socio-legal reform and lawyers shared his vision. Later, they were joined by the administrators and lawyers newly employed in the State legal aid commissions, and a significant few in the community legal centres.

However, notwithstanding the hopes of its major supporters, the national scheme was to quickly demonstrate its shortcomings. Neither its funding nor design allowed it to fulfil the aspiration of providing every Australian citizen with equal access to a comprehensive range of lawyer services.[4] From its inception, the scheme operated to provide a narrow range of lawyer services to poorer people, subject to restrictive eligibility criteria. Therefore, it was institutionally disqualified from satisfying the expectations of those who hoped that it would - through universal and equal access to legal aid - introduce a new era of popular access to law in Australian society. The national scheme was also destined to fail on a second front. As it became fully operational in the early 1980s, the operations of the scheme were unable to stem a rising tide of new 'problems' in popular access to law. Within a few years, there was a new consciousness in Australian society of the cost of legal transactions, and the socio-economic significance of adequate access to legal services.[5] Moreover, there was a growing public perception that it was no longer just the 'poor' who were disadvantaged by inadequate access to the legal system.[6] In 1989, the Australian

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the Developing Countries. *Legal Aid and World Poverty: A Survey of Asia, Africa and Latin America*, (1974). The term "welfare capitalism" is discussed and defined at n 35 below.

3 Ministerial Statement, Senator the Hon L K Murphy, 13 December 1973, Sen Deb 1973 Vol 58 at 2800.

4 "Lawyer services" are "a subset of 'legal services'" comprising that "part of the market for legal services ... provided solely by" practising barristers and solicitors: Senate Standing Committee on Legal and Constitutional Affairs, (February 1992) at 11. The meaning of "legal services" applied in the thesis is defined at n 5 below.

5 "Legal services" connotes the full range of functions generated by the legal system. Its meaning includes "lawyer services" (n 4 above) and "lawyer functions" (n 28 below), together with the services and functions the state and its agencies provide through the legal system; for instance, the administrative machinery, legislation, the courts - and ultimately the system of centralised legal regulation itself. This conception is wider and more inclusive than the conventional definition of "legal services" as synonymous with lawyer services: Australian Bureau of Statistics, Legal Services Industry, 1987-88, Catalogue No. 8667.0 at 9; Access to Justice Advisory Committee, *Access to Justice: an Action Plan*, (1994), Part III at 65-221.

6 The poor citizens of the welfare states are generally closely associated with legal aid - both as targets or objects of policy, and as beneficiaries of legal aid schemes. However, the concept of the 'poor' as a legal, social or economic point of reference in modern Australian society - and comparable countries - has manifest limitations. For instance, Anglo-Australian law has never developed a uniform or comprehensive definition of the 'poor', or poverty. Moreover, the idea that the 'poor' exist as a potentially identifiable group only serves to obscure the real social, economic and political dimensions of modern poverty in the welfare state: R Cranston, *Legal Foundations of the Welfare State*, (1985) at 5-7.

Council of Social Services Inc (ACOSS) expressed its concern that "greater numbers of average income Australians are also becoming disadvantaged in terms of their ability to pay their own way to obtain access".[7] ACOSS's voice was amongst many protestants, and they were not limited to the social welfare sector. For instance, in 1990, in reviewing legal developments in the 1980s, the editor of the *Australian Law Journal* - an influential and well-respected conservative legal academic - lamented that "the fruits of justice continue to be denied to the majority of the Australian people".[8]

These new 'problems' in popular access to law also found a national political voice.[9] In May 1989, the Commonwealth Senate voted to refer the question of the cost of legal services and litigation and the availability of legal aid to its Standing Committee on Legal and Constitutional Affairs.[10] In 1990 and 1991, this committee conducted its inquiry, seeking submissions and holding public hearings.[11] In 1992, the Standing Committee completed its deliberations, and, in 1993, published two reports identifying what its members believed were practicable reforms to reduce the cost of legal transactions, and to improve citizens' access to legal services.[12]

However, the political significance of these new 'problems' in popular access to the legal system had already attracted the interest of mainstream politicians. The Keating Federal Labor government decided to initiate its own official inquiry. In May 1993, its Attorney-General, The Hon Michael Lavarch MP, established an extra-parliamentary body known as the Access to Justice Advisory Committee (AJAC) to recommend reforms to legal services to "enhance access to justice and to render the system fairer, more efficient and more effective."[13] The AJAC was directed to consider evidence already collected by various inquiries - convened since the early 1980s - into the operation of the national legal system, and to adapt their

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Furthermore, poverty alone does not indicate that a person is deprived of adequate access to lawyer services: M Cass & J S Western, *Legal Aid and Legal Need*, (1980) at 13-14; P Hanks, *Social Indicators and the Delivery of Legal Services*, (1987) at 53. The idea of an existent 'poor' is also allied with liberal legalist explanations of modern legal aid (pp 142-154 below). Consequently, it is both a value laden term, and has limited value in portraying the reality of the needs of poorer people in the modern market for legal services. Accordingly, the terminology of the 'poor' is used sparingly. Where possible, alternative words or phrases like "poorer people", "poorer and disadvantaged people" and "poorer and disadvantaged citizens" - is used to describe people living in conditions of relative poverty: R Cranston, above at 5. If the term is used specifically in a liberal legalism context - which 'naturally' associates poorer people with legal aid - it is referred to thus as 'the poor.'

7 National Legal Aid Advisory Committee, *Legal Aid for the Australian Community*, (1990) at 182.

8 J G Starke, "Current Topics" (1990) 64 *Australian Law Journal* 753.

9 Access to Justice Advisory Committee, above n 5 at paras 1.2-1.4; Senate Standing Committee on Legal and Constitutional Affairs, *The Cost of Justice: Foundations for Reform*, (1993) at paras 16 & 43.

10 Ibid at para 1. The reference was known as the 'Cost of Justice' inquiry.

11 It also published discussion and background papers on the role of market forces in access to lawyer services, legal aid, recent reforms to the legal profession in England, contingency fees, lawyers' fees, lawyers' ethics, methods of dispute resolution and the courts and the conduct of litigation.

12 Senate Standing Committee on Legal and Constitutional Affairs, above n 9; Senate Standing Committee on Legal and Constitutional Affairs, *The Cost of Justice: Second Report: Checks and Imbalances*, (1993).

13 Access to Justice Advisory Committee, above n 5 at v.

recommendations to conform to the dictates of the new Federal economic reform agenda.[14] Its report was presented to the Prime Minister on 2 May 1994, and he responded twelve months later by publishing an 'Action Statement'.[15] This statement officially endorsed a "comprehensive national strategy for addressing problems with access to justice across the entire legal system".[16] This new Federal strategy was comprised of various socio-legal reformist policies "geared towards resolving conflicts before they become legal problems, reforming key legal institutions and strengthening access and equity across the legal system".[17] However, less than a year later, in March 1996, the Keating Government was defeated at the polls, ending thirteen years of Labor Party national administration. It had not been able to fully implement its new strategy, the 'access to justice' policies of the incoming conservative administration were unclear, and the problems in popular access to the legal system in the post-war Australian welfare state remained unsolved.

The Provenance of the Thesis

The actual provenance of this thesis lies in the work of the Commonwealth National Legal Aid Advisory Committee (NLAAC) between 1988 and 1990. In late 1986, the Hawke Federal Government changed the administrative arrangements for Commonwealth participation in the national scheme.[18] It established an Office of Legal Aid Administration (OLAA) within the Attorney-General's Department, and constituted the NLAAC and the National Legal Aid Representative Council to carry out the function - previously performed by the Commonwealth Legal Aid Council - of advising the Attorney-General on matters affecting Commonwealth involvement in legal aid.[19] The 1986 changes also vested political and administrative responsibility for Commonwealth participation in the Minister for Justice.

In September 1988, the NLAAC advised the Minister that it had resolved to "undertake [a national] inquiry into legal aid policy and ... the efficiency and effectiveness of the arrangements for funding and administering legal aid".[20] The inquiry began with the publication of a discussion paper in late 1988, and until mid-1989 the NLAAC accepted written submissions and heard evidence at public meetings throughout Australia. It presented the report of its inquiry to the Minister for Justice in mid-1990.[21] The NLAAC report contained a detailed analysis of the

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14 Ibid at xxvi-xxvii.

15 Ibid at v; Attorney-General's Department, *The Justice Statement*, (1995).

16 Attorney-General's Department, above n 15 at 2.

17 Ibid at iii. The 'Justice Statement' included new national policies on dispute resolution, including family-based disputes, lawyer services and the legal profession, courts and tribunals, women's' justice issues, legal aid, law reform, consumer protection, criminal law, human rights, and cross-cultural access to law.

18 National Legal Aid Advisory Committee, above n 7 at 1-2 & 25-32.

19 Ibid at 2-3.

20 Ibid at 4; D Fleming, "Rethinking Legal Aid Policy" (1989) 14 *Alternative Law Journal* 6.

21 National Legal Aid Advisory Committee, *Legal Aid for the Australian Community*, (Canberra, Australian Government Publishing Service, 1990).

problems facing the Federal Government in financing and administering its responsibilities in the national scheme, together with several hundred instances of advice and recommendations in thirty different classifications.[22]

The NLAAC's advice and recommendations were constrained by its statutory functions and responsibilities, the politics of the legal aid sector and the private legal profession, and the dynamics of the national legal services system. Consequently, its report emphasised reforms to the management of the national scheme to enhance its effectiveness and efficiency. Nevertheless, the NLAAC endeavoured to portray these proposed reforms in the context of the national legal system. In particular, its report acknowledged the relationship between optimum levels of effectiveness and efficiency in the operations of the national scheme, and the continuing, nationwide 'problems' in access to the legal system described above. Sometimes it did so only implicitly, but in a number of instances it did so expressly.[23] For instance, the NLAAC recommended that systemic legal and administrative reforms were necessary to improve specific aspects of the national scheme.[24] Moreover, in the penultimate chapter of the report, it highlighted the centrality of this relationship.[25] The NLAAC advised the Minister that it was impracticable for governments to consider legal aid administration without simultaneously confronting the 'problems' in 'access to justice', saying that the problems facing the legal aid scheme could not "be severed from the wider problems associated with legal transaction costs facing the community with respect to protecting or asserting their legal rights and interests".[26]

Neither did these external constraints stifle the NLAAC in developing new perspectives on the national scheme. For instance, its report was the first inquiry to acknowledge the impact of public policy on funding, providing and supplying legal aid.[27] It also alerted the Minister to the impact of the organisation of the lawyer services industry upon the costs of administering the national scheme, and the capacity of governments to redress problems in access to lawyer services and functions.[28] The NLAAC also began to explore and publicise the relationship

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22 Ibid at 282-252.

23 Ibid at 285-289, 312-315 & 322-343.

24 Ibid at 179-252.

25 Ibid at 182-186.

26 Ibid at 184.

27 Cf. Australian Government Commission of Inquiry into Poverty, Law and Poverty Series, *Legal Aid in Australia*, (1975); Australian Legal Aid Review Committee, Report, (1974); Australian Legal Aid Review Committee, 2nd Report, (March 1975); Attorney-General's Department, Legal Aid Task Force, *Final Report, August 1985: Discussion Paper November 1984*, (1985).

28 National Legal Aid Advisory Committee, above n 7 at 103-104. "Lawyer functions" refers to the performance by 'non-lawyers' of functions similar to those performed by licensed legal practitioners. One instance is paralegals or other 'non-lawyers' providing legal representation, assistance or advice in connection with contemplated or actual proceedings before courts or tribunals. Another instance is where "lay people ... such as accountants, welfare advisers, public officials, company secretaries [provide] advice about the interpretation of legislation, consumer rights, ascertaining rights to welfare services etc.": Senate Standing Committee on Legal and Constitutional Affairs, above n 4 at para 3.2.

between Federal Government outlays on the national scheme and the trend in Federal socio-economic policy favouring "constraint in relation to public expenditure".[29] It pointed out that this trend - which had been apparent since the early 1980s - evidenced a major shift away from principles of political economy, which historically had sustained the core of the 'socially defensive' Federal welfare state.[30] The NLAAC suggested that application of these new economic policies would adversely effect the administration of the national legal aid scheme. It also cautioned that this policy shift meant that it was now unlikely that a universal national scheme providing a comprehensive range of legal services would ever be incorporated into the Australian welfare state.[31]

The Genesis of the Thesis

Whilst the above describes the provenance of the thesis, its genesis lay elsewhere: in the author's experiences of the NLAAC inquiry, its report and its aftermath. In 1988-90, the author was employed as NLAAC's principal legal officer, and, in this capacity, was both actively involved in the conduct of its inquiry and the author of its report.[32] The author's experiences - and subsequent post-report writing reflections - left him with a legacy of unanswered questions. These questions covered four categories which all related to aspects of methodology, context, history and implications of the NLAAC inquiry and its report.

The first category emerged from the NLAAC's attempt to contextualise the functions of the national legal aid scheme in the 1970s and 1980s. We have already seen that this was constrained by the four external factors mentioned above.[33] In addition, there was an equally important internal constraint, namely the fact that almost everyone involved the NLAAC inquiry was a lawyer. A chartered public accountant, long associated with the Legal Services Commission of South Australia, was the only exception. However, he held liberal professional values similar to those of the lawyers. Consequently, all involved in the inquiry were well-schooled in liberal legalism and its modern trinity of social, political and legal ideals.[34] In the Australian context, this meant that all were at least as equally unschooled in political science, the sociology of law, social theory, Public Policy, public administration and theories of welfare capitalism.[35] Therefore, the collective theoretical perspective was narrow.

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29 National Legal Aid Advisory Committee, above n 7 at 72; National Legal Aid Advisory Committee. *Funding, Providing and Supplying Legal Aid Services*, (1989) at paras 3.22-3.25.

30 National Legal Aid Advisory Committee, above n 7 at 72-74.

31 Ibid at 73-74 & 77-79.

32 Ibid at 4-7 & xi.

33 Above, p 5.

34 J N Shklar. *Legalism*, (1964) at 1-2.

35 "Welfare capitalism" describes the distinctive role of the post-war advanced capitalist state "in managing and organizing the economy ... in the welfare-state complex": G Esping-Andersen. *The Three Worlds of Welfare Capitalism*, (1990) at 1-2. The welfare capitalist world is generally said to embrace Austria, Belgium, Canada, Denmark, Finland, France, Germany, Ireland, Italy, Japan, the Netherlands, New Zealand, Norway, Sweden, Switzerland, the United Kingdom and the United States: F G Castles & D

From a liberal legalist perspective, the NLAAC's contextualisation of post-war legal aid may well have been novel and illuminating.[36] However, from other perspectives it was naive and superficial - and only marginally improved our understanding of the national scheme in the context of the modern law, politics and government. Therefore, the NLAAC report left open the question of how we could - and how we should - approach the task of understanding the origins of the national legal aid scheme and its significance in the society of the Australian welfare state in the 1970s and 1980s.

The second category of unanswered questions originate in the NLAAC's own engagement with this issue. In retrospect, its report failed to portray its many and wide-ranging instances of advice and recommendations in an adequate historical or social context. For instance, the NLAAC advised the Minister that

> ... many submissions reiterated that inadequate opportunities for affordable, fair and effective access to justice remains a major problem for the poor, and are becoming a significant problem for the non-poor, in the Australian community in 1990 ... governments and their legal and administrative systems are failing to provide access to justice to significant numbers of people in the community including many who are disadvantaged.[37]

However, in 1990 it was hardly a revelation that ordinary citizens faced problems in access to the Australian legal system. After all, it was 15 years since the Commonwealth Commissioner for Law and Poverty had placed governments on notice of the "high level of unmet need for legal aid services within the community".[38] Furthermore, the NLAAC's inquiry had originated in part from its concerns about the apparent increase in the numbers of ordinary people unable to afford the cost of lawyer services.[39] Moreover, the presence of problems in popular access to legal services was not only a post-war phenomenon. Since the 1900s, Australian State Parliaments had periodically legislated to extend the availability of civil and criminal legal aid. In doing so, they had been motivated by concerns about the social injustice of inequality in access to legal services - similar to those expressed in the 1970s and 1980s.[40] Therefore, neither legal aid nor its associations with social justice were new to modern Australian society. Yet the NLAAC did not

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Mitchell, "Three Worlds of Welfare Capitalism or Four?", *Australian National University Public Policy Program*, Discussion Paper No. 21, Oct. 1990 (as amended June 1991) at 10-11.

36 Above, pp 5-6.

37 National Legal Aid Advisory Committee, above n 7 at 268.

38 Australian Government Commission of Inquiry into Poverty, above n 27 at para 6.2.

39 National Legal Aid Advisory Committee, above n 7 at 13, 31-32, 254 & 268-282. "Ordinary people" describes those citizens who are neither wealthy nor belong to the poorer sections of society. Its usage is now commonplace in Australian 'law' discourse: Senate Standing Committee on Legal and Constitutional Affairs, Cost of Legal Services and Litigation, Lawyers' Fees, Discussion Paper No 2. (April 1991) at para 9; "President's Page", (1994) 29 (8) *Australian Lawyer* 3; The Hon Justice Michael Kirby "A failure in our legal heartland", (1994) 29 (11) *Australian Lawyer* 23.

40 The second reading speech of Mr. D R Hall, Attorney-General in the NSW Holman Nationalist Government, introducing the Poor Persons Legal Remedies Bill 1918 is one example: NSW PD 1918 Vol LXXIII at 2274. Other examples are noted below in Chapter Four.

investigate these historical contexts. It did not ask what the origins of modern legal aid were, and whether its experience in modern Australian society had any significance for understanding contemporary developments affecting the national scheme.

The third category of unanswered questions is different. This category does not refer to the fact that the NLAAC failed to ask the 'right' questions - as in the first and second categories above. It is concerned with the fact that, even if the NLAAC had sought to place the national scheme in an historical context, it would have faced practical difficulties. In 1989, there were - quite apart from the unanswered or unasked questions of methodology and history above - major gaps in the historical record of the Australian experience of legal aid. Whilst this was especially so in a welfare state context, it was also true in the context of the history of legal aid administration. The principal, accessible historical source was contained in the 1975 report of the Commissioner for Law and Poverty - itself heavily permeated by liberal legalism and limited in its portrayal of developments before the 1960s [41] The NLAAC did little to redress the gaps in the historical record. Therefore, questions remained about what had actually happened in the modern Australian experience of legal aid - not only in relation to the developments in the 1970s, but also to its previous history in Australian law and government.

The fourth category of unanswered questions stemmed from the aftermath of the NLAAC report. Some were prompted by the lukewarm political reaction when the report was released: neither the Minister nor the OLAA displayed great enthusiasm as advocates for the thrust of the report. Moreover, the legal aid sector, including the State and Territory legal aid commissions, community legal centres, the organised legal profession and lawyers, showed only a passing interest. Initially, this was mildly surprising. Whilst the NLAAC report was not - as we have seen - without its flaws, it had achieved its major objectives by providing the Federal Government with a fresh analysis of the national problems facing legal aid. Furthermore, it had expounded a new and alternative "solution oriented" approach to managing the Commonwealth role in the national scheme.[42] Nevertheless, neither the core recommendations of the NLAAC report, nor its new approach to legal aid management were ever recognised by the Federal Government. Indeed, within 12 months of its release it had slipped into history - adding to the growing archive of reports into legal aid. This left several other unanswered questions. Why were the major actors in the national scheme - especially the Federal Government - so obviously disinterested in the NLAAC's findings and recommendations? More importantly, why had the star of legal aid, so bright in the social firmament of the 1970s, faded so quickly in the 1980s?

Other unanswered questions in the aftermath of the NLAAC report came with hindsight. By 1992 and 1993, it was obvious that the NLAAC's decision to conduct an inquiry into the operations of the national scheme had been taken on the cusp of

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41 Australian Government Commission of Inquiry into Poverty, above n 27.

42 National Legal Aid Advisory Committee, above n 7 at 268.

the 'access to justice' response of the Federal Government. By the time the report was published in 1990, the ideals of 'legal aid' had ceased to be the central point of reference for national public policy towards popular access to legal services. This was reflected in the appointment of the AJAC, its report and the Prime Minister's 'Action Statement'.[43] Why did this policy shift occur? Why had the Keating Government replaced legal aid and its ideals with an 'access to justice' response - and what did this signify for popular access to law in the Australian welfare state?

The Relevance of the NLAAC Legacy

Initially, it was envisaged that this thesis would focus on these unanswered and unasked questions. However, whilst finding answers to the questions is - as we see below - an important part of the thesis, its primary objective is different. The change to the initial focus occurred for two reasons. The first was that the centrality of the NLAAC legacy gradually declined. In retrospect, it was only one of a myriad of public interventions since the mid-1970s affecting Australian legal aid. Secondly, once we begin to contextualise the NLAAC questions - in the post-war welfare state and its legal system - it quickly becomes evident that they have a wider significance. Their real significance is their role as social indicators. They show that the presence of inadequate levels of fair and effective citizens' access to the legal system has been a characteristic of post-war Australian society. They also indicate that this legal problem was socially significant, at least in the 20 years from 1973-95. Twice Federal Governments took action to improve citizens' access to the legal system - once in the mid-1970s, via the national scheme, and again in 1993-95, via the 'access to justice' response. Finally, the NLAAC questions indicate that, in 1995, we did not fully understand the origins of these legal phenomena, namely why post-war Australian society displayed inadequate levels of fair and effective citizens' access to its legal system, or the two responses of the Federal welfare state. Nor did we have an appropriate explanatory framework to understand their significance in post-war Australian society, its legal system or welfare state.

In this role, the NLAAC questions are not merely historically significant indicators. The wider issues which they raise remain socially significant in the contemporary welfare state. In 1999, Australia has ongoing problems with achieving adequate, fair and effective levels of citizens' access to its legal system. On assuming office in 1996, the Howard Federal Coalition Government adopted the 'access to justice' policies of its predecessor - albeit in a diluted form.[44] However, these policies in themselves have not proved sufficient to change the post-war pattern. Moreover, the new Attorney-General was quick to announce the first of a series of measures to

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43 Above, p 4.

44 The 1996 election platform of the Federal Liberal Party promised to maintain "current commitments to access to justice measures". However, in the Howard Government's first Budget it announced that expenditure on existing Commonwealth 'access to justice' strategies would be curtailed, the cost of access to Federal legal services, including bankruptcy and courts and tribunal access, increased and Commonwealth expenditure on legal aid reduced: Attorney-General's Portfolio, 1996-97 Budget Summary at 2-3.

reduce Federal contributions to the national scheme, a measure which prompted the Senate Legal and Constitutional References Committee to conduct a new inquiry into legal aid.[45] Furthermore, since 1995, overall relative levels of access to the legal system have probably declined, so that the Australian legal system is even more inaccessible to its citizens. Certainly, this is a widely held perception. However, perception is subjective, and coloured by social and political expectations of law. Therefore, we have to be careful not to overstate the level or significance of current problems in citizens' access to the legal system. In particular, we have to apply 'reality checks' to test the validity of public perceptions. In Australia, this process can be somewhat problematic. Unlike some comparable countries, like The Netherlands, we do not have reliable, centralised collections of data on the operation of the justice system. We cannot as readily - in some cases, not at all - check perception against reality. Nevertheless, this does not mean that the problems in citizens' access are insignificant. It simply means that the 'evidence' tends to be more equivocal and contestable. Much of it derives from the practical experiences of courts, judges, lawyers, legal aid agencies and legal interest groups, whose testimony is not unlike that of a State Attorney-General in 1927, who, when pressed for evidence of the need for legal aid, replied that "[my] evidence is that I have seen the need for it every day of my life; and in scores of cases, both in civil and criminal jurisdiction, I know that people have been denied access to the courts owing to their poverty".[46]

Furthermore, achieving adequate, fair and effective levels of citizens' access to the legal system remains socially desirable. In a sense, this proposition is axiomatic. After all, Australia is still a free, liberal and modern democratic society. Once we could confidently and boldly assert - and few would have disagreed - that in such a society fair and effective access to the legal system is a right of citizenship, and its achievement a public duty of governments. However, in the 'down-sizing' welfare state neither liberal legalism, nor its associated modern conceptions of citizenship and government are uncontested.[47] Therefore, it seems wise to add - if only briefly - some less prosaic reasons why fair and effective levels of citizens' access to the legal system still matters. Even the 'market-oriented' Australian welfare state still uses the legal system to "legitimate public policy", regulate non-state activities and organisations, and perform its various social welfare and economic policy functions.[48] To perform these functions effectively, the state still needs to ensure, at least, minimum levels of effective citizens' access to law. Moreover, governments

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45 Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System, First Report*, (1997) at 2.

46 Mr. Slater, Attorney-General in the Hogan ALP Government, second reading speech introducing the Poor Persons Legal Assistance Bill, 30 November 1927, Victoria. LC & LA, Vol CLXXV at 3001.

47 D Fleming, "Change, tensions and trends in administrative law" in G Singleton (ed) *The Second Keating Government: Australian Commonwealth Administration 1993-1996*, (1997) at 163 referring to a review of some contemporary alternative conceptions of modern citizenship in W Kymlicka & W Norman, "Return of the Citizen: A Survey of Recent Work on Citizenship Theory, (1993-94) 104 *Ethics* 352 & B Thomas, *The culture of citizenship: inventing post-modern civic culture*, (1994).

48 R Cranston, above n 6 at 2 & 4 citing R M Titmuss, *Commitment to Welfare*, (1968) at 130.

and the legislative and administrative organs of the state still see an accessible, fair and effective legal system as a minimum requirement of political legitimacy. As a Commonwealth Minister for Justice opined in 1993, the "rule of law can, in the end, only be maintained if it rests on the absolute confidence and support of the people [who] must believe ... that the law will be applied without fear or favour to the strong and the weak alike".[49]

Adequate fair and effective access to the legal system has also remained important for citizens, not only because it is part of their modern civil and political rights. Even the 'down-sizing' welfare state continues to manufacture law, it remains "a giant machine for making and applying law [and for] social control ... which is exercised through law".[50] Moreover, Australian citizens in 1998 - as 10, 20 and 30 years before - cannot avoid the impositions of legal regulation, "everyone is involved with law".[51] In fact, the 'consumer-citizens' of the 'market driven' economy of the contemporary welfare state have potentially more demands for access to legal services than ever before, as 'customerisation' and privatisation of public functions encourages a more pro-active, legally assertive type of citizenship. Finally, effective citizens' access to legal services is important for the operation of business and commerce, and for invigorating the social assumptions of the free market ideology promoted by the Hilmer Report and the Australian Competition and Consumer Commission.[52]

The Subject-Matter and Opening Contention

Against this background, we can now define the subject-matter of the thesis and describe its opening contention. Its subject-matter is the reality of the ongoing 'problems' in access to the legal system - and 'access to justice' - in the late 20th century Australian welfare state. The thesis considers whether these problems are realistically capable of being resolved. To do so, it begins by posing a general question: is fair and effective access to law a feasible expectation of citizens or governments in the Australian welfare state?

The opening contention of the thesis is that revisiting the origins of the mid-1970s national legal aid scheme - and its social significance - holds the key to determining the feasibility of achieving fair and effective access to law in contemporary Australian society. The post-war experience of legal aid was the first coordinated national response of the Australian welfare state to the legal problems faced by its poorer citizens. Ostensibly, its aim was to improve levels of fair and effective access to the legal system. Yet it appears that its outcome was problematic, and we have yet to explain its origins or significance in the context of the law and society of the post-

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49 The Hon Duncan Kerr, MP, Address to the Annual Regional Conference of the Law Society of New South Wales, 28 October 1993 cited in Access to Justice Advisory Committee, above n 5 at 3.

50 L M Friedman, "Legal Culture and the Welfare State" in G Teubner (ed), *Dilemmas of Law in the Welfare State*, (1985) at 2.

51 D A A Stager in collaboration with Harry W Arthurs. *Lawyers in Canada*. (1990) at 61.

52 D Fleming, above n 47 at 152 & 163.

war welfare state. The thesis contends that we can still learn from this legal phenomenon of 25 years ago. Revisiting the post-war experience will improve our understanding of 'why' Australia acted to enhance access to legal aid in the 1970s. It will also improve our capacity to understand the 'access to justice' response, and thereby the feasibility of any future reforms towards fair and effective access to law.

The Organisation of the Thesis

The material and discussion in the thesis is divided into three parts. Part I begins by explaining the history behind the national scheme, the reasons why it emerged in 1973-76 and its ideological context in modern Australian society. In doing so, it answers some of the unanswered questions of the NLAAC report. However, Part II also demonstrates the limitations of institutional and ideological history in explaining the post-war experience, concluding that 'missing' parts of the story remain to be told. Thus, Part II begins by revisiting, in a cross-national context, the existing ideas which explain the post-war experience. It develops an alternative theory of the origins and significance of modern legal aid, which it proceeds to apply in revisiting - in the context of the Western world - the origins and significance of its post-war development.

Part III proceeds to demonstrate 'why' and 'how' the lessons of revisiting the post-war experience enable us to better assess the feasibility of achieving fair and effective access to law. It begins by applying the insights, 'benchmarks' and analytical methodology of Part II to reconsider the origins of the new 'problems' in 'access to justice', the jettisoning of the legal aid response and the significance of the 1993 'access to justice' response. Part III concludes by briefly considering the implications of the thesis for the feasibility of achieving fair and effective access to law in the contemporary Australian welfare state.

The Central Assumptions and Premises

The thesis is organised around a number of central assumptions and premises. Most of these are identified, defined and their significance explained as they arise in the text. For instance, we have already advanced the premise that Australia is a welfare capitalist state, and later go on to explain relevant implications of this status.[53] Similarly, the assumption that public policy drives legal regulation and its implications for understanding legal phenomena in the welfare state are explained in Part II.[54]

However, there is one central assumption - and one central premise - which have influenced the design of the thesis. The assumption is that Australian society is regulated by a unique type of modern system of law and government. Its national legal system certainly forms part of the modern Western legal world - in particular,

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[53] Above, n 35; below, pp 202-205.

[54] Below, pp 202-214.

its Anglo-American or common law components. Yet, from the outset, the origins, social construction and formative experiences of the Australian legal system have been distinctive and different.[55] Until the early post-war years, the overwhelming 'Britishness' of Australian society obscured its distinctive national character. However, Australian law and legal culture began to bloom in the 1960s, and social transformation was officially matched twenty years later by final legal and political devolution from Britain.[56]

The designing premise is that comparative public policy - and its techniques - are both applicable and useful in evaluating and assessing the significance of legal developments. Comparative public policy is now widely used in studies of Australian Public Policy and, according to Castles, without "some kind of comparison it is impossible to characterise the Australian experience at all".[57] Its practitioners use two types of comparative techniques, cross-temporal and cross-national, both of which are necessary to "locate adequately the nature of any aspect of the Australian experience".[58] Cross-temporal comparison is the familiar technique of history. It examines intra-national developments to see what has changed - and to look for the reasons why. Consequently, the historical narrative in Part I below also helps us to understand post-war legal aid by comparing it with developments in earlier periods - for example, the interventions of some States and law societies in the 1920s and 1930s.

Comparative Public Policy uses cross-national techniques to compare national developments - like the Australian national legal aid scheme - with those in groups of countries with similar policy agendas and systems of political economy. Cross-national comparison of economic and social policy developments in the welfare capitalist countries is an established field of Comparative Public Policy. Moreover, in practice it "is usually to the forefront in contemporary debate about the character of Australian society".[59]

Part II of the thesis uses cross-national comparison to portray the origins and significance of the Australian post-war experience of legal aid in an international context. Similarly, Part III uses cross-national analysis to explore the origins and significance of the developments in 'access to justice' in the 1980s and 1990s, and to help to further define the feasibility of achieving fair and effective access to law. In doing so, it draws upon the real benefits of Comparative Public Policy in offering "guidance in designing better policies":

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55 D Neal. *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales*, (1991) at 61-83.

56 Australia Act 1986 (Cth).

57 F G Castles. "Why Compare Australia?", in F G Castles (ed.), *Australia Compared*, (1991) at 1.

58 Ibid at 1-2.

59 Ibid at 2.

> Even if there are no direct lessons, policy comparisons will often throw light on hidden assumptions operating within one's own country and thus alert the observer to latent opportunities and constraints that would otherwise go unrecognised.[60]

This is particularly important in an increasingly interdependent and internationalised world.[61]

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60 A J Heidenheimer. H Heclo & C T Adams, *Comparative Public Policy: The Politics of Social Choice in America, Europe and Canada*, (1990) at 1-2.

61 Ibid.

Part I:
The Context of the Post-War Experience

Chapter Two
The Modern Background

> The MINISTER FOR JUSTICE: Yes, on capital charges it has always been the custom to supply legal assistance for the accused if the accused is without means. But in ordinary cases that is not done. As soon as the Government took office we placed £100 on the Estimates for the purposes of providing legal assistance when necessary. However, we have not blazoned anything about it.
>
> Hon. Sir James Mitchell: How much did you say; £100 a year?
>
> The MINISTER FOR JUSTICE: Yes, we have put £100 a year on the Estimates in order that, if there were one or two cases in which it seemed desirable that legal assistance should be rendered, we would be able to supply it.
>
> Hon. Sir James Mitchell: But is not £100 too much?
>
> Second reading speech of the Hon J C Willcock, Minister for Justice in the Collier Labor Government, introducing the Poor Persons Legal Assistance Bill, 1928 (WA), 27 November 1928, WA PD 1928 Vol 80 at 2025

Introduction

This chapter is the first of three historical narratives in this part. It relates the developments in legal aid in Australia from the British conquest in 1788 until the end of World War II. It does so in the context of three phases of modern Australian law and government - the colonial period, the first 30 years of the Commonwealth, and the period from the early 1930s to September 1945.

The colonial period began in England in the 1780s with the creation of the legal foundations of the proposed new colony of New South Wales. In this context, the chapter first describes the metropolitan poor persons jurisdiction, its law and procedure which formed the original institutional basis of Australian legal aid. It proceeds to relate the circumstances of the reception of this jurisdiction into the colonial legal systems in the 1820s. The story of legal aid in this period ends with an account of the changes to this received metropolitan law and other developments in colonial civil and criminal legal aid between 1850 and 1900.

The next phase of modern Australian law and government began with the establishment of the federal Commonwealth in 1901. In this second context, the chapter outlines the developments in legal aid in the first 30 years of the new century, including the arrangements introduced by the embryonic federal state in the 1900s, and the policy stance towards national legal aid evident on the part of the Commonwealth government in the 1920s. This part of the chapter also narrates the story in the Australian States, including the enactment of the poor prisoners' defence and criminal appeals provisions in the 1900s, 1910s and 1920s, developments in civil legal aid after World War I and reforms to the *in formâ pauperis* procedures in civil

proceedings. This period also saw the first significant public appearances of the Australian legal profession in relation to the organised provision of legal aid.

The third phase of law and government considered in the chapter is the period from the early 1930s until September 1945. In this last context, the chapter first describes the developments in legal aid in South Australia and Victoria in the 1930s, and the reorganisation of civil and criminal legal aid in New South Wales in 1941-43. It concludes by narrating the developments during World War II - from the response of the State law societies in 1939 and 1940 to provide legal aid for newly enlisted servicemen, to the formation of the Commonwealth Legal Service Bureau in 1941-43.

The Metropolitan Background

The colonial period began in January 1788 when Britain claimed suzerainty over the eastern part of the Australian continent. The metropolitan legal system then contained no general schematic provision for legal aid for poorer litigants and accused. Neither the Common Law nor legislation recognised any right for poorer people to be legally-represented in civil or criminal proceedings at public expense.[62] The only public acknowledgment of the needs of poorer litigants and accused was in the poor persons jurisdiction of the Common Law courts, the Court of Chancery and other superior courts in the early modern metropolitan central legal system.[63]

This jurisdiction had ancient origins, deriving from two primary and personal governmental obligations of the Crown. The first was the personal responsibility of the incumbent monarch to provide his or her subjects with justice. The second primary prerogative obligation in which the poor persons jurisdiction originated was the paternal duty of the Crown to defend the "poor and helpless".[64] Initially, the responsibility for the discharge of these two primary obligations rested with the monarch, and his or her entourage of councillors and administrators. However, by the early Middle Ages the core of a national system of government through public administration had developed in England.[65] In this emerging medieval 'state', responsibility for the performance of many governmental functions - previously at least notionally personally superintended by the Crown - was newly invested in public officials and institutions.[66] It was at this time that the prerogative duties over the administration of civil and criminal justice - including those specifically applying to the poor - were vested in the Chancellor and the judges of the new Common Law courts. The result was that the original inherent jurisdiction of these judicial

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62 *Dietrich v R.* (1992) 109 ALR 385 per Mason CJ & McHugh J 386 at 397 & Brennan J, as he then was, 400 at 401.

63 Including Admiralty, the ecclesiastical courts and the Prerogative Courts.

64 G Spence. *The Equitable Jurisdiction of the Court of Chancery*, (1846) Vol I at 342.

65 J H Baker. *An Introduction to Legal History*, 3rd ed, (1990) at 14-15; Rheinstein M (ed), *Max Weber on Law in Economy and Society*, (1954) at 257.

66 J Maritain, *Man and the State*, (1951) at 15-19 discusses some of the problems associated with applying modern conceptions of 'the state' to earlier forms of Western political organisation.

administrators included the power to make special provision for poor parties and accused, as an incident of their general functions in the administration of justice.

It is clear that the modern poor persons jurisdiction of the metropolitan superior courts originated in these medieval developments. However, it is far less clear that - as some modern judges and commentators have claimed - the modern poor persons procedures developed in the early medieval central legal system.[67] This appears very much to be a case of ex post facto 'historical' reconstruction.[68] In modern society, we have become accustomed to legal form following function - in the modern state, implementation generally follows the investiture of legal powers and functions. These modern raconteurs have all too readily assumed that this was also so in medieval society when, actually, nothing could be further from the truth. In medieval England, the distribution and exercise of 'state' administrative power was ill-defined, fluid and something of a jumble. Therefore, whilst the early medieval courts did make special provision for the poor - that they "should have their writs for nothing, was an accepted maxim" - it does not inevitably follow that the results were akin to the modern metropolitan poor persons procedures.[69] Neither does it mean that a modern type of *in formâ pauperis* procedure - if it did emerge - was regularly used or systematically available in the jurisdictions supervised by the Chancellor or administered by the Common Law judges. Indeed, the evidence of history is equivocal on this question.

History does reliably record that a type of special procedure for poor litigants appeared after the establishment of the first ecclesiastical courts in England in the late 13th century.[70] In these courts, procedures operated whereby legally-trained clerics appearing in ecclesiastical proceedings were authorised to represent poor petitioners and litigants. These clerical 'lawyers' were also able to represent poor parties on a similar charitable basis in the secular courts.[71] History also tells us that the expansion of the English national legal system in the 13th and 14th centuries was paralleled by the emergence of distinctive classes of legal functionaries who represented or acted as agents of civil litigants and criminal accused.[72] However, it remains unclear if - or when - these early secular lawyers emulated their ecclesiastical brethren in providing gratuitous lawyer services for poor people. Similarly, the contemporary historical record is inconclusive as to if - or when - the Chancellor or the Common Law judges incorporated special procedures to protect poor parties engaged in actions or proceedings in their jurisdictions. However, it seems likely that they did so.

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67 J M Maguire, "Poverty and Civil Litigation" (1923) 36 *Harvard Law Review* 361 at 365-66. *Brunt v Wardle* (1841) 3 Man & G 534 per Tindal C J at 542 & Maule J at 544 (133 ER 1254 at 1257-1258).

68 P Fitzpatrick, *The Mythology of Modern Law*, (1992) at ix-x.

69 Sir Frederick Pollock & F W Maitland, *The History of English Law before the Time of Edward I*, 2nd ed (1968) Vol 1 at 195.

70 J M Maguire, above n 67 at 365.

71 Ibid.

72 J Disney, P Redmond, J Basten & S Ross, *Lawyers*, (1986) at 5-6.

The first definite record of a modern type of poor persons procedures was its appearance in a 1494 statute - "A Mean to help and speed poor Persons in their Suits" ("the 1494 Act").[73] Procedural law reform often follows actual practices already adopted by the courts, or developed by judges and lawyers. In this case, the form and technicality of the 1494 Act suggests that its mechanisms for the conduct of civil proceedings *in formâ pauperis* may were based on an existing model. However, our knowledge of the immediate historical antecedents of its *in formâ pauperis* procedures is scant. It allows us neither to say conclusively if they preceded the Act - nor, if so, when and in which jurisdiction they first appeared.

If the *in formâ pauperis* procedures were not simply an invention of statute, it is most likely they first appeared in the exercise of the paternal jurisdiction of the Chancellor as the "refuge of the Poor and afflicted".[74] This ameliorative equitable jurisdiction - which enabled the Chancellor to protect the legal rights and interests of the poor, and resolve their legal problems - was well-established by the end of the 14th century. In exercising this jurisdiction the Chancellor had extensive powers, which certainly included the power to grant procedural concessions to poorer civil litigants.[75] On the other hand, the available historical evidence suggests that it was improbable that an *in formâ pauperis* procedure developed in the Common Law courts. In the first place, there is little, if any, contemporary evidence before 1494 that the Common Law judges exercised their inherent powers to assist poor litigants and accused.[76] Secondly, their ability to exercise these powers in civil proceedings had been circumscribed by the introduction of an early type of party and party costs system in the late 13th century.[77] Thereafter, non-suited or otherwise unsuccessful litigants were required to pay the taxed costs of their opponent. This was likely to have retarded - if not prevented - the adoption of poor persons procedures similar to those contained in the 1494 Act.[78] In criminal proceedings, it is even more unlikely that these statutory procedures were preceded by developments in the jurisdiction of the

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73 1494 11 Hen 7 c 12.

74 G Spence, above n 64 at 384 & 387.

75 J M Maguire, above n 67 at 368.

76 Ibid at 366. In 1997, Professor Jim Evans, an equity historian from the Law School at the University of Auckland, suggested - when reading an earlier version of this part of the thesis - that the *in formâ pauperis* procedure may have a emerged in the jurisdiction of the Chancellor in the late 15th century. His suggestion is worth investigating. This was a period of vigorous legal development - reflecting continued inter-jurisdictional competition and economic changes producing serious conflict between landowners and tenants over occupancy rights. As Maguire notes, the statutory amelioration of Common Law procedures in the 1994 Act to facilitate actions of the poor "finally came less from a love of the poor than from regard for expediency" (above n 37 at 370). Similarly, in 1493 - or possibly earlier - Henry VII established the Court of Requests, also known as the Court of Poor Man's Causes to deal with the "suits of poor men and of the King's Servants": Sir William Holdsworth, *A History of English Law*, 7th ed (1956) Vol I at 412. This was a remarkably successful popular jurisdiction, especially in the field of protecting the rights of poor tenants. Even the end of its life - when, having been ravaged by the jealousy of the Common Law courts in the 16th century, it faded with the Restoration - it "continued to thrive [its] cause list was full. because it met a want which was felt ... [even] Coke was obliged to admit that it might be well if its jurisdiction was established by Parliament": Sir William Holdsworth. above at 415-416.

77 J M Maguire, above n 67 at 366.

78 Ibid.

Court of King's Bench. Poor accused in this jurisdiction had few procedural interests to protect - they were not liable to pay the costs of the Crown. Neither were criminal accused in the 15th century - whether poor or not - ordinarily entitled to be legally represented in the conduct of their defence before the judges at the King's Bench.[79]

Whatever its early medieval lineage, the *in formâ pauperis* procedure in the 1494 Act provided the institutional basis of the modern poor persons procedural law.[80] The expressed object of the Act was to enable the "Poor" to obtain access to legal services in trials of civil proceedings at Common Law.[81] The Act operated to relieve eligible poor plaintiffs from payment of the costs and fees ordinarily incurred in pleading causes of action in the Courts of King's Bench, Common Pleas, the Exchequer and other Common Law courts of record. The poor were entitled to freely obtain both writs and the clerical assistance required to draw their pleadings.[82] The 1494 Act also directed the Common Law judges to appoint counsel and attorneys - whom it obliged to act without payment of professional fees - to represent eligible poor plaintiffs.[83]

From 1494 until 1883 the Act was the institutional response of the metropolitan legal system to the conduct of civil proceedings at Common Law by poorer plaintiffs.[84] However, its role in the late medieval, early modern and modern English metropolitan legal system was not limited to Common Law courts. The Act, and its associated procedural law which developed in the 16th, 17th and 18th centuries - and which is outlined below - also served as a template for the development of *in formâ pauperis* procedures in other jurisdictions in the national legal system. The modern poor persons procedures in the Court of Chancery - and the lesser national civil courts - were modelled on the *in formâ pauperis* provisions in the 1494 Act and its subsequent procedural law.[85] In the early 18th century, the judges of the Court of King's Bench - who began to allow criminal accused to be legally represented - adapted the civil procedures in the 1494 Act to enable poor accused to conduct a defence *in formâ pauperis*.[86] Moreover, its procedures also served as a model when -

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79 It was not until the early 19th century that criminal accused facing trial were entitled to legal representation. However, this general rule always contained a few exceptions. Those indicted for trial for treason could always be legally-represented - so could an accused charged with the commission of a felony, if a legal point about the evidence arose at the trial. Legal representation was also possible in appeals of felony and misdemeanours in some circumstances. Moreover, from the early 18th century the metropolitan criminal courts regularly permitted lawyers to represent or prompt accused at trials of criminal offences: J H Baker, "Criminal Courts and Procedure at Common Law 1550-1800" in J S Cockburn (ed), *Crime in England 1550-1800*, (1977) at 37-38; J M Beattie, *Crime and the Courts in England 1660-1800*, (1986) at 356.

80 G Spence, above n 64 at 381.

81 S 1, A Mean to help and speed poor Persons in their Suits, above n 11.

82 Ibid, ss 2 & 3.

83 Ibid, ss 4, 5 & 6.

84 Repealed by s 3 Statute Law Revision and Civil Procedure Act 1883 (UK).

85 G Spence, above n 64 at 381: *Borradale v Davenport* [1958] VR 470 at 472.

86 For instance, in *Anonymous* (1704) 6 Mod 88 (87 ER 846) a married woman prosecuted for poisoning her husband's cows by placing bruised glass in grain was admitted to defend the indictment *in formâ*

in the few instances in which this occurred in early modern England - legislators expanded the availability of special procedures for the poor in other parts of the national legal system.[87]

By the end of the 18th century - when British law arrived in Australia - the judge-made procedural law associated with the administration of the 1494 Act and its non-statutory progeny was fully developed.[88] The Act had never specified who the "Poor" subjects of the Crown were or defined the requisite material poverty qualifying a litigant to proceed as a poor plaintiff.[89] These omissions were not subsequently remedied by the Parliament. Therefore, it fell to the judges to develop a legal definition of poverty to establishing eligibility to conduct civil and criminal proceedings *in formâ pauperis*. From the outset, the judges considered the conduct of legal proceedings *in formâ pauperis* to be a privilege restricted to litigants or accused who were genuinely poor. In 1810, Mr. Justice Hullock recorded that they had "been long in the habit of granting this privilege to such persons, having cause of action, as will swear that they are not worth 5*l*. ... in the world, exclusive of their wearing apparel, and the right to the matter in controversy".[90] For instance, in the Prerogative Court in *Lovekin v Edwards* Sir John Nicholl said that:

> To sue as a pauper is a great privilege of law, it belongs only to the necessity arising from absolute poverty, and from the absence of any other mode of obtaining justice ... It is a complete but not an uncommon misapprehension of the law, to suppose that because a person is in insolvent circumstances, and because he can truly and conscientiously swear that he is not worth 5l. after all his just debts are paid, that therefore he is entitled to be admitted, or rather to proceed, as a pauper it is a prima facie ground to admit him as such but no more; if it were otherwise many persons living in great splendour and luxury would be so entitled; for many persons in business in the enjoyment of an immense income and maintaining a proportionate expenditure would not be worth 5l. after payment of their just debts.[91]

This was not the only restriction placed by the judges on access to the *in formâ pauperis* procedures. The Common Law judges always construed the 1494 Act as confining their inherent jurisdiction to make special provision for poor civil litigants.[92] On this interpretation, their powers to specially assist poor litigants were

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pauperis. Another case is *R v Wright* (1736) 2 Strange 1041 (93 ER 1020). Developments in the law applying to conducting criminal proceedings *in formâ pauperis* in the Court of King's Bench paralleled the more liberal approach of some early modern judges to allowing criminal accused to be legally represented (above at n 79).

87 Section 7 of An Act to revive the laws therein mentioned relating to the importation of foreign brandy, and other Waters and Spirits, 1729 12 Geo 2 c 28, provided for customs prosecutions to be defended *in formâ pauperis* .

88 Justice Hullock, *Costs in Civil Actions and Criminal Proceedings*, (1810) Vol 1 at 221-229: Sir John Comyns, *A Digest of the Laws of England*, (1800) Vol 4 at 232-234.

89 S 1, A Mean to help and speed poor Persons in their Suits, above n 11.

90 Justice Hullock, above n 88 at 222. The case law contains many instances where this test was applied: *Anonymous* 3 Salkeld 507 (91 ER 433); *Walker v Walker* (1837) 1 Curt 560 (163 ER 196); *Barham v Barham* (1789) 1 Hag Con 4 (161 ER 455); *Clifford v Mabey* (1822) 1 Add 127 (162 ER 43); *Boddington v Woodley* (1842) 5 Beav 555 (49 ER 433) & *Webb v Cheesbrough* (1904) 21 WN (NSW) 45.

91 (1810) 1 Phill Ecc 179 at 183-184 (161 ER 953 at 955).

92 Above at pp 19-21.

restricted to poor plaintiffs - poor defendants and third parties became ineligible to proceed in civil proceedings *in formâ pauperis*. A similar interpretation - and practice - was generally adopted by the judges in the Court of Chancery and the other national civil jurisdictions. However, it appears that in exceptional circumstances civil defendants and third parties in these jurisdictions may sometimes have been permitted to proceed *in forma pauperis*.[93]

In the Court of King's Bench, the judges did not interpret the 1494 Act as confining their inherent powers to assist poor criminal accused. However, they imposed another restriction upon otherwise eligible accused - it was only possible to defend criminal proceedings *in formâ pauperis* if thereby the interests of justice were best served. Nevertheless, by the end of the 18th century it was usual for all poor accused facing trial - and other poor people otherwise involved in criminal or quasi-criminal proceeding - in the Court of King's Bench to be admitted to proceed *in formâ pauperis*.[94] However, this was never a right - it remained a discretionary privilege within the gift of the presiding judge, to be conferred when the legal representation of a poor accused or party was desirable, or otherwise dictated by the interests of justice. As a privilege it could be denied or, if cases countervailing considerations affecting the administration of criminal justice arose, withdrawn.[95]

The judge-made procedural law descended to the details of the conduct of proceedings *in formâ pauperis*. Ordinarily, an application for admission to plead or defend as a poor party or accused was made when the subject proceedings commenced.[96] In civil actions, the judges asserted a power to entertain applications after the hearing began.[97] The judge-made law also defined the scope of the procedural privileges conferred - poor parties and accused proceeding *in formâ pauperis* were entitled to free legal representation.[98] In civil proceedings, the procedural privileges were more extensive. From 1531, poor plaintiffs were relieved from any liability to pay party and party costs if their cause of action failed, they were nonsuited or withdrew their action before judgment.[99] However, admission to

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93 *Lovekin v Edwards* (1810) 1 Phill Ecc 179 per Sir John Nicholl at 186 (161 ER 953 at 956).

94 Justice Hullock, above n 88 at 228-229; *Anonymous* (1704) 6 Mod 88 (87 ER 846); *R v Wright* (1736) 2 Strange 1041 (93 ER 1020); *R v Morgan* 2 Str 1214 (93 ER 1020, 1025, 1036 & 1138).

95 Justice Hullock, above n 88 at 228-229: *R v Pearson* (1760) 2 Burr 1039 (97 ER 695).

96 G Spence notes that practice was for an application to be supported by an affidavit deposing to the applicant's poverty, and a certificate of counsel addressing the merits of the cause or defence (above n 64 at 381).

97 In these circumstances, admission to plead *in formâ pauperis* was not retrospective. A poor plaintiff who was unsuccessful - or non-suited - was liable to pay the prior taxed costs of the defendant. However, it was within the discretion of the Court to require payment. Matters relevant to this exercise discretion included the course of the litigation, the conduct of the parties and related matters: *Jones v Peers* (1825) M'Cle & Yo 282 (148 ER 419) & *Stanley v Moore* (1891) 17 VLR 491.

98 Nevertheless, a successful plaintiff proceeding *in formâ pauperis* was entitled to payment of his or her solicitor and client costs: W Blackstone, *Commentaries on the Laws of England.* (1783 (1978 rep) 9th ed Vol 3 at 401: Justice Hullock, above n 88 at 228.

99 *Sloman and Aynel* (1726) Fortescue 320 (92 ER 871); *Nokes and Watts* (1722) Fortescue 319 (92 ER 870): Justice Hullock, above n 88 at 226. Initially, the authorities indicated that plaintiffs proceeding under the 1494 Act were not liable for party and party costs. Given that a costs regime was already operating in civil matters (above p 19-20 & n 77), this suggests the Act was interpreted as implicitly

conduct civil proceedings *in formâ pauperis* did not confer a general license to litigate - its privileges were restricted to the specific subject proceedings.[100] Neither did it render a poor plaintiff totally immune from any liability for payment of a defendant's party and party costs. If their pleadings were amended during the hearing, he or she could be ordered to pay the additional costs incurred of a defendant newly required to answer fresh allegations. Similarly, dilatory or vexatious poor plaintiffs were subject to different forms of judicial sanction - the hearing of his or her action could be stayed, or they could be dispaupered. The latter was also possible in criminal proceedings. It revoked the procedural privileges conferred on poor parties and restored them to the same position as ordinary litigants or accused - required to pay for legal representation, and, in civil matters, exposed to payment of party and party costs.[101]

Reception of the Metropolitan Poor Persons Law

The reception of the modern poor persons law was not conterminous with the establishment of modern Australian law and government - the late 18th century English legal system was never reproduced in the colony of New South Wales. Instead, the colonial legal system was initially established by a modern combination of the prerogative and statute.[102] Moreover, the first colonial superior courts neither replicated their metropolitan counterparts, nor exercised comparable jurisdictions. Whilst the Court of Civil Jurisdiction was authorised to entertain real and personal causes of action modelled on the Common Law, its powers were defined by prerogative instrument, and not by reference to the existing powers and functions of the judges in the metropolitan superior national courts.[103] Therefore, it did not

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negating any costs liability of unsuccessful poor plaintiffs. However, in 1531 the Act 23 Henry 8 c 15 c 2 empowered the Common Law judges to award costs against plaintiffs in wide range civil causes of action, although exempting plaintiffs proceeding *in formâ pauperis*. Instead, it provided that these parties - if unsuccessful- were liable to suffer "other punishment" at the discretion of the judge, in lieu of payment of party and party costs. Subsequent orders of the Common Law courts and Chancery admitting plaintiffs to plead *in formâ pauperis* often provided that they parties should be whipped and pilloried if unsuccessful: B Abel-Smith & R Stevens *Lawyers and the Courts: A Sociological Study of the English Legal System 1750-1965*, (1967) at 13; *Munford v Pait* (1665) 1 Sid 261 (82 ER 1093); *Anonymous* 2 Salkeld 506 (91 ER 433). The presence of these types of orders should not necessarily be interpreted as discriminating against the poor, other contemporary legislation is said to have made similar provision in matters involving the non-poor. Moreover, it is also not clear how often these types of orders were actually executed. Nevertheless, in the late 16th and early 17th centuries there are reports of a few instances in which the punishment was actually carried out - although after the Restoration both the making 'punishment' orders and the practice of judicial whipping was gradually discontinued: Case 149. *Anonymous* 7 Mod 114 (87 ER 1132); *Anonymous* 3 Salk. 107 (91 ER 721); W Blackstone, above n 98 at 400; W S Holdsworth, *A History of English Law*, (1937) 2nd ed Vol 4 at 538. The original provisions of the 1531 Act were repealed early in the 18th century, but poor parties remained free from liability to pay the costs of successful defendants.

100 *Boddington v Woodley* (1842) 5 Beav 555 (49 ER 433): Justice Hullock, above n 87 at 229.

101 Justice Hullock, above n 88 at 222-224: G Spence, above n 64 at 381.

102 2 April 1787 Charter for Establishing Courts of Civil and Criminal Jurisdiction on the Eastern Coast of New South Wales: New South Wales Act, 1787 27 Geo III 2 (reproduced in Commonwealth of Australia. *Historical Records of Australia*, (1922) Series IV, Sec A, Vol 1, at 6-12 & 3-5). A C Castles, *An Australian Legal History*, (1982) at 90-104.

103 A C Castles, above n 102 at 91-92 & 378-379.

provide a legal platform for the reception of the civil poor persons procedural law, although its prerogative origins meant that its officials were at least notionally invested with inherent powers to assist its poorer supplicants. In 1814, the Court of Civil Jurisdiction was replaced by three new superior civil courts: the Governor's Court, the Lt. Governor's Court and the Supreme Court.[104] As these courts exercised a comparable jurisdiction to their predecessor, they similarly did not attract the poor persons jurisdiction.[105]

The first superior criminal court established in New South Wales was the Court of Criminal Jurisdiction. Its jurisdiction, like its civil counterpart, was defined by reference to the substantive metropolitan criminal law, and not to powers of the judges of the Court of King's Bench.[106] Consequently, it did not incorporate the metropolitan law applying to the conduct of criminal proceedings *in formâ pauperis*. As a statutory criminal court it was notionally invested with an inherent jurisdiction to assist poor accused to obtain justice - although it seems unlikely that this was officially recognised by this "best known and often the most dreaded tribunal in New South Wales".[107]

In 1823, the administration of colonial civil and criminal justice was reestablished. The functions of the Governor's Court, the Lt. Governor's Court, the Supreme Court and the Court of Criminal Jurisdiction consolidated into a new Supreme Court of New South Wales.[108] The new Supreme Court was invested with a civil and criminal jurisdiction equivalent to the jurisdiction of the courts of King's Bench, Common Pleas and the Exchequer, and the equitable and ecclesiastical jurisdiction of the Court of Chancery[109] In 1828, its legal basis was reconfirmed by the Australian Courts Act, which also invested it with the Common Law jurisdiction of the Court of Chancery.[110]

These jurisdictional transformations saw the reception of the metropolitan poor persons law into the colonial legal system. In 1837, the process was repeated when a Supreme Court was established in the new colony of South Australia; and several times again in the next 24 years as Supreme Courts emerged in the new legal systems of Victoria, Queensland and Western Australia "modelled closely upon the older Supreme Courts ... with a similar core of authority based on the models of English courts."[111] By 1861, the reception of the metropolitan poor persons law into the colonial legal system was complete.

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104 4 February 1814 Letters Patent to Establish Courts of Civil Judicature in New South Wales reproduced in Commonwealth of Australia, *Historical Records of Australia*, above n 102 at 77-94: A C Castles, above n 102 at 104-106.

105 A C Castles, above n 102 at 105.

106 New South Wales Act, 1787 27 Geo III 2, s 1: A C Castles, above n 102 at 46.

107 A C Castles, above n 102 at 46.

108 Ibid at 132-152; New South Wales Act, 1823, 4 Geo IV c 96.

109 New South Wales Act, 1823, 4 Geo IV c 96, ss I, II, IX & X .

110 Australian Courts Act. 1828, 9 Geo IV c 83, s XI.

111 Supreme Court Act, 1837 7 Will IV No 5 B & C 167: A C Castles, above n 102 at 333.

Developments in Colonial Law and Government

The received metropolitan poor persons law remained the basis of civil legal aid in colonial law and government until the 1900s.[112] It was gradually modified and reformed as the Supreme Courts developed their own rules of civil procedure. For instance, in 1854 the Rules of Court of the Supreme Court of Victoria removed the right of pauper plaintiffs to require defendants to pay party and party costs.[113] Other reforms liberalised the eligibility criteria governing access to the poor persons procedures - the maximum permissible 'worth' of a person applying to conduct proceedings *in formâ pauperis* , exclusive of the subject-matter, was increased from £5 to £25. By 1900, poor defendants and other parties had also become eligible to defend or conduct civil proceedings *in formâ pauperis*. The introduction of divorce legislation modelled on metropolitan reforms in the late 1850s and 1860s was an important instance.[114] It included provision for the conduct of divorce and matrimonial causes proceedings *in formâ pauperis*.[115] The received poor persons law also formed the basis of other instances of Civil Law reform in the colonies. For example, s 12 of the Crown Remedies and Liability Statute 1865 (Vic) permitted a party who was "disabled by poverty" from defending proceedings to petition the Supreme Court for legal assistance.[116]

These reforms to the received law had little impact on the vitality of the poor persons procedures. When its jurisdiction arrived in New South Wales, it was already ineffective as an institution to assist poorer civil litigants in the metropolitan legal system. This was a product of the breakdown of the medieval social fabric in early modern England, legal modernisation and the emergence of industrial capitalist society after the 1750s.[117] All these factors contributed to the decline of the efficacy

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112 The 1820s legislation (above nn 109 & 110) reestablishing the colonial legal system also authorised the establishment of summary small debts tribunals to entertain civil actions not exceeding £10. In 1829, the Legislative Council of New South Wales created a statutory Court of Requests to sit at Sydney, Windsor, Campbelltown, Parramatta, Maitland and Bathurst. Therry was sworn in as its first Commissioner. Throughout the 1830s, he administered a busy and demanding circuit - in what quickly became a popular jurisdiction for poorer civil litigants. In 1839, the circuit was expanded to include Melbourne and Port Macquarie. In 1842, the already burdensome workload of Commissioner Therry was increased when the maximum civil jurisdiction of the Court of Requests was increased to £30. In 1844, he resigned to accept a judicial appointment. Two years later, the sittings of the Court of Requests outside the County of Cumberland were discontinued: R Therry, *Reminiscences of Thirty Years' Residence in New South Wales and Victoria*, (1974)) at [15]-[17].

113 Costs Rule 11 in Chapter XI of the Rules made pursuant to the Supreme Court (Administration) Act 1852 (Vic), s 32. Party and party costs were recoverable only at the discretion of the Court or a judge.

114 S B Kitchin, *A History of Divorce*, (1912) at 233-234.

115 In Victoria for example these changes were contained in an Act to amend the Law Relating to Divorce and Matrimonial Causes 1861 (Vic), s 37 and rls 50-52 Rules and Regulations of the Supreme Court in its Divorce and Matrimonial Causes Jurisdiction in the Appendix.

116 A defendant's petition was required to be supported by affidavit as to lack of means. The Supreme Court of Victoria, if it accepted the veracity of this evidence, was empowered to assign counsel and an attorney to defend the petitioner - these lawyers were required to act without fee.

117 B Abel-Smith & R Stevens, above n 99 at 2: M Cappelletti, "Legal Aid: Modern Themes and Variations" in M Cappelletti, J Gordley and E Johnson, Jr, *Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies*, (1975) at 16-17.

of the *in formâ pauperis* procedures - as well as inclining to exclude the poor and their legal problems from the jurisdiction of the superior courts.[118] They probably also meant that it was impecunious and cash-strapped members of the growing middle classes who were more likely to seek access to its procedural privileges.[119] Therefore, by the 1820s the poor persons procedures were well and truly ineffective in England as a means of legal aid for the poor.

This situation was compounded in the circumstances of the Australian colonies. Between 1830 and 1850, the socio-legal preconditions for the operation of the *in formâ pauperis* procedures were non-existent. The colonial social fabric was both modern and different - its population small and still predominantly convict in New South Wales and Van Diemen's Land. The social penetration of the Supreme Courts was limited and there were few practising lawyers. After 1850, the obvious differences between metropolitan and colonial society were reduced - with the imposition of modern self-government, and the diversification and expansion of local economies. However, the plight of poorer civil litigants worsened. The extension of the *in formâ pauperis* procedures in the new divorce and matrimonial law had little impact since everywhere these reforms benefited the middle classes, and not the poor.[120] Moreover, legal modernisation had reformed the civil justice system to the detriment of poor litigants in the inferior courts, and the gold rushes saw an influx of Anglo-Irish lawyers who were skilled in the arcane and costly pleading practices of pre-Judicature Acts Common Lawyers.[121] Furthermore, in this period, in the words of Dr John Bennett, a well-known legal historian, the judges of the colonial Supreme Courts "dumped the poor".[122] It has not been possible to test this picture against the actual records of contemporary usage of the *in formâ pauperis* provisions in civil proceedings.[123] However, the available secondary evidence suggests that this description is accurate. In 1927, the Attorney-General in Victoria spoke about the use of the *in formâ pauperis* procedures contained in the Rules of the Supreme Court - and his observations probably apply with equal force to describe the experience in all the colonies in the latter part of the 19th century:

> ... the Prothonotary has told me that in 20 years' experience he knows of no case where any poor person has invoked these provisions of the Supreme Court rules in order to secure some measure of relief in connexion with civil proceedings ... In connexion with divorce proceedings, the which the rules equally apply, the

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118 B Abel-Smith & R Stevens, above n 99 at 2; below at pp 170-171.

119 The cases on dispaupering reveal a significant minority of genteel poor - like naval officers of half-pay, or needy clergymen - seeking to avail themselves of this privilege of the poor.

120 R Phillips, *Putting Asunder: A history of divorce in Western society*, (1988) at 607-610.

121 In 1846, Courts of Requests operating outside the County of Cumberland were disbanded. Their functions and jurisdiction were finally abolished by the District Courts Act 1858 (NSW). These changes reflected the centralisation and reform of civil justice in England: below p 177.

122 Conversation with Dr John Bennett, Law Program, Research School of Social Sciences, October 1992.

123 In 1991, correspondence with Supreme Court officials in New South Wales, South Australia, Queensland, Tasmania and Western Australia revealed that this information was not readily available. The actual usage of the *in formâ pauperis* procedures in the 19th century could only be obtained by a manual search of the files, and staff were unavailable for this purpose.

> Prothonotary knows of only two cases in which the in forma pauperis provisions have been availed of.[124]

The situation in criminal proceedings was the same, although for slightly different reasons. The colonial Supreme Courts had not incorporated the received inherent poor persons jurisdiction of the Court of King's Bench into their everyday practice - in fact, they appear to not have acknowledged it at all.[125] However, its background presence may have accounted for their adoption of the 'dock brief' or 'dock defence' - or else they may simply have replicated modern metropolitan criminal court practice. In certain circumstances, the 'dock-brief' system - which itself was probably a corruption of the *in formâ pauperis* procedure - allowed judges to appoint barristers to defend an otherwise unrepresented poor accused for a nominal fee. Its emergence was closely associated with the establishment of a statutory right to legal representation in serious criminal proceedings. In the late 19th century, it was employed in the colonies, although probably not to any great extent and generally limited to trials of capital and other major indictable offences in the Supreme Courts.[126]

In the 1870s and 1880s, a more predictable form of criminal legal aid appeared in the colonies. Most governments began to provide legal assistance for the defence of poor accused facing trial for serious criminal offences in the Supreme Courts.[127] These schemes were non-statutory, relying upon the traditional prerogative powers to provide justice for the 'poor' - as exercisable by modern executive governments.[128] Legal aid took the form of financial assistance provided at the discretion of the colonial Attorneys-General or Ministers for Justice.[129] The amount paid for the defence of legally-aided accused was modest - in 1880 in Victoria, £10.10.0, rising

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124 Mr. Slater. Attorney-General in the Hogan ALP Government, above n 46 at 3000-3001 & 3004.

125 *Borradale v Davenport* [1958] VR 470 per Sholl J at 472. No significant Australian case law appears in his Honour's review of the relevant judicial authority at 474-476. Similarly, the presence of this jurisdiction does not appear to have been canvassed before the High Court of Australia in either *Mc Innes v R* (1975) 27 ALR 449 and *Dietrich v R* (1992) 109 ALR 385: D Fleming, "Legal Aid" in *The Laws of Australia*, (1996) Vol 11 Criminal Procedure at 11.9 [12].

126 For instance. Qld PD 1907 Vol XCIX at 485 refer to the conduct of a 'dock brief' defence in a murder trial in 1894. Other instances appear at NSW PD 1907 Vol XCIX at 671 & Vic PD 1916 Vol CXLIII at 1222.

127 By 1900, comparable types of schemes operated in New South Wales, Queensland, Victoria, and probably also Western Australia. Initially, the Queensland scheme appears to have been restricted to Aboriginal accused: J H Phillips, *The Trial of Ned Kelly*, (1987) at 26-33; WA PD 1928 Vol 80 at 2025. There is every reason to believe that comparable schemes also operated in South Australia and Tasmania. Indeed, the first Attorney-General of the Commonwealth, Alfred Deakin said *inter alia* in 1903, in response to an amendment to the Judiciary Bill 1903 (Cth), that in "moving the amendment the honorable member has correctly stated the practice with which I am personally familiar, and which, I believe, is followed in the several States. The practice is to assign counsel to prisoners only in capital cases, and the power to do so is not very frequently employed": Cth Parl Deb 1903 Vol 14 at 1529.

128 Above at p 23-24.

129 In practice. the schemes were administered by public officials. For example, in New South Wales an accused person seeking legal aid would first apply to a local Clerk of Petty Sessions - who would forward the application to the Attorney-General. If necessary, enquiries would then be made through the Police Department as to the financial means of the accused, and other relevant matters: NSW PD 1907 Vol XCIX at 668-669.

to £14.14.0 if counsel was briefed.[130] These amounts fell well short of the professional fees commanded by experienced criminal lawyers of the day.[131] Consequently, in practice it was often only young or inexperienced lawyers who would agree to conduct legally-aided defences.[132] However, the contemporary politician who claimed that the "experiments of medical students on the human anatomy are not to be compared with the experiments that have been made by junior counsel on men whose liberty or life has been at stake in this country" was probably overstating the case.[133] Generally, these schemes provided legal aid for the conduct of the defence of all poor accused charged with capital offences, and also in some colonies for the defence of all Aboriginal people charged with non-capital indictable offences.

From Federation to the 1930s

When the colonial period ended, the introduction of state pension schemes and wage regulation in the 1890s had already signalled the emergence of the embryonic Australian welfare state.[134] Comparable social welfare trends continued in the new national polity in the 1900s and 1910s.[135] By the 1920s, the system of political economy and regulation, which would shape the public policy of the Australian welfare state until the early 1980s, was well entrenched. Yet , in the 1900s, 1910s and 1920s neither the new Commonwealth nor the State governments provided general schemes of legal aid for their citizens. And they only minimally expanded the availability of legal aid for poorer people. Neither did this period see the emergence of significant non-state private charitable and benevolent and trade union legal aid schemes - which had already been the experience in Britain, Germany and the United States.[136]

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130 Apparently, the administrative maxima could be exceeded in exceptional cases. For instance, in 1880 the celebrated folk hero Ned Kelly received legal aid at his trial for murder in the Supreme Court of Victoria. His instructing solicitor applied for payment of the full amount of the fees sought by the barrister originally briefed to conduct the defence. This application was refused, and payment made at the standard rate: J H Phillips, above n 127 at 32-33. These rates remained unchanged in Victoria in 1915: cl 6 of the Regulations Relative to Defence of Destitute Persons Charged with Capital Crimes and of Aboriginals charged with Indictable Offences, Victorian Government Gazette, 27 October 1915, No 148 at 4187.

131 For instance, The barrister initially retained to defend Ned Kelly - described by J H Phillips (above n 127 at 26) as "a rising star in his profession" - demanded a brief fee of £50.50.0, with daily refreshers of £10.10.0 after the second day of the trial.

132 J H Phillips, ibid. at 28-29, records how eventually the "most inexperienced barrister in the colony", who had never appeared in the Supreme Court and had practised in Victoria for less than a year, was briefed to conduct the defence of Ned Kelly.

133 NSW PD 1907 Vol XCIX at 672-673.

134 M A Jones, *The Australian Welfare State: Growth, Crisis and Change*. (1983) at 19-30: N G Butlin, A Barnard & J J Pincus, *Government and Capitalism*, (1982) at 9-12.

135 M A Jones, above n 134 at 19-30.

136 "Legal Aid to Poor Persons" (1928) 2 *Australian Law Journal* at 181; R L Abel, above n 2 at 537-539 summarises developments in non-state civil legal aid in comparable Western societies in this period.

The Stance of the Commonwealth

The creation of a national government and Commonwealth Parliament in 1901 had little impact on the availability of legal aid. Both entities showed few, if any, signs of interest in the organised national provision of legal aid for Australian citizens. It is true that in 1903 the Parliament legislated for legal aid for the defence of poorer accused facing trial for indictable offences against its criminal laws.[137] It is also true that by 1910 legislators - together with the judges of the High Court of Australia - had made other fresh provision for legal aid.[138] However, the significance of these developments is generally misunderstood. They were not, as is often implied, the progenitors of Commonwealth participation in the post-war national scheme.[139] In the 1900s and 1910s, federal law and government made few intrusions on the daily lives of ordinary residents of the States. They were unlikely to invoke the civil jurisdiction of the High Court, and even less likely to attract the attentions of Commonwealth criminal law, or the courts-martial provisions of the Defence Act. Moreover, the developments in federal legal aid in the 1900s did not reflect initiatives in national social welfare or social justice policy. In any event, the social pressures for greater popular access to legal aid were probably not great - pre-World War I Australian society was unusually inventive and prosperous.[140]

Instead, new national provision of legal aid in the 1900s and 1910s was the product of less dramatic forces. On the one hand, it was simply part - and a very minor part - of the establishment of the basic machinery of the federal state and its supreme court. By this time, minimal public provision of legal aid for poor accused in serious criminal matters, and poor civil litigants in the superior courts, was de rigeur in comparable Western states.[141] On the other hand, the appearance of federal legal aid schemes was also a product of happenstance. The legal aid provisions in the Judiciary Act 1903 (Cth) and Defence Act 1903 (Cth) originated in amendments moved by non-ministerial members of the House of Representatives personally interested in law reform and procedural justice.[142] They were not deliberate state initiatives - the Federal Government accepted them on 'good housekeeping' grounds, and because they conformed with comparable developments in metropolitan law.

From 1910 until 1941, the national government displayed no further interest in legal aid.[143] Throughout this period, the provision of legal aid in Australia was seen as primarily a governmental responsibility of the States. The federal position is

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137 Section 69(3) Judiciary Act 1903 (Cth).

138 Sections 96 & 103 Defence Act 1903 (Cth). The original Rules of Court of the High Court of Australia (Commonwealth Statutory Rules 130/1910) came into force on 1 January 1911.

139 J P Harkins, "Federal Legal Aid in Australia" (unpub. paper 1976) at paras 1.1-1.4: National Legal Aid Advisory Committee, above n 7 at 24-25.

140 G Bolton, *A View From The Edge: An Australian Stocktaking*, (1992) at 16-19.

141 The poor persons provisions in Order III of the High Court Rules simply replicated existing provisions in the Rules of Court of the State Supreme Courts.

142 Cth Parl Deb 1903 Vol 14 at 1529-1530, 1555, 1557 & 1562: Cth Parl Deb 1903 Vol 15 at 3291 & 4059-60.

143 S 17 Seaman's Compensation Act 1911 (Cth) also made provision for regulations which may affect legal assistance. These are published in Commonwealth Government Gazette 7 October 1926.

tellingly illustrated in a 1925 exchange of correspondence between the Secretary-General of the League of Nations and the Prime Minister.[144] On 24 February 1925, the Secretary-General wrote to the Prime Minister seeking details of provision for legal aid for resident and other indigent foreign nationals in Australia.[145] His letter also asked the Prime Minister to indicate the willingness of Australian governments to enter into an international treaty guaranteeing foreigners equivalent access to citizens to legal aid in civil matters. The initial response of the Prime Minister was to refer the enquiry to the States.[146] When he eventually replied to the Secretary-General, the Prime Minister relayed the answers of the respondent States, neither referring to the existing Commonwealth legal aid schemes nor indicating its attitude to the proposed treaty. Whilst his response was not intended to define national legal aid policy, and was consistent with the intra-governmental conventions applying in the 1920s to the Commonwealth role in international law, it demonstrates that the real story of legal aid in this period is to be found in developments in the States.[147]

The Developments in the States

In the first 30 years of Federation, legal aid in the States - with one minor exception - remained the preserve of governments and the legal profession.[148] The major developments were the enactment of the poor prisoners' defence and criminal appeals legislation, and the reform of the arrangements for civil legal aid in the State superior and intermediate courts. The story of these and related developments is narrated below.

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144 Australian Archives (Mitchell, ACT): Department of External Affairs, Series No. A981, League of Nations - Legal Aid for the Poor, 1925.

145 The League of Nations had resolved in 1924 to adopt measures intended to increase the access of foreign nationals to legal aid in its member states. Awareness of this problem had been heightened by the experience of mass migration, presumably following the political dislocations following World War I.

146 The Premiers of Queensland, Tasmania, Victoria and Western Australia replied saying that legal aid in those States was equally available to foreign nationals. However, only Tasmania was prepared to enter an international treaty guaranteeing foreign nationals equal access to civil legal aid. Queensland was prepared to participate but - like Western Australia - saw little need for a treaty. Victoria reserved its decision, pending sighting a draft international agreement: Australian Archives: Legal Aid for the Poor, 1925, above at n 144.

147 The response of the Prime Minister indicates that an international treaty on legal aid was seen by the Commonwealth as falling outside its governmental responsibilities. In 1925, the scope of Commonwealth power to enter into international treaties on behalf of Australia was not settled - the question was first considered by the High Court in *R v Burgess: Ex parte Henry* (1936) 55 CLR 608. In *Burgess*, Evatt and McTiernan JJ 462 at 466 suggested the capacity of the Commonwealth to rely on the external affairs power to enter into International Labour Organisation treaties was limited. Also, it appears that it was the practice in the 1920s for the States themselves to participate in international treaties affecting Australia.

148 In the early 1920s, the newly-formed ex-servicemen's organisation Legacy provided limited legal aid informally to former World War I servicemen and their families: M H Ellis, *The Torch: A Picture of Legacy*, (1957) at 60.

The Poor Prisoners' Defence Legislation

In 1907, New South Wales and Queensland joined the Commonwealth in enacting provision for legal aid for the defence of 'poor' accused committed for trial for indictable offences.[149] By 1930, all the States - except Tasmania - had followed suit.[150] These enactments were known as the poor prisoners' defence legislation, and they remained the principal machinery for criminal legal aid in the States until the 1960s.[151]

This legislation replaced the informal criminal legal aid schemes operated by the colonial governments.[152] Its provisions took various forms in the different States. For instance, in Victoria s 2 (1) of the Poor Prisoners Defence Act 1916 provided that any "person committed for trial for an indictable offence against the laws of Victoria may at any time within fourteen days after committal and before the trial jury is sworn apply in writing in the prescribed form to a Judge of the Supreme Court or to a chairman of a court of general sessions or to a police magistrate for legal aid for his defence". Whilst the provision in the other States had similar objectives, they did not, notwithstanding the hopes of the Commonwealth 1903, reflect the presence of a coordinated national response.[153] It was simply that State legislators - like their Commonwealth counterparts - had taken the provisions in the metropolitan Poor Prisoners' Defence Act 1903 (UK) as a model.[154]

Administratively, responsibility for triggering the poor prisoners' defence legislation rested with an accused, although - on the basis of the New South Wales experience - judges, magistrates, police and other officials frequently guided poor accused towards its provisions.[155] An accused was first required to apply to a judge or magistrate for a certificate of eligibility.[156] Generally, this application was required to be made after committal, and prior to the swearing in of a jury for the trial.[157] An applicant was also generally required to satisfy two threshold criteria too qualify for

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149 S 2 Poor Prisoners Defence Act, 1907 (NSW); s 2 The Poor Prisoners' Defence Act of 1907 (Qld).

150 S 2 Poor Prisoners Defence Act 1916 (Vic): s 3 Poor Persons Legal Assistance Act 1925 (SA): s 5 Poor Persons Legal Assistance Act 1928 (WA).

151 Below at p 56.

152 Above at pp 25-27. Steps had already been taken in Victoria to regularise the administrative arrangements. In 1911, 1915 and 1916, provisions of its scheme were incorporated into instruments made by the Executive Government (Regulations Relative to Defence of Destitute Persons Charged with Capital Crimes and of Aboriginals charged with Indictable Offences, above n 128).

153 Cth Parl Deb 1903 Vol 14 1529.

154 Ibid: NSW PD 1907 Vol XXVII at 661: Vic PD 1916 Vol CXLIII at 1222.

155 C E Weigall, "Poor Prisoner' Defence" (1941) 15 *Australian Law Journal* 72 at 72. In 1916, the Attorney-General in Victoria expressed the hope that similar informal facultative processes would evolve in the administration of its own legislation: Vic PD 1916 Vol CXLIII at 1226.

156 In Western Australia, the procedure was different. Section 5 of the Poor Persons Legal Assistance Act 1928 (WA) required an accused to apply to the Attorney-General - the application would then be referred to the Law Society to assess eligibility for legal aid.

157 The Commonwealth, Victorian and Western Australian legislation also required that an application be made within 14 days of committal for trial although this requirement may sometimes have been waived if the practice in 1970s and 1980s in the administration of s 69(3) of the Judiciary Act 1903 is any guide: D Fleming, "Legal Aid" above n 125 at [16]. See also *R v Pierce* [1961] VR 496.

the issue of a certificate. First, he or she was required to establish their inability to afford the cost of lawyer representation for the conduct of a defence.[158] Secondly, applicants were required to establish the desirability - in the interests of justice, - that he or she be legally represented at trial.[159] Relevant considerations included the applicant's personal circumstances, and his or her legitimate interest in obtaining legal representation. However, the central premise of this conception of the 'interests of justice' was the wider public interest in procedural fairness in the criminal justice process.[160]

An applicant accused also carried the onus of establishing eligibility for legal aid - proving that their own and the public interest would be best served by a grant of legal aid.[161] If they did so, applicants became entitled to a certificate of eligibility which empowered State Attorneys-General to exercise a statutory discretion to grant legal aid.[162] In capital cases, the evidence suggests that this discretion was generally exercised in favour of an accused.[163] In non-capital cases, the State authorities assessed applications on their merits, including the basis of the proposed defence. For instance, in New South Wales legal aid would generally be granted if the facts disclosed a real defence, or if a question of law was likely to arise at the trial.[164] In the 1930s, in the few Commonwealth cases in which the judges of the High Court granted a certificate of eligibility under s 69(3) of the *Judiciary Act* 1903, the Attorney-General generally granted legal aid.[165]

Various arrangements existed for the provision of legal aid in the poor prisoners' defence schemes. In Western Australia - and Queensland until 1916 when the Public Curator was authorised to provide legal representation for the defence of poor

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158 Again, the Western Australian procedure was different. An applicant was required to satisfy the Law Society that he or she was impoverished - s 2 of the Poor Persons Legal Assistance Act 1928 (WA) defined a "poor person" as anyone who proved that he or she was "not worth £50 (excluding his wearing apparel and tools of trade, and, in a civil proceeding, the subject matter of such proceeding), if such poor person is then married then he or she and his or her wife or husband as the case may be are not together worth said sum of £50 and that such poor person has not earned the basic wage determined and declared under the provisions of the Industrial Arbitration Act, 1912-1925, during the previous twelve months; and also any other person who proves that special circumstances incidental to his case necessitate legal attention which his means do not enable him to obtain".

159 In Western Australia, the equivalent statutory test was expressed as the 'overall merits' of an application for legal aid.

160 *Re Matthew Forrest* [1912] VLR 466 per Cussen J at 468-469: *Rex v Douglas* [1904] 10 *"The Argus" Law Reports* 100 per Hodges J at 101.

161 For instance, in the 1930s and 1940s the justices of the High Court required applicants to file a supporting statutory declaration evidencing their inability to pay for - or obtain - sufficient funds for the conduct of a defence. The justices also required an applicant to include a brief statement explaining why the interests of justice would be served by the provision of legal representation. Applicants who failed to comply with this procedure "were invariably refused": Mr. Frank Jones, Registrar of the High Court of Australia, letter 12 November 1991 at 2-3.

162 In South Australia, s 3(2) of the Poor Persons Legal Assistance Act 1925 conferred this power on the Supreme Court judges.

163 C E Weigall, above n 155 at 72. This was probably also true of the other States, given the experience of the informal criminal legal aid scheme introduced by the colonial governments.

164 Ibid.

165 Mr. Frank Jones, above n 161 at 2-3.

accused - it was provided by private legal practitioners.[166] Thereafter, in Queensland, lawyers in the Public Curator's Office worked as de facto public defenders to represent legally-aided accused.[167] Between 1916 and 1927 in Victoria, legal assistance was provided by private legal practitioners. In 1927, a statutory Public Solicitor assumed responsibility for poor prisoners' defence, although retaining private barristers to represent legally-aided accused at trial.[168] A similar statutory office was created in South Australia in 1925 and was invested with responsibility for representing legally-aided accused.[169] However, in 1933 this role was devolved to the private legal profession when existing arrangements for legal aid were reorganised.[170] In New South Wales, until 1941, when a Public Defender was established, legal representation was provided by private legal practitioners.[171] At the national level, the defence of legally-aided poor prisoners was conducted by practising barristers instructed by the Commonwealth Deputy Crown Solicitor in the State in which the trial was pending.[172]

The Criminal Appeals Legislation

Between 1912 and 1924, the Parliaments in New South Wales, Queensland, Victoria and South Australia enacted criminal appeals legislation modelled on similar reforms in the metropolitan criminal law.[173] This legislation included provisions for legal assistance for poor appellants unable to afford the cost of providing lawyers for the appeal. For instance, s 10 of the Criminal Appeal Act 1914 (Vic) provided that the Attorney-General should "assign to an appellant a solicitor and counsel or counsel only in any appeal or new trial or proceedings preliminary or incidental to an appeal or new trial in which ... appears desirable in the interest of justice that the appellant should have legal aid and that he has not sufficient means to enable him to obtain that aid."[174] Comparable provisions were enacted in the legislation of the other States.[175] The eligibility criteria and administration of legal aid under the criminal appeals legislation closely resembled the law and practice in the poor prisoners' schemes discussed above.[176]

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166 Regulations made on 30 March 1916 pursuant to s 114 (1) Public Curator Act 1915 (Qld) authorised "the provision of legal aid in any legal proceedings by or against poor persons, accused persons, and others": H Gregory, *The Queensland Law Society Inc. 1928-88: A History*, (1991) at 170.

167 Ibid; Australian Government Commission of Inquiry into Poverty, above n 27 at para 3.55.

168 S 6(b) (ii) & (iii) Poor Persons Legal Assistance Act 1927 (Vic).

169 S 8(c) and (d) Poor Persons Legal Assistance Act 1925 (SA). L Mumford, "The South Australian Public Solicitors Office 1926-1933: A Public Salaried Legal Aid Scheme Ahead of Its Time?", (unpublished 1996 Honours Thesis) records the background to the formation of the Office of Public Solicitor in South Australia.

170 Below at p 37.

171 Below at p 38.

172 Mr. Frank Jones, above n 161 at 2-3.

173 Criminal Appeal Act 1912 (NSW): The Criminal Code Amendment Act 1913 (Qld): Criminal Appeals Act 1924 (SA): Criminal Appeal Act 1914 (Vic).

174 This provision was reenacted with minor amendments as s 601 Crimes Act 1915 (Vic).

175 S 13 Criminal Appeal Act 1912 (NSW); s 671C Criminal Code Act 1899 (Qld): s. 13 Criminal Appeals Act 1924 (SA).

176 Above at pp 31-33.

Reform of the Poor Persons Law in Civil Proceedings

Until World War I, the *in formâ pauperis* provisions in the Rules of Court of the State Supreme Courts remained the principal form of legal aid in civil proceedings. At the outbreak of war in 1914, it appears that some State law societies provided free legal advice, wills and other minor legal services to enlisting soldiers.[177] More significantly, in the closing months of the War in 1918, New South Wales introduced reforms to its existing arrangements for civil legal aid. Legislation was enacted which reformed the *in formâ pauperis* procedures in its Supreme Court.[178] Over the next 14 years, legislators in South Australia, Victoria and Western Australia and Tasmania followed suit.[179] It was only in Queensland that statutory reform of civil legal aid did not occur. In 1915, the expanded functions of its Public Curator had included reform to civil legal aid, which was thenceforth available to poorer people in conveyancing, wills and probate matters.[180] Moreover, in the 1920s and 1930s, the Queensland Law Society and the Bar administered an informal scheme whereby legal representation was available to civil litigants proceeding *in formâ pauperis* in Supreme Court actions.[181]

In the other States, South Australia, Victoria and Western Australia and Tasmania, the purpose of legal aid reform was to "make effective provisions of our civil and criminal law, which, at the present time, are ineffective".[182] The reforms were primarily schematic and administrative retaining the principles and machinery of the poor persons procedures.[183] Consequently, successful applicants retained both the procedural privileges, and social stigma of poor parties. The changes in New South Wales and Tasmania were modelled on the Poor Persons Rules introduced in the civil divisions of the English Supreme Court in early 1914.[184] In 1918, the New South Wales variant of the metropolitan scheme authorised the judges of its Supreme Court to make comparable procedural rules enabling litigants to take, defend or be a party to proceedings in the Court as a "poor person".[185] In 1932 in Tasmania, new rules modelled on the Poor Persons Rules were made directly by the judges of the Supreme Court. In both States, the new Rules of Court made few changes to the

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177 Documents in the Australian Archives (Australian War Memorial) indicate that the Law Institute of New South Wales, the Australian Services Movement and the Australian National Services League cooperated to provide legal advice to soldiers.

178 Poor Persons Legal Remedies Act 1918 (NSW).

179 Poor Persons Legal Assistance Act 1925 (SA): Poor Persons Legal Assistance Act 1927 (Vic): Poor Persons Legal Assistance Act 1928 (WA): Supreme Court Civil Procedure Act 1932 (Tas) and Part I Division 3 of the Rules of Court made under its provisions.

180 Above at p 32-33.

181 H Gregory, above n 166 at 170.

182 Mr. Slater, Attorney-General in the Hogan Labor Government, above n 46 at 2999; NSW PD 1918 Vol LXXIII at 2269-2270.

183 For example s 2 of the Poor Persons Legal Assistance Act 1927 (Vic) was expressed in terms of extending the privilege of suing or defending *in formâ pauperis* in civil proceedings.

184 Lord High Chancellor, *Report of the Committee on Legal Aid and Legal Advice in England and Wales*, Cmd 6641, (1945) at 2: S Pollock, *Legal Aid - The First 25 Years*, (1975) at 12-14.

185 S 3 Poor Persons Legal Remedies Act 1918 (NSW). Legislative authority was deemed necessary because the Supreme Court judges had doubts about the scope of their inherent jurisdiction to provide relief to poor civil litigants: NSW PD 1918 Vol LXXIII at 2274.

existing poor persons procedural law .The major innovation was that the organised legal profession now agreed to participate on a regular basis in providing legal representation to poor parties in Supreme Court proceedings.[186]

In the end, a similar solution was adopted in Western Australia. Apparently, the Poor Persons Legal Assistance Bill 1928 (WA) originally only made provision for the creation of a statutory Public Solicitor. However, the introduction of the Bill sparked the interest of the Law Society.[187] Consequently, in its passage through the parliamentary process the Bill was amended - still providing for the appointment of a Public Solicitor, but only if the Law Society was unwilling to carry out those statutory functions.[188] The absence of a Public Solicitor in Western Australia in the 1920s suggests that the Law Society proved willing to administer the new legal aid scheme.

On the other hand, in South Australia and Victoria the establishment of Public Solicitors in the mid-1920s was an integral part of the reforms to civil legal aid.[189] These new statutory creatures were required to be legal practitioners whose primary function in civil matters was to provide legal representation to approved poorer litigants. In both States, the choice of a public lawyer for poor civil parties was prompted by a belief that reforms modelled on the 1914 Poor Persons Rules were impracticable.[190] In South Australia, the Attorney-General considered that "to solve the problem of providing legal assistance for the poor, the government needed to take responsibility for legal aid".[191] In Victoria, the Attorney-General blamed the legal profession for the "utterly ineffective" state of the existing poor persons procedures in its Supreme Court Rules.[192] He also claimed that the evidence from England was that relatively few solicitors actually participated in the 1914 scheme.[193] These arguments carried the day. From 1928 until 1961, the Public Solicitor in Victoria was to be solely responsible for civil legal aid.[194] In South Australia, a Public Solicitor was appointed in 1925, but his role was short-lived. In 1933, the office was abolished, and its functions replaced by a new civil legal aid scheme administered by the Law Society.[195]

In all States, reforms liberalised the financial eligibility criteria for civil legal aid. Previously, these had remained fixed at their 19th century maxima of a personal nett

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186 S 4 of the Poor Persons Legal Remedies Act 1918 (NSW) contained one significant procedural innovation. It permitted a Supreme Court or District Court judge asked to fix a date for hearing proceedings involving a poor litigant to interview all parties or attempt to conciliate the dispute - invocation of these powers disqualified a judge from subsequently trying the cause or action.

187 WA PD 1928 Vol 80 at 2184-2185.

188 S 3 Poor Persons Legal Assistance Act 1928 (WA).

189 S 7 Poor Persons Legal Assistance Act 1925 (SA); s 5 Poor Persons Legal Assistance Act 1927 (Vic).

190 L Mumford, above n 169 at 27.

191 Ibid.

192 Above n 46 at 3000.

193 Ibid.

194 Below at pp 65.

195 Below at pp 37-38.

worth not exceeding £25.[196] In New South Wales and Victoria, the legal aid reforms increased the maximum qualifying amount to £50, excluding an applicant's clothes and tools of trade and the subject-matter of the proceedings.[197] In South Australia, the statutory maxima was increased to £100.[198] Comparable reforms to the capital criteria were also made in Western Australia and Tasmania.[199] However, these States also introduced a new requirement that an applicant's weekly income fall within prescribed limits. In Western Australia, an applicant for civil legal aid was required to establish that he or she had not earned the basic wage fixed by the Industrial Arbitration Act 1912 (WA) in the previous 12 months.[200] In Tasmania, the 1932 reforms provided that the usual income of an applicant should not exceed £3, or, in special circumstances, £4, per week.[201] Moreover, in all States the reforms typically extended the scope of civil legal to proceedings before District or County Courts, workers' compensation courts and tribunals and sometimes other jurisdictions.[202]

The 1930s and the Developments During World War II

From the late 1920s until the late 1930s, Australia shared in the worldwide blight of economic recession. These social circumstances "could have stimulated the growth of the [Australian] welfare state".[203] Instead, for various reasons it was economic and not social policy which dominated the welfare state in the 1930s.[204] The onset of recession also retarded developments in the legal profession and lawyers' services industry.[205] The combination of these and related factors meant that the legal aid schemes in the 1930s were generally moribund, with the principal exception of the developments in South Australia in 1933. Social salvation of a kind came to Australia in the early 1940s in the course of the World War II. It was the coming of war - and its unintended and incidental gradual restoration of national economic and social well-being - which produced the remaining developments in legal aid discussed in this chapter.

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196 Above at p 25.

197 S 2 Poor Persons Legal Remedies Act 1918 (NSW) - a judge could permit an amount greater than £50 in special circumstances; s 8 Poor Persons Legal Assistance Act 1927 (Vic).

198 S 4 Poor Persons Legal Assistance Act 1925 (SA).

199 S 2 Poor Persons Legal Assistance Act 1928 (WA) increased the upper financial limit to £50. In Tasmania, the Rules of Court made under the Supreme Court Civil Procedure Act 1932 (Tas) increased the amount to £40 or, in special circumstances, £100.

200 S 2 Poor Persons Legal Assistance Act 1928 (WA) - the prescribed income and the assets test could be varied in special circumstances.

201 Rules of Court pursuant to the Supreme Court Civil Procedure Act 1932 (Tas).

202 For example, s 3 (2) Poor Persons Legal Remedies Act 1918 (NSW); s 8 Poor Persons Legal Assistance Act 1927 (Vic) and s 6 (3) Poor Persons Legal Assistance Act 1928 (WA).

203 M A Jones, above n 134 at 39.

204 Ibid.

205 J Bennett, *A History of Solicitors in New South Wales*, (Sydney, Legal Books Limited, 1984) at 278-279; O Mendelsohn & M Lippman, "The Emergence of the Corporate Law Firm in Australia", (1979) *2 UNSW Law Journal* 78 at 81.

The Developments in Legal Aid for Poorer People

In the 1930s, the public face of legal aid in Australia was one of stability. In 1935, the Commonwealth introduced a legal aid scheme in the Northern Territory.[206] However, this merely replicated the limited provisions for civil legal aid already available to residents of the States, and the pre-war Commonwealth national position was undisturbed. With one exception, the States retained their existing arrangements for civil and criminal legal aid.

The exception - as foreshadowed above - was South Australia. By the early 1930s, both the government and the Law Society believed that the legal aid scheme administered by the Public Solicitor had failed to meet public expectations. They saw the 1925 scheme as limited in scope and as providing legal aid in a narrow range of proceedings and legal problems.[207] These shortcomings were compounded by divorce law reform in 1929, and the economic stringencies wrought by the onset of the Great Depression.[208] Some private legal practitioners also complained that the Public Solicitor was assisting parties who were financially able to pay for lawyer services.[209] In 1933, when the government invited the Law Society to cooperate with the Public Solicitor in providing legal aid, it rejected the invitation, making a counter-proposal to create a legal aid scheme modelled on the English 1914 Poor Persons Rules.[210] In fact, the scheme proposed by the Law Society was far more generous and comprehensive than the metropolitan scheme; its members were willing to agree to provide legal aid to poorer people requiring representation in various civil, criminal and matrimonial proceedings, together with advice and assistance in non-contentious matters.[211] Assistance would be freely available for the genuinely poor, and for ordinary people - the 'non-poor', on lower incomes - on payment of a financial contribution graduated according to income, capital and other means.[212] The Law Society's counter-proposal was subject to the condition that its members would assume all the functions of the Public Solicitor. The South Australian government accepted the offer, and its terms, and the new scheme began on 1 September 1933.[213]

This second round of change to legal aid in South Australia reflected two undercurrents behind the public face of legal aid in the 1930s. One was the position of the private legal profession. The developments in South Australia followed the reaction of the Law Society of South Australia in 1928. Both demonstrate the growing interest of the State legal professions in controlling legal aid. These two

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206 Poor Persons Legal Assistance Ordinance 1935 (NT).

207 D Bruce-Ross. "A Legal Assistance Scheme" (1948) 22 *Australian Law Journal* 51 at 54.

208 Ibid: Australian Government Commission of Inquiry into Poverty, above n 27 at 36.

209 D Bruce-Ross, above n 207 at 54.

210 Ibid.

211 Ibid: Australian Government Commission of Inquiry into Poverty, above n 27 at 35.

212 D Bruce-Ross. above n 207 at 54.

213 Originally, the scheme was known as the Poor Persons Legal Relief Scheme - its name was later changed to the Legal Assistance Scheme. The operation of the scheme was facilitated by the Poor Persons Legal Assistance Act 1936 (SA).

law societies were not alone. In 1937, the Law Institute of Victoria made representations to the Victorian government to replace the legal aid functions of the Public Solicitor with a scheme akin to the South Australian model.[214] Whilst its representations were rejected, the general point is nevertheless made.[215] The other undercurrent was the decay of the Poor Persons Rules type-scheme in New South Wales. By the end of the 1930s, it was evident that the hopes of reformers in 1918 for effective civil legal aid through the organised voluntary efforts of private legal practitioners had not been realised.[216] The operations of the scheme were described as "slow and cumbrous, and that only those who are virtually paupers [were] eligible for its benefits, if they may be so called".[217]

It was this problem in New South Wales which prompted the final significant development in legal aid for poorer people in the States in this period. In the early 1940s, the McKell Labor Government initiated a series of reforms to legal aid, its Attorney-General readily conceding that whilst they would not create a popular "legal utopia", they would "build a system that will be a tremendous improvement on the existing utterly inadequate arrangements".[218]

The changes began with reforms to the administration of criminal legal aid. In 1941, a non-statutory Office of Public Defender was established within the Attorney-General's Department.[219] The Office was to be constituted by barristers employed to conduct the defence of poorer criminal accused granted legal aid. Two years later, the Legal Assistance Act 1943 (NSW) established a new scheme of civil legal aid for the benefit of "persons of limited means and with limited income".[220] The Act also created a Public Solicitor to administer the scheme and make arrangements for legal assistance.[221] This scheme differed from its predecessor - and existing statutory arrangements for legal aid in other States - in one important respect. A person granted legal aid was no longer required to be officially stigmatised as poor - anyone in New South Wales whether 'rich', poor or of indifferent means or status was entitled to apply for legal aid.[222] However, popular eligibility did not mean universal entitlement - this was to be determined by the Public Solicitor in accordance with specified jurisdictional, financial and other criteria.[223] Nevertheless, entitlement was

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214 Wallace J. Ball President of the Law Institute of Victoria, letter 22 October 1937 to the Attorney-General of Victoria reproduced at "Poor Persons' Legal Assistance" (1937) *Law Institute Journal* 137.

215 Ibid.

216 In 1918, Mr. D R. Hall had said *inter alia* that he believed enactment of the Poor Persons Legal Remedies Bill 1918 (NSW) would put the processes of the Supreme Court "within the reach of the poor man in this country to no longer suffer injustice on account of their poverty" (above n 40 at 2274).

217 Second reading speech of Captain C E Martin, Attorney-General in the McKell Labor Government, introducing the Legal Assistance Bill 1943, NSW PD 1942-43 Vol CLXX at 2710-2711.

218 Ibid.

219 Australian Government Commission of Inquiry into Poverty, above n 27 at 89.

220 Preamble, Legal Assistance Act 1943 (NSW).

221 S 3 Legal Assistance Act 1943 (NSW).

222 S 6 Legal Assistance Act 1943 (NSW). However, it retained the basic procedural privileges of the *in formâ pauperis* procedure.

223 S 6 (4) Legal Assistance Act 1943 (NSW). An applicant was required to satisfy the Public Solicitor that he or she had reasonable grounds for taking, defending, continuing or being a party to legal proceedings.

extensive, with the Commissioner for Law and Poverty suggesting in 1975 that contemporary records indicated that as many as 75% of New South Wales residents were financially eligible for legal aid when the scheme was introduced in 1943.[224]

The Legal Assistance Act made legal aid available in civil proceedings in the District Court, and civil and matrimonial proceedings in the Supreme Court.[225] Civil legal aid was also available in related appeals, and proceedings in the Judicial Committee of the Privy Council.[226] In civil matters, legal representation was provided either by the Public Solicitor and other employed lawyers - or else by private legal practitioners.[227] In criminal proceedings, it was provided by lawyers in the Office of Public Defender - whose functions were the Act expanded.

The Outbreak of War, the Law Societies and Legal Aid for Soldiers

The armed forces of the Commonwealth were mobilised within a few days of the official outbreak of World War II in September 1939. In the next six months, large numbers of civilians enlisted for military service - these new military personnel frequently needed legal advice to assist in making the transition from civilian life. In the first few months of the war, the State law societies and legal practitioners volunteered to provide informal legal advice schemes.[228]

However, within a few months these initial arrangements for legal aid were formalised. In February 1940, the Law Institute of Victoria established a legal aid service for soldiers. Free legal advice and other lawyers' services were provided to members of the Australian Imperial Forces who had enlisted for overseas service and to their dependants - eligibility was subsequently extended to all members of the Commonwealth armed forces, their dependants, nurses training for overseas services and intending recruits. In July 1940, the AIF Director of Personnel Services at Southern Command in Melbourne wrote to his counterparts in Northern Command, Eastern Command, Western Command and the 7th Military District suggesting that the Victorian scheme might be a "way in which the services of the members of the

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The Act also contained assets and income tests - applicants who possessed or were entitled to property of a total value of more than £100 were ineligible for legal aid. "Property" for these purposes excluded the subject matter of the proceedings, wearing apparel, tools of trade and household furniture and a residential dwelling in which the value the interest of the applicant did not exceed £750. The income test was fixed by reference to the Sydney needs basic wage. An applicant's income, including spousal income, in the previous 12 months, after deducting £50 for each dependant, could not exceed an amount equal to the multiple of £50 next above the annual equivalent of the basic wage at the date of the application, plus any fixed additional loadings.

224 Australian Government Commission of Inquiry into Poverty, above n 27 at 78-79.

225 S 6 (4) (a) Legal Assistance Act 1943 (NSW). The McKell Government - when practicable - intended to extend the operation of the scheme to proceedings in all New South Wales courts: NSW PD 1942-43 Vol CLXX at 2711.

226 Ss 16 & 17 Legal Assistance Act 1943 (NSW).

227 S 8 Legal Assistance Act 1943 (NSW). The Public Solicitor was required to keep a list of legal practitioners willing to assist in the administration and provision of legal assistance.

228 These appear to have been comparable to the voluntary legal aid services offered by some State law societies in 1914 (above n 177).

legal profession might be utilised".[229] His suggestion prompted these officials to approach the other State law societies to establish voluntary legal aid schemes for soldiers.

Soldiers' legal aid schemes were subsequently established by the law societies in New South Wales, Queensland, South Australia, Tasmania and Western Australia.[230] Services were provided by practising members of the law societies in their own offices - or in temporary offices in military camps and recruiting offices. However, visiting military camps to provide legal aid was sometimes not without its problems. In September 1940, the Queensland Law Society agreed to provide solicitors to make weekly visits to camps at Enoggera, Grovely and Redbank, but this arrangement was to be short-lived. The solicitors experienced transport difficulties, and the demand for their services was less than predicted - in late November, the frequency of their visits was reduced to once a fortnight.[231] By mid-1941, the Law Society advised the military authorities in Queensland that it would only provide legal aid to soldiers at its Brisbane office, and only on 24 hours notice.[232]

The services provided in the State soldiers' legal aid schemes were usually restricted to free legal advice, and the preparation of wills and powers of attorney.[233] When

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229 Memorandum 10 July 1940 Director of Personal (sic) to N Cmnd, E Cmnd, W Cmnd and 7 Mil Dist. Australian Archives (Australian War Memorial); CRS AWM 60 Item No: 142/1/261 - Free Legal Aid to members of AIF (Australian Imperial Force).

230 In Queensland, a Legal Aid to Soldiers Committee was established at 113-115 Queen Street, Brisbane. In South Australia and Western Australia, the contact point for soldiers' legal aid was the Law Society - presumably this was also the case in New South Wales. In Tasmania, the soldiers' legal aid service was known as the Free Legal Aid Service, and was administered by the Southern Law Society in Hobart - and the Northern Law Society in Launceston: Australian Archives (Australian War Memorial) Series No: A663 Item No: 0130/2/775 Free Legal Aid Service. For Western Australia, see Cth Parl Deb 1942 Vol 172 at 330.

231 AMF Memorandum, DCR 142/1/251 Adjutant-General to 24 Infantry Brigade AIF outlining the arrangements for free legal advice reached with the Queensland Law Society. Military transport was not available to transport voluntary solicitors to the camps. The military administrators were also unwilling to authorise the supply of petrol to the solicitors for use in their private cars. In the end, the transport problem was resolved by the free supply of petrol at the camp - in the case of one car, 1 1/2 gallons, and another 3 gallons. At the end of the first week of the operation of the scheme in late September 1940, 12 soldiers at Grovelly camp had advised they were in need of legal advice - only two actually appeared for interview. The embarrassed authorities sought explanations, threatening disciplinary action against responsible officers. It was established that the remainder were at the rifle range - and had already obtained "the necessary legal advice from solicitor friends within their units.": Australian Archives file Series AWM 60 Item No: 142/1/261).

232 Assistant-Secretary Queensland Law Society letter 18 June 1941 to Colonel i/c Administration, Northern Command, Victoria Barracks, Brisbane: Australian Archives Series AWM 60 Item No: 142/1/261.

233 For instance, in the Senate in 1942 Senator Clothier cited the *West Australian* newspaper which referred to the fact that the services provided to members of the armed services by the Law Society of Western Australia were limited to wills and simple powers of attorney. The newspaper reported the Law Society and its members as unwilling to provide free legal advice, assistance with matrimonial matters or advice on property management while soldiers were on active service It also noted that a Soldiers Dependants' Appeal Committee was providing a referral service in these types of legal problems - deserving applicants would be referred to practising lawyers who had agreed to provide free legal advice. A firm of solicitors - known as Kott and Lalor - was named as having accepted over 250 referrals: Cth Parl Deb 1942 Vol 172 at 330-31.

necessary, arrangements would sometimes be made for soldiers to obtain assistance from solicitors practising in other States. In New South Wales - and almost certainly in other States - these arrangements were complemented by officers of the Public Trustee who visited military camps to provide legal advice and minor assistance.[234]

The Formation of the Commonwealth Legal Service Bureau

In March 1941, the Federal Cabinet approved the establishment of a national scheme to advise members of the armed forces and their dependants on the operation of the National Security (War Service Moratorium) Regulations, the National Security (Reinstatement in Civil Employment) Regulations and similar provisions.[235] In its original visage, it appears that the Federal Government intended to rely on services provided voluntarily by the private legal profession to administer the scheme - the relevant minute contemplates the appointment of State panels of solicitors willing to give free legal advice.[236] The scheme was advertised along these lines in mid-1941.[237] However, it appears that the voluntary plan did not gain the support of the State law societies - which already made their own arrangements to provide legal aid for soldiers and their dependants.[238] In the event, it was decided - it is not clear precisely when, although the answer may yet lay in the archival records - to implement the scheme with the assistance of lawyers employed in the Commonwealth Attorney-General's Department.

However, by 1943 Legal Service Bureau (LSB) offices were in operation. Their function was basically to provide free lawyer services in connection with new legal problems arising out of the management of the war-time national economy. Accordingly, in 1943-44 its work focused around providing legal advice and assisting with legal problems arising out of moratorium provisions. The work of its officers soon expanded to include providing advice to servicemen and their dependants in relation to their legal rights under the war time occupancy and rent control provisions. By 1945, LSB offices had been established in all State capitals, and several smaller cities in New South Wales and Queensland.[239]

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234 The NSW Public Trustee also undertook the administration of estates worth less than £1,000 of members of the armed forces killed in action free of charge.

235 War Cabinet Minute, Melbourne, 5 March 1941, Agenda No. 90/141, Voluntary Legal Advice and Assistance to Members of the Forces or their Dependents (*sic*), Australian Archives file series A663/1 Item 0130/2/1270.

236 Ibid. Volunteers were to be sought through the State Directorates of Voluntary Service. The Cabinet Minute above states that the "Director of Voluntary Service [is] to arrange for the Panels of Solicitors so formed to be given due publicity for the information of members of the Forces and their dependents [*sic*] and to make suitable arrangements for the work to be distributed evenly as practicable amongst the solicitors concerned". Panels of at least 12 solicitors were to be established in Sydney and Melbourne, with smaller panels in the other capital cities. Consideration was also to be given to the establishment of panels in the larger provincial cities.

237 Australian Archives file series A663/1 Item 0130/2/775. For example, the Melbourne *Argus*, *Age* and *Sun*, 2 July 1941.

238 Eg, references appear in contemporary parliamentary debates with respect to the developments of this kind in Western Australia.

239 Offices were opened in Newcastle and Wollongong in New South Wales and Rockhampton and Townsville in Queensland: J P Harkins, above n 139 at 3.

The LSB was also involved with the Commonwealth Ministry of Post-War Reconstruction, established in late 1942 to plan for the future of the economy and society of the Australian welfare state.[240] In September 1945, the Attorney-General's Department agreed with a proposal from the Ministry that the LSB should prepare a legal aid pamphlet as part of a series of pamphlets to accompany a handbook entitled a "Return to Civil Life".[241] 400,000 copies were published, the majority being distributed to members of the armed forces on demobilisation, and the rest distributed to LSB offices and voluntary organisations.[242] The pamphlet was soon revised with the assistance of the LSB. Mainly because difficulties had arisen with respect to the advice it contained on tenancy law, notices to quit and taxation law, but also because of concerns that it was seen as a legal manual instead of a procedural guide.[243]

Conclusion

In 1945, the metropolitan poor persons jurisdiction had been part of the Australian law and government for over 120 years. Until the 1910s, in traditional *in formâ pauperis* procedure had - with colonial adaptations - provided the basis of civil legal aid in the Australian superior courts. In criminal proceedings, neither the jurisdiction nor its procedures were ever specifically employed. However, the ancient prerogative functions from which they derived - the provision of justice and assistance to the weak and impoverished - were the foundation of the initial state responses to criminal legal aid - the 'dock-brief' system and the informal scheme administered by the colonial and State executive governments. Furthermore, the modern application of these two prerogative functions lay behind the developments in criminal legal aid in the 1900s and 1910s: the poor prisoners' defence and State criminal appeals legislation. This legislation represented a legalisation of existing practice, and this along the lines of metropolitan models.

Other developments in Australian legal aid in the 1910s, 1920s and 1930s continued to reflect metropolitan developments.[244] Positively, in the case of the voluntary legal aid schemes in New South Wales and Tasmania modelled on the 1914 Poor Persons Rules. Negatively, in the case of the decisions by governments in South Australia and Victoria and, at least in original conception, Western Australia to create statutory

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240 S J Butlin & C B Schedvin, War *Economy 1942-1945*, (1977) at 625-679; Y A Mamchak, "The Origins and Early Years of the Australian Ministry of Post-War Reconstruction" (unpub thesis 1980) at 143: G Sawer, *Australian Federal Politics and Law 1929-1949*, (1963) at 130.

241 Assistant Secretary, Attorney-General's Department, Canberra letter 21 September 1945 to Crown Solicitor, Canberra; Ministry of Post War Reconstruction letter 26 September 1945 to Mr. Lyons, Attorney-General's Department, Canberra: Australian Archives file series A472/1 Item W19114 Part 2.

242 Commonwealth of Australia, *Legal Assistance to Members of the Forces and their Dependants*, (Commonwealth Government Printer, Canberra 1945).

243 The changes were settled by 11 December 1945 and the revised booklet submitted for publication: letter 21 September 1945, Secretary, Attorney-General's Department, Canberra to Mr. R T. Vinnicombe, Staff Bulletins, 66 Macarthur Street, Parramatta (Australian Archives file series A472/1 Item W19114 Part 2).

244 Australian legislators and law societies were familiar with the work of the Finlay Committee appointed in 1926 to inquire into criminal legal aid for the poor: Lord High Chancellor, above n 184 at 7.

Public Solicitors. However, this latter development, namely the administration or provision of legal aid by state officials under the auspices of a legislative scheme on the basis of hybrid conceptions of 'impoverished citizenship', also represented a significant departure from the metropolitan experience. This was not the British interwar experience - where legal aid remained a niggardly gesture of the legal profession and the state towards the poor.[245] In reality, the Australian experience in the 1920s and 1930s may not have been spectacularly different - in fact, it almost certainly wasn't. Nevertheless, in the Public Solicitor schemes we glimpsed the links between the state, legal aid and modern citizenship - the essential elements of citizens' legal assistance in the welfare state.

Precisely why this occurred in some Australian States in the 1920s is beyond the scope of this thesis. However, it appears that it was a product of a cocktail of factors. Something was happening to the legal profession - although our knowledge of this is fragmentary. The traditional nepotistic selection practices in solicitors' employment were bowing to meritocracy in a few signs of fracture.[246] For many solicitors, it was a difficult period to worsen during the Depression.[247] There were also developments in the organised legal profession, and indications of a higher public profile. Calls in 1924 and 1927 for an Australian Law Association were followed by the establishment of the Law Council of Australia at a national conference in 1933, at which the Chief Justice of the High Court spoke about the duties and opportunities of the legal profession.[248] The State governments themselves - at least in New South Wales, South Australia, Victoria and Western Australia - began to articulate increased expectations of the social functions of the profession.[249] This was especially so in the Labor governments in the three States - South Australia, Victoria and Western Australia - which legislated for Public Solicitors. The developments in Australian legal aid before 1945 culminated in New South Wales in the early 1940s, in particular in the 1943 general, citizen-based legal aid scheme. In retrospect, this was a remarkable development which pre-empted the national scheme established in Britain in 1949, which has been acknowledged as the beginning of the Western post-war experience, by six years and which was at least as broad in scope and conception.[250]

Nevertheless, in 1945, at the national level legal aid provision in Australia remained un-coordinated and diverse, like the legal profession and legal services system itself. The formation and operations of the LSB had not been the forerunner, as legend would have it, of a Commonwealth inspired, national citizen's legal aid scheme. In 1942-1945, the LSB had functioned primarily in facilitating Federal administration

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245 P C Alcock, "Legal Aid: Whose Problem?" (1976) 3 *British Journal of Law and Society* 151 at 164 & 164-173.

246 O Mendelsohn & M Lippman, above n 205 at 81.

247 J Bennett, above n 205 at 278-279.

248 "The Origins of the Law Council of Australia", (1967) (October) 3(1) *The Law Council Newsletter* 27 at 27-28.

249 Below at p 130.

250 The British 1949 scheme is discussed below at p 64 & n 399.

of the economy, society and de-mobilisation of the war time welfare state, an incident of the unprecedented expansion of its administrative functions.[251] Neither does any long-term peacetime role of the LSB - or the national provision of legal aid to Commonwealth citizens - appear to have been on the agenda of the social planners in the Ministry of Post-War Reconstruction. Nor does the Federal Labor Government appear to have contemplated the legislative needs of a national scheme in its various proposals over 1943-45 to expand Commonwealth powers over national economic regulation and social welfare provision.[252]

However, it was not as though there was no interest in legal aid in Australia. The law societies, lawyers and reformers were aware of developments in Britain.[253] More significantly, in September 1945 the Commonwealth Attorney-General, Dr H V Evatt, clearly had in contemplation a continuing, peacetime function for the LSB, maybe even as the nucleus of a new and significant post-war national scheme.[254] Thoughts of a national continued expanded role for the LSB existed in the immediate post-war period.[255] Yet, as we describe in the next chapter, it was to be almost 30 years before the establishment of a national legal aid scheme.

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251 G E Caiden, *Career Service*, (Melbourne University Press, 1965) at 282; G Sawer, above n 240 at 184.

252 G Sawer, above n 240 at 171-174

253 "Legal Aid and Social Security" (1945) 18 *Australian Law Journal* 273-274; below at pp 52-53 & 177. In Britain, the Rushcliffe Committee was appointed in 25 May 1944 to "enquire what facilities at present exist in England and Wales for giving legal advice and assistance to Poor Persons, and to make such recommendations as appear to be desirable ... for modifying and improving, so far as seems expedient" the existing system of legal aid. It reported in May 1945 - recommending inter alia the establishment of a state-funded scheme, administered by the legal profession - except in relation to proceedings under the poor prisoners' provisions: Lord High Chancellor, above n 184 at 1 & 23. The Committee provided the policy basis for the English 1949 legal aid scheme.

254 Below at p 46.

255 Below at p 46-48.

Chapter Three
The Post-War Background

> Mr. HAYLEN. I direct a question to the Attorney-General regarding the announcement that 600,000 pensioners and persons entitled to claim social services benefits are to be provided with free legal advice by the Legal Service Bureau established by the Attorney-General's Department for the benefit of ex-servicemen ... Since it is proposed to extend its operations to involve the giving of advice to civilians, will the bureau be decentralized by the setting up of country branches, so that this very important organization, which works for the under-privileged, may be more readily accessible to the people?
>
> Dr. EVATT. – ... The Legal Service Bureau, which was set up to help ex-servicemen and their dependants, has a statutory basis, and its work is not only being continued, but is also being extended ... Under the new arrangements, officers in the bureau are authorized to deal with legal questions arising out of certain social services claims. The Minister for Social Services and I have arranged that officers of the bureau shall be available to give advisings if called upon by claimants for age, invalid or widows' pensions, in connexion with which legal questions sometimes arise regarding their property and means ...
>
> Question Time in the House of Representatives, 30 September 1949, Cth Parl Deb 1949 Vol 204 at 775-776

Introduction

Australia was a laggard in joining in the post-war 'wave' of legal aid in welfare capitalism. This chapter tells the story of developments in the politics and administration of legal aid in the Commonwealth and the States from 1945 until 1972, i.e. the post-war period preceding the national scheme which emerged in 1973-76.

The chapter begins by describing the peacetime functions of the Legal Service Bureau, namely its role in social reconstruction in the late 1940s and early 1950s, and its gradual decline as prosperity and social change overtook its functions. The chapter proceeds to outline the wider national picture in the 1950s, including the restoration of pre-war Commonwealth legal aid policy, the spread of the charitable and semi-charitable State law society schemes and the work of the few, informal charitable schemes.

Much of the remainder of the chapter is taken up with the developments of the 1960s. Thanks to the research of the Commissioner for Law and Poverty in 1974-75, we know more about the 1960s than any previous decade. However, this research focused on the shortcomings of the legal aid system in the 1960s - as was its task - and bypassed some of its subtleties and contiguities in Australian society. Whilst the chapter describes the crumbling of the State charitable and semi-charitable law society schemes, it reveals that this development was more complicated than we have come to believe. In many States there were attempts to save the law society schemes by transforming them into more viable 'public' schemes - with funds from State governments, or interest from trust account and fidelity fund deposits.

Furthermore, the chapter points out that the decline of the law society response was linked to post-war changes in the legal services industry. It also records the hitherto neglected role of the Law Council of Australia in calling for a new Federal legal aid scheme in 1964-65. The chapter also alerts us to the background presence of public concerns about the impact of poverty in Australian society, and its impact on developments in legal aid in the 1960s.

Finally, the chapter describes other developments in the 1960s, including the reforms to State criminal legal aid and the trade union and other minor 'non-state' schemes. It concludes by briefly relating the formative developments in Aboriginal legal aid services and community legal centres in 1971-72.

The Peacetime Role of the Commonwealth Legal Service Bureau

In June 1945, the Commonwealth Parliament enacted the Re-Establishment and Employment Act 1945 (Cth). This was part of the planning for the task of civil reconstruction which had become the dominant concern of the Federal Government as the war dragged to an end.[256] The Re-Establishment and Employment Act provided inter alia that the LSB were to continue providing legal aid to wartime and demobilised armed services personnel and their dependants, and authorised the Attorney-General to establish new LSB offices for this purpose.[257]

Two months later, Dr Evatt directed the Attorney-General's Department - in response to "the pressing requirements of servicemen and their dependants" - to expand the operations of the LSB.[258] The direction placed the LSB under the administrative umbrella of the Department.[259] However, operational responsibility was to remain with its Officer-in-Charge, Mr. Frank Wilkins, who was to continue to take policy direction from the Attorney-General personally.[260] These organisational arrangements remained in force until 1951.[261] In 1947, s 8 of the Interim Forces Benefit Act (Cth) again expanded the functions of the LSB to include serving members of the armed forces.

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256 Y A Mamchak, above n 240 at 143: G Sawer, above n 240 at 166.

257 S 105.

258 Memorandum 25 August 1945, H. V. Evatt to Secretary, Attorney-General's Department, Canberra (Australian Archives file series A472/1 Item W19084).

259 Ibid. The revised administrative arrangements included the renaming of the LSB as the 'Legal Aid Bureau'. This nomenclature was never adopted.

260 Ibid. On 6 November 1992, Mr. J. P. Harkins was interviewed at his home in Canberra. In 1945, Mr. Harkins was a Legal Officer in the Commonwealth Crown Solicitor's Office in Sydney. From 1951, he worked as Senior Legal Officer in the Sydney office of the LSB - becoming officer-in charge in 1959. After 10 years, Harkins left the LSB and subsequently held senior appointments in the Commonwealth Attorney-General's Department before his appointment as the first Director of the Australian Legal Aid Office in 1973 (below at pp 83-95). Frank Wilkins was, according to Harkins, a personal friend of Dr Evatt - and was formerly a solicitor in private practice at Wellington, in New South Wales.

261 Below at p 47-48.

In the immediate post-war years, the provision of legal aid to demobilised armed services personnel and their dependants was the major function of the LSB. In September 1949, the Chifley Federal ALP Government proposed to extend its role to include the provision of legal aid to Commonwealth aged and invalid pensioners. It appears that an agreement for this purpose was reached between the Attorney-General and the Minister for Social Services.[262] If so, and if it was ever implemented, it would have only operated for a few months. The Chifley Government lost office at the Federal elections held in December 1949.[263] A Liberal/Country Party coalition under the leadership of Mr. R. G. Menzies, which would remain in power until 1972 was elected as the new Federal Government.

Senator Spicer, the new Commonwealth Attorney-General, had no intention of expanding any of the functions of the LSB. Indeed, when he assumed office in December 1949 he was concerned at what he saw of the work of the LSB - "its functions had been extended beyond statutory limits and ... it was rendering service to certain people without legal authority".[264] His initial concerns were not allayed as he gained familiarity in 1950 with its operations:

> Five years having elapsed since the end of hostilities, the main emphasis of the work of the bureaux had shifted. It was obviously never intended that the bureaux should provide for all servicemen and their dependants, at the taxpayer's expense, the services of a solicitor over the whole range of legal problems of civil life, both in their business and their private affairs. But I found that, unless the bureaux were simply to drift into something very like this position, a clear line would have to be drawn.[265]

In March 1951, Senator Spicer - in response to an enquiry by Dr Evatt, then Leader of the Federal Opposition, about the future role of the LSB - restated and clarified its peacetime functions.[266] These were to remain confined to the provision of legal aid to serving members of the armed forces, its former wartime members and their dependants. LSB staff were authorised to provide legal representation in rehabilitation and reestablishment matters, including tenancy and moratorium

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262 Cth Parl Deb 1949, Vol 204 at 16 & 775-776: Cth Parl Deb 1949, Vol 205 at 1210. The parliamentary record corresponds with the recollection of Mr. J P Harkins above n 260 at 2. According to Harkins, shortly before the 1949 federal election, Dr Evatt issued an administrative order that the LSB would thenceforth provide legal aid to Commonwealth social security beneficiaries. No record of the order has been located. However, the likelihood that such a direction was given is supported by the later parliamentary record. In 1952, Senator Spicer, Attorney-General in the Menzies Liberal/Country Party coalition Federal Government, said that when he first assumed office in 1949 the LSB "had a sort of vague, general charter to give advice to people who received social services benefits" - going on to say that this "type of activity" had since "been discontinued": Cth Parl Deb 1952, Vol 219 at 2397-2398.

263 In Question Time in the Senate in 1951 the Minister for National Development, Senator Spooner, said his "departmental advice [was] that there is a doubt whether [it was] ever actually put into operation": Cth Parl Deb 1951 Vol 213 at 617.

264 Cth PD 1952 Vol 219 at 2397-2398.

265 Ministerial Statement, Senator The Hon J A Spicer, Attorney-General, 8 March 1951, Cth Parl Deb 1951, Vol 212 at 103-104.

266 H Reps Deb 1951 Vol 212 at 52-53. There are suggestions elsewhere in the parliamentary debates that the Menzies Government may have been considering changes to the role of the LSB: Cth Parl Deb 1951 Vol 213 at 149-150 & 617.

proceedings.[267] In other matters, legal aid was to be restricted to legal advice.[268] Clients who were advised by the LSB and who still required legal representation afterwards were to be advised to obtain the assistance of private solicitors.[269] Those who did not already have access to a private solicitor - or who did not themselves wish to retain one - were able to request LSB staff to place them "in contact with an ex-service solicitor who is willing to act ... if possible at some concession in respect of fees".[270] Senator Spicer said that he also intended that the LSB was to become more closely integrated with the operations of the Attorney-General's Department.[271]

This marked the official start of the second phase of the post-war role of the LSB. Its peak operational capacity had already been reached in the years 1945-49.[272] However, public demand for its services did not correspondingly decline - in fact, it peaked in the early 1950s reflecting the continuing social aftermath of World War II. The high cost and limited availability of residential accommodation and rents control created demand for legal aid in tenancy problems. It also extended the period of post-war social disruption - and exacerbated to marital and other family problems which many people were encountering as ex-service personnel resumed civilian life.[273] These problems often manifested themselves in divorce and other matrimonial disputes. Post-war reconstruction also produced its own, new types of legal problems. People needed legal advice and assistance to transact legislation governing the rehabilitation of demobilised service personnel and regulating economic activities.

Throughout the remainder of the 1950s, the LSB operated successfully within the limits of its scarce resources, notwithstanding the occasional parliamentary grumble about its peacetime *raison d'être*.[274] Its own lawyers provided free legal advice in a

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267 Ministerial Statement, above n 265. The question of continuing legal representation before Fair Rents Boards in Sydney was placed under consideration.

268 Ibid. In matters involving complaints about Commonwealth administration, LSB staff were directed to take particulars and request that the relevant department or authority take remedial action.

269 Ibid.

270 Ibid. Referrals were to be made in consultation with professional associations and to be spread fairly and regularly amongst ex-service solicitors. Similar principles were to be followed in briefing counsel, who, in any event, were not to be briefed at Commonwealth expense "except in cases of substantial financial need, and with the approval of the secretary of the department".

271 Ibid. Real integration finally occurred in 1959 when Frank Wilkins retired as Director of the LSB - his position was not filled, and the LSB was placed under the control of the Deputy Commonwealth Crown Solicitors in the States: H Reps Deb 1959, Vol 24 at 873-874.

272 In 1946 for instance 44 lawyers and 63 support staff were employed in LSB offices throughout Australia: J P Harkins, above n 139 at 4.

273 Mr. J P Harkins interview, above n 260.

274 The few expressions of parliamentary discontent about the LSB revolved around the justification for its continued presence in peacetime. Some thought that its functions should - and could - be assumed by the State law societies. The first expression of these views was in 1948. A senator suggested that the functions of the LSB in Queensland should be assumed by the Law Society. He voiced similar views in 1949: Cth Parl Deb 1948, *Debates*, Vol 199 at 2299-2300; Cth Parl Deb 1949-50, Vol 203 at 1427. In 1952, another call was made for a transfer of LSB functions to the State law societies: Cth Parl Deb 1952, Vol 219 at 2401-2402. See also H Reps Deb 1954, Vol 4 at 1107. On the other hand, in 1957 one parliamentarian called for the LSB functions to be expanded: H Reps Deb 1957, Vol 16 at 1270-1271. It

wide range of legal matters and legal representation in civil and criminal proceedings.[275] Legally-assisted proceedings were often referred to private legal practitioners. Many practising barristers and solicitors were willing to represent LSB clients without charge, or else at concessional rates. Sometimes, these lawyers were former members of its own staff who were now establishing legal practices. Other times, they were demobilised lawyers reestablishing practices left behind on enlistment.[276] However, often they were merely legal practitioners who were ex-service personnel - or otherwise were favourably disposed towards ex-servicemen and women and their families.[277] The benevolence of these solicitors and barristers greatly contributed to the success of the LSB in this period.

By the early 1960s, the heyday of the LSB was well and truly over. This was manifested in two different ways. First, the functions of the LSB were increasingly less relevant to the majority of wartime service personnel and their families. For most of its clients, the personal hardships which they experienced in the late 1940s and early 1950s had been temporary. National post-war reconstruction had been accelerated by the economic boom of the mid-1950s. By 1960, the restoration of peacetime socio-economic conditions was almost complete.[278] Ex-service personnel were now able to take advantage of the social and employment opportunities offered in the prosperity of the revived post-war economy. Economic prosperity was the vehicle which saw many ordinary people and their families move into the relative affluence of mainstream Australian society in the 1960s. It was not that their changed fortunes inevitably freed them of legal problems - but the legal problems they now confronted were outside the scope of the services which the LSB was authorised to provide. The result was "a decline in the work of the Bureaux".[279]

However, the workload of the remaining LSB staff did not ease significantly in the early 1960s. Indeed, it was claimed at the time that LSB staff were suffering from overwork and poor resources.[280] The reason was that a minority of ex-service personnel and their families still needed - and were eligible for - legal aid from the

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appears that he may not have been alone. Gregory claims that in 1959, Sir Garfield Barwick - then Commonwealth Attorney-General - wrote to the Law Society of Queensland to "suggest that the Commonwealth should establish Legal Service Bureaux to assist people receiving Commonwealth pensions". The Society replied that its informal law society scheme was adequate: H Gregory, above n 166 at 172.

275 The LSB provided, for instance, legal representation before war pensions and fair rents tribunals and in courts in tenancy proceedings and moratorium proceedings. Legal aid in tribunal proceedings was usually provided by its own paralegal advocates, especially in the case of proceedings before Fair Rents Tribunals in New South Wales: J P Harkins, above n 139 at 4-5; Cth Parl Deb 1946 Vol 186 at 983-984. This was also the practice in proceedings before the Commonwealth War Pensions Entitlement Appeal and War Pensions Assessment Appeal Tribunals - where paralegal advocacy was an alternative to self-representation. S 72 (2) Repatriation Act 1920 (Cth) excluded lawyers - but permitted parties to be represented by non-lawyers.

276 J P Harkins, above n 139 at 4-5.

277 Mr. J P Harkins interview, above n 260 at 2.

278 M A Jones. above n 134 at 55.

279 J P Harkins, above n 7 at 5.

280 H Reps Deb 1961, Vol 33 at 1380.

LSB.[281] The difficulty for the LSB was that the exigencies of war and post-war economic recovery had ceased to be the focal point of Australian society. The original social basis of its peacetime functions had almost disappeared - its clients had become less distinguishable from other poorer people. Moreover, the numbers of private lawyers willing to assist the remaining clients of the LSB probably also declined. In the early 1960s, it was over 15 years since the war had ended and many ex-service lawyers now had growing family and professional responsibilities. It was also the time when new cost pressures on operating solicitors' practices began to appear - with a downward implications for profitability.[282]

In 1966, official interest in the LSB momentarily revived when the Federal Government prepared to send troops to fight in Indochina.[283] Military conscripts - and potential conscripts - became eligible for legal advice on civil employment rights and entitlements.[284] Regular serving soldiers called for active duty and their dependants could now also obtain legal aid from the LSB - an entitlement which continued throughout the period of active service.[285] Legal aid was also available to enable departing members of the armed forces to order their personal affairs.[286]

However, these new functions were not matched by additional resources - which remained deficient.[287] In 1973 - when the LSB was subsumed into the Australian Legal Aid Office - its staff had dwindled to 31.[288] It has been estimated that since 1943 the LSB, its staff, volunteer lawyers and those acting on referral had provided legal aid to over 1.5 million people.[289]

The Wider National Picture until the 1960s

In the immediate post-war years and the 1950s, the presence of the LSB in its new peacetime role was the only significant innovation in legal aid. Australia did not follow the British welfare state which established a comprehensive national public

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281 The scope of the functions of the LSB had been varied twice since the 1951 ministerial direction. Shortly afterwards, the Attorney-General had advised that LSB services were to be extended to World War I veterans and their widows: Cth Parl Deb 1951-52, Vol 215 at 2488. Members of the armed forces who served in the Korean War and the Malayan Emergency in the 1950s and their families also became eligible for legal aid from the LSB: J P Harkins, above n 7 at 5. Yet neither of these changes significantly increased demand for legal aid from the LSB.

282 Below at pp 73-75.

283 H Reps Deb 1966, Vol 50 at 116: H Reps Deb 1966, Vol 52 at 757.

284 H Reps Deb 1966, Vol 52 at 847-848.

285 Ibid. Those who returned alive from the war and their dependants were to remain eligible for the services of the LSB for 2 years from the date of their discharge from the armed services. The dependants of those who were killed would retain eligibility for assistance from the LSB.

286 Ibid. These additional services included the preparation of wills, powers of attorney, maintenance or separation agreements, other necessary documents and assistance in negotiating settlements of potential civil litigation.

287 J P Harkins, above n 7 at 5: H Reps Deb 1966, Vol 52 at 847-848.

288 13 lawyers and 18 administrative staff: J P Harkins, above n 7 at 4.

289 Ibid.

law society scheme in 1949.[290] As in 1945, it was not that Australian governments and the law societies were unaware of - or disinterested in - these developments.[291] It was simply that they chose a different path, one which, until the 1960s, substantially mirrored the shape of Australian legal aid as it had emerged in the late 1920s and the 1930s.[292]

The Continuation of Pre-War Commonwealth Policy

The modest presence of the LSB was the only significant face of the Commonwealth in national legal aid in this period. Its pre-war arrangements for civil and criminal legal aid remained in force.[293] Moreover, both the Chifley Government in 1945-49 and the Menzies Governments in 1950-60 retained the policy stance followed by the Commonwealth since Federation, namely that of a minimal provision of legal aid in a limited range of activities associated with federal or national functions.

The few new developments in Commonwealth legal aid conformed to this pattern. In 1945, the new legislation which facilitated the prosecution and trial of suspected war criminals included legal aid provisions.[294] Four years later, amendments to the Conciliation and Arbitration Act 1903 (Cth) creating mechanisms to redress malpractice in elections for office in industrial organisations also included provision for legal aid.[295] In 1955, the existing arrangements for legal aid in courts-martial were revised - as part of reforms to the law governing members of the Commonwealth armed forces facing trial for military offences.[296] The minimalist response of the Commonwealth to legal aid was also evident in 1959 when it enacted national divorce and matrimonial causes law. Its Matrimonial Causes Act made only token provision for legal aid.[297] The primary task of assisting poorer people seeking matrimonial relief under Commonwealth law was left to the civil legal aid schemes in the States.

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290 Legal Advice and Assistance Act 1949; S Pollock, above n 184 at 37-48.

291 H Gregory, above n 166 at 171; "Legal Aid in the United Kingdom" (1949) 22 *Australian Law Journal* 405. "Public law society scheme" is defined below at n 299.

292 Above at pp 28-39.

293 Commonwealth SR No 23/1952 amended the *in formâ pauperis* provisions in the original High Court Rules (above n 138) - the maximum net capital assets allowed to a poor party were increased from £25 to £100, or, in special circumstances, £200. The amount of the allowable weekly income was increased to £9. In 1968, these provisions were amended again when SR No 4/1968 substituted decimal currency equivalents.

294 War Crimes Act 1945 (Cth).

295 S 96K Commonwealth Conciliation and Arbitration Act 1949 (Cth).

296 S 60 (d) Courts-Martial Appeals Act 1955 (Cth) and cl 11, Commonwealth SR No 20/1957: H Reps Deb 1955, Vol 6 at 567-568.

297 S 127 (6) Matrimonial Causes Act 1959 (Cth). Section 127(1)(k) authorised regulations permitting the conduct of matrimonial proceedings *in formâ pauperis* and relieving 'poor' litigants from payment of court fees - regulations were never made. Poorer petitioners and parties could only invoke the poor persons rules in the State Supreme Courts and the various law society legal aid schemes: P Toose, R Watson & D Benjafield, *Australian Divorce Law and Practice*, (1968) at 689-690.

The Spread of Law Society Schemes in the States

In the States, the pre-war statutory arrangements for criminal and civil legal aid remained intact throughout the 1950s, with only a few modifications or reforms.[298] These changes were neither important nor did they represent any significant innovation. Where innovation occurred in the late 1940s and 1950s, it reflected the desire of the State law societies to participate in the organised provision of legal aid for poorer people. Once again, this reflected a continuation of pre-war trends, i.e. developments in the pattern which had emerged by the end of the 1930s, and which had been frozen in consequence of war. By 1961, new charitable or semi-charitable law society legal aid schemes had been established in Queensland, Tasmania, Western Australia and Victoria.[299]

This process began in late 1945, when the Queensland Law Society considered the adoption of a public law society scheme similar to that proposed by the Rushcliffe Committee.[300] A year later, the Queensland Government had similar thoughts. It established an advisory committee, including representatives of legal practitioners, to consider the introduction of a new statutory scheme.[301] The initiative fizzled out. However, the actions of the State Government did lead the Law Society to acknowledge that the "implementation of some form of legal aid in Queensland was inevitable".[302] It also prompted the Queensland Law Society to define its political

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298 In some States, the poor prisoners' defence legislation (above pp 31-33) was repealed. For instance, in Victoria the original provisions had already been consolidated in the Poor Persons Legal Assistance Act 1928 (Vic), which itself had repealed and reenacted in the Poor Persons Legal Assistance Act 1958 (Vic). Comparable changes in other States in the 1950s also retained the machinery and eligibility criteria of the original scheme. In 1947, in Queensland new regulations made under the Public Curator Acts 1915 (Qld) reorganised the public defender functions within the Public Curator's Office: Australian Government Commission of Inquiry into Poverty, above n 27 paras 3.55-3.59. There was one significant related reform. The Suitors' Fund Act 1951 (NSW) indemnified non-corporate respondents for their costs to a maximum of £500 in civil appeals where a court found for an appellant on a question of law. The Act was adopted as a model for State appeals costs fund legislation: Appeal Costs Fund Act 1964 (Vic); Suitors Fund Act 1964-1971 (WA); Appeal Costs Fund Act 1968 (Tas); Appeal Costs Fund Act 1973 (Qld).

299 Formation and administration by the organised legal profession - primarily as voluntary response to provide legal aid to poorer people - was the common characteristic of the law society schemes. In the 'charitable' schemes, the services of participating lawyers were substantially provided free of charge on a charitable basis. The official rationale was that the charitable provision of legal aid to the 'poor' was a public duty of the legal profession. The 'semi-charitable' law society schemes were motivated by similar considerations, differing from the 'charitable' schemes in two important respects. First, part of the total administrative costs of these legal aid schemes was offset by public funds. However, the major part of those costs were still 'paid' - directly or indirectly - by the law societies or practising lawyers. Secondly, it was the intention of the 'semi-charitable' schemes that participating lawyers should be paid for their services, if only at a standard, average rate or concessional rates of professional fees. The 'public' law society schemes were also professionally administered. However, they had two distinctive state components: public (or in the case of the Australian 1960s schemes semi-public) funding and administration under the auspices of a public legislative scheme. They were, in the legal aid jargon of the 1970s, 'Judicare' type legal aid schemes: E C Bamberger, "The American Approach: Public Funding, Law Reform, and Staff Attorneys" [1977] 10 *Cornell International Law Journal* 207 at 211; A Paterson, "Legal Aid at the Crossroads" (1991) 10 *Civil Justice Quarterly* 121 at 126.

300 H Gregory, above n 166 at 171.

301 Ibid.

302 Ibid.

stance, asserting that "the lead should come from the private profession which should control legal aid when it was introduced".[303] In the meantime, Queenslanders would have to be content with the Law Society's somewhat belated efforts to promote an informal charitable scheme amongst its members.[304] This scheme began with the provision of assistance to former wartime members of the armed services and their families.[305] In 1950, its scope was extended to include old age and invalid pensioners.[306] Throughout the 1950s - and into the early 1960s - the Queensland charitable scheme operated to provide legal aid on a minimal basis "for needy cases by the Council's informal approach to solicitors".[307]

The informal charitable option was also the choice of the Law Society in Western Australia, probably as a continuation of the 1928 arrangements with the State Government.[308] In 1960, it established a charitable law society scheme wherein eligible applicants for legal aid were referred to its members, who participated on a voluntary basis.[309]

The major influence on the development of the law society schemes in the 1950s was the experience of the South Australian semi-charitable scheme.[310] By 1945, this scheme had been operating successfully for twelve years, although public demand for its services initially dipped after the war.[311] Nevertheless, it remained an attractive model for other parts of the Australian legal profession. In the early 1950s, the Law Council recommended that other State law societies interested in establishing legal aid schemes should adopt the South Australian semi-charitable model.[312]

The Law Institute of Victoria had first been attracted by the South Australian experience in 1937.[313] In 1949, it again approached the Victorian government with a

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303 Ibid.

304 Ibid at 172.

305 Ibid at 170.

306 Ibid.

307 Ibid at 172. Gregory opines that the "assistance provided by solicitors under the voluntary scheme was considerable" - a somewhat surprising statement as she also says that during "the early 1960s the numbers of people helped in this way grew steadily from 55 in 1961 to 151 in 1965" (ibid).

308 Above at p 35.

309 Australian Government Commission of Inquiry into Poverty, n 27 above at para 2.219: WA PD 1967 Vols 176-178 at 2270-2271.

310 Above at pp 37-38.

311 In the early post-war period, the number of applications to the Law Society for legal aid was initially less than in the mid-1930s. In 1936-37, there had been 1,383 applications, with 734 referrals to legal practitioners. In 1945-46, the number of applications had fallen to 944, with 409 referrals. In 1946-47, the number of applications fell still further to 873, with 375 referrals: G E Parker, W R Cornish & A C Castles. "The Crisis in Legal Aid in South Australia", (1960-1962) 1 *Adelaide Law Review* 59 at 64 & Table C at 67. The decline in demand was attributed to greater economic prosperity and the impact of the Adelaide office of the LSB: D Bruce-Ross, above n 207 at 56.

312 H Gregory, above n 166 at 171.

313 Above at p 39.

proposal to substitute a semi-charitable law society scheme for the functions of the Public Solicitor.[314] Once again, the Victorian government rejected the idea.

In fact, the first of the new post-war semi-charitable schemes were established in 1954 by the Tasmanian Northern and Southern Law Societies.[315] The scope and administrative arrangements of these two schemes closely resembled the South Australian model. The result was that poorer people in Tasmania became eligible for legal aid from private lawyers on a comprehensive basis.[316]

In 1961, the Victorian Government finally succumbed to the entreaties of the legal profession for the introduction of a semi-charitable law society scheme. Its agreement was influenced by the prospects which it saw the scheme offering to increase the availability of legal aid throughout Victoria - especially in Courts of Petty Sessions and rural areas - at minimal public expense.[317] The Victorian Government approved a scheme whereby the Law Institute and the Victorian Bar Council would "provide legal assistance for poor persons and to appoint a committee to establish and administer a scheme for that purpose".[318] The scheme was intended to provide civil legal aid for poorer ordinary people unable to afford the cost of lawyers' services.[319] It retained the legal aid functions of the Public Solicitor - and it was intended that he would continue to assist poorer civil litigants and criminal accused.[320]

The Few Informal Charitable Schemes

After the war, the ex-servicemen's organisation Legacy made informal arrangements for legal aid to assist widows and dependants of deceased servicemen.[321] This scheme relied upon the voluntary charitable participation of private legal

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314 "Poor Persons Legal Assistance", (1949) *Law Institute Journal* 180 at 180-181.

315 S 3 Legal Assistance Act 1954 (Tas) empowered the Attorney-General to approve the establishment of legal aid schemes for persons of limited means.

316 Ibid, s 8: Australian Government Commission of Inquiry into Poverty, above n 27 at para 2.263.

317 Vic PD 1961 Vol. CCLXIV at 231-232.

318 Preamble, Legal Aid Act 1961 (Vic). Section 4 provided that legal aid was to be either free, or provided on payment of a financial contribution.

319 Australian Government Commission of Inquiry into Poverty, n 27 above at para 2.184; "Legal Aid" (1972) 46 *Law Institute Journal* 67; Vic PD 1961 Vol. CCLXIV at 231. Ss 15-18 Legal Aid Act 1961 (Vic) also repealed the civil, matrimonial and workers' compensation poor persons provisions in the Poor Persons Legal Assistance Act 1958 (Vic).

320 However, the government contemplated that the future role of the Public Solicitor might be reconsidered if the new legal aid scheme succeeded: Vic PD 1961 Vol. CCLXIV at 233.

321 For instance, between 1946 and 1957 Sydney Legacy provided assistance to widows and dependants of deceased servicemen in over 3,000 cases - covering a wide range of legal problems, but housing problems predominated. The scheme was a joint venture of its Legal, Family Welfare, Housing and Special Housing Committees. Where practicable, applicants for assistance were referred to the LSB, the Public Trustee or the Public Solicitor. In other matters, problems were referred to private lawyers who provided free assistance or else subject to a financial contribution assessed by the Family Welfare Committee: M H Ellis, above n 148 at 125-127. Comparable arrangements were operated by 'Legacy' in other States. For example, in Queensland in 1950 the Law Society established a panel of solicitors to advise war widows who could not afford legal fees: H Gregory, above n 166 at 170.

practitioners.[322] It reached the peak of its operations between 1945 and the mid-1950s.[323]

Another informal legal aid scheme operated in Melbourne by the late 1950s. The Brotherhood of St Laurence established a legal advice service with the assistance of law students enrolled at the University of Melbourne.[324] By attending court to provide favourable character and background evidence, its youth workers also assisted young people involved in criminal proceedings.[325] This practice continued into the 1960s.[326]

In the early post-war period and the 1950s, comparable developments in the informal provision of legal aid occurred elsewhere. For instance, in 1949 the Good Neighbour Council of Victoria had sought assistance from the Law Institute "to assist in the formation of a panel of solicitors ... prepared to assist migrants who had legal problems".[327] It would be surprising if comparable small-scale developments did not emerge in other religious and charitable organisations in Australia in this period.

The informal charitable schemes included legal aid provided by private lawyers outside the various State law society schemes. Some voluntarily participated in informal court-based schemes.[328] More generally, individual private lawyers provided free services to poorer people and their families. The public antipathy which has developed towards the legal profession since the 1970s would tend to decry this suggestion. However, there is no doubt that this type of informal professional provision of legal aid was significant for poorer and disadvantaged people. Neither can it be doubted that this informal charitable response sprang from the social ideals of the modern professionalism which was deeply-rooted in the lives of many Australian barristers and solicitors in the 1950s As late as 1977, researchers into law and poverty could say - without equivocation - that many "lawyers in

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322 M H Ellis, above n 148 at 127.

323 Ibid. Nevertheless, Legacy continued to actively assist widows and dependants of deceased servicemen well into the 1970s. According to a telephone interview conducted with Mr. Jeff Halliday of ACT Legacy on 31 October 1991, limited services continue to be provided to the widows of deceased World War II ex-servicemen. These are now provided less formally and depend upon the contacts of local Legacy branch members. In some cases, World War II veterans still practice as solicitors. However, generally Legacy now seeks assistance from other sources, including the Public Trustee and the Returned Services League. Moreover, a number of solicitors remain willing to assist Legacy widows, eg in wills and conveyancing associated with family resettlement, without charge or at reduced rates of professional fees.

324 G E Parker, W R Cornish & A C Castles, above n 311 at 56.

325 Brotherhood of St. Laurence, *Annual Report* 1962/63 at 10.

326 The Right Rev. Peter J. Hollingworth, opening address to the "Legal Aid In The 1990s" conference, Melbourne, 26 May 1989.

327 "Legal Assistance to Migrants", (1951) 25 *Law Institute Journal* 49.

328 In the early 1970s, two court-based voluntary legal aid schemes operated in New South Wales. A panel of honorary solicitors provided legal representation for women seeking maintenance awards or affiliation orders. The Supreme Court Registrar in Divorce also administered a scheme in which approximately 200 solicitors had agreed "to undertake divorce cases at reduced fees on behalf of persons 'in necessitous circumstances'": Australian Government Commission of Inquiry into Poverty, n 27 above at paras 4.27 & 4.39.

private practice regard it as part of their professional responsibilities to provide legal assistance for people they think of as poor ... [They have] made, and will continue to make, a significant contribution towards satisfying the legal needs of many poor people".[329]

The Developments of the 1960s

However, the problem was that even a "significant" voluntary contribution by individual members of the legal profession had never been enough. Moreover, towards the end of the 1950s, it also began to become clear that the organised provision of legal aid through the charitable and semi-charitable schemes was inadequate to meet the needs of poorer people. By the early 1960s, the law society schemes had begun to crumble - and new solutions needed to be found to the problems of post-war legal aid. This led to calls for greater involvement of the Commonwealth and State governments through public funding of the law society schemes. This response, through the transformation of many of these schemes into public law society schemes, was the next phase and major new development in Australian legal aid in the 1960s. Criminal legal aid was also reformed, and the small-scale informal charitable provision of legal aid continued.

The Crumbling of the Charitable and Semi-Charitable Schemes

In the 1940s and 1950s, the charitable and semi-charitable law society schemes had suited the interests of both the State governments and the organised legal profession. Governments and their poorer citizens were the beneficiaries of increased availability of legal aid at minimal public expense.[330] In some States - like Queensland and Western Australia - it was effectively for no financial cost to the state at all.[331] On the other hand, the organised profession obtained the not inconsiderable political benefits of being seen to make a public display of the social justice dimensions of its professional ideals, and this, once again, at minimal institutional cost. [332] The real cost of the charitable and semi-charitable schemes was borne by poorer people, and practising lawyers.

The former paid the social cost because the law society schemes were only well-equipped to provide poorer people with access to the types of services available to the paying clients of private lawyers. Yet the legal needs of the poor had never been

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329 Australian Government Commission of Inquiry into Poverty, *Poverty and the Legal Profession in Victoria*, (1977) at 66.

330 For example, in 1948 the South Australian Government paid £750 towards the cost of administering the law society scheme. In the 1950s, the Tasmanian Government made an annual grant of £1,500 for legal aid: Parliament of Tasmania, *Tasmanian Government 1977 Committee of Inquiry into Future Legal Aid Services in Tasmania*, (1978) at 7. There were related incidental public expenses. For instance, in both these States legally-aided civil litigants were exempted from payment of charges, fees and stamp duties: ss 3 & 4 Poor Persons Legal Assistance Act 1936 (SA): ss 4 & 6 Legal Assistance Act 1954 (Tas). S 6 (1) a Legal Aid Act 1961 (Vic), also provided for financing of disbursements in legally-aided matters.

331 In the latter, the State government merely provided free office accommodation: Australian Government Commission of Inquiry into Poverty, above n 27 at 58; WA PD 1967 Vols 176-178 at 2270-2271.

332 Below at pp 129-132.

the same as those of the 'rich', the middle-class or waged ordinary people. However, in the 1960s, neither poorer people - nor their special legal problems - had vanished in the affluence of post-war Australian society.[333]

Moreover, it was practising barristers and solicitors - and not their professional organisations - who bore the real financial cost of the charitable and semi-charitable legal aid schemes. They paid this cost by way of fees foregone or discounted, and it was this 'contribution' which accounted for the success of the charitable and semi-charitable response. For example, in the late 1950s it was estimated that the annual value of free services provided by private lawyers practitioners in the South Australian semi-charitable scheme was £50,000.[334] Comparable sums, adjusted up or down according to specific local factors, would have been evident in the law society schemes in Queensland, Western Australia, Tasmania and Victoria.[335]

Until the mid-1950s, many practising lawyers - primarily solicitors - had obviously been both willing and able to subsidise the law society schemes to this extent. However, by the early 1960s they became increasingly less willing, and financially less able, to continue to do so. Moreover, the financial burden of legal aid was not distributed evenly amongst practising lawyers. The Law Society of Western Australia reported in 1966 that its charitable scheme cast "a very heavy burden on a limited section of the profession, namely those practitioners who practise in the inferior matrimonial and criminal jurisdictions".[336]

In South Australia, disenchantment amongst practising lawyers with the terms of their involvement in legal aid had become public in 1959. The Council of the Law Society reported that the cost of the semi-charitable scheme had "become increasingly burdensome on members of the profession".[337] Furthermore, there was growing criticism amongst its members of the negligible state contribution to the financial cost of providing legal aid.[338] They also questioned whether a semi-charitable legal aid scheme, which had been conceived during the Great Depression of the 1930s, was still appropriate in the prosperity of the post-war boom.[339] Moreover, many South Australian lawyers had come to believe they were making a disproportionate contribution - in time and income foregone - to community needs for legal aid. In the 1950s, the number of applications for legal aid had increased significantly, including growing numbers of applications for legal representation in

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333 Below at pp 75-76.

334 G E Parker, W R Cornish & A C Castles, above n 311 at 59.

335 In Victoria, legal practitioners were not paid professional fees. Instead, s 8 Legal Aid Act 1961 (Vic) entitled them to share in any distribution of the net amounts paid to the Legal Aid Committee from costs recovered in legally-aided matters and client contributions.

336 (1966) (July) 2(2) *The Law Council Newsletter* at 10.

337 G E Parker, W R Cornish & A C Castles, above n 311 at 59 citing Report of the Council of the Law Society of South Australia, (1959) at 5.

338 Ibid at 59 & 65.

339 Ibid at 65.

lengthy and complex criminal trials.[340] The increased application rate was claimed to be disproportionately high compared to the actual post-war increases in population. The effect of all these factors was magnified by the wide compass of the South Australian scheme.[341]

In 1960, the South Australian Government responded to these concerns by agreeing to make annual grants to cover part of the actual costs of operating the legal aid scheme.[342] Thenceforth, the Law Society was able to pay legal practitioners providing legal aid a small proportion of their ordinary professional fees.[343] However, this limited state intervention, which did not increase significantly in financial scale throughout the 1960s, was insufficient to prevent the demise of the scheme in 1969.[344]

Comparable problems also appeared in the law society schemes in Tasmania, Victoria and Western Australia in the early 1960s. In Tasmania, its two semi-charitable schemes were consolidated in 1962, but the State Government did not increase the amount of its annual financial grant.[345] It was reported as being reluctant to do so, notwithstanding the fact that the number of annual applications for legal aid was already "rising steeply".[346] It retained this stance towards the new consolidated semi-charitable scheme until 1969. The result was that "the funds were far too low to effectively run" the scheme and that lawyer participation steadily declined until it "virtually collapsed".[347] In 1969, the operations of the law society scheme were rejuvenated when the Tasmanian Government provided new and additional funding.[348]

Against this background, it is obvious in retrospect that the semi-charitable scheme in Victoria was destined to have a short and troubled life.[349] The days of the post-war law society schemes were clearly coming to an end by the time it commenced operations in 1964. Money was the bane of the existence of the Victorian law society scheme, for reasons comparable to those discussed above in relation to South

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340 In 1950-51, there were 1,109 applications for legal aid, and 644 referrals. In 1958-59, there were 1,493 applications, with 1,093 referrals: ibid at 64 & Table C at 67.

341 Australian Government Commission of Inquiry into Poverty, n 27 above at para 2.133.

342 In the years 1960-67, the State government paid the Law Society an annual grant equivalent to $9,000 towards the cost of providing legal aid. In 1968, the annual amount was increased to $17,000: SA PD Session 1969 at 1738.

343 For instance, in 1966-68 payments to lawyers for services in legally-aided criminal matters averaged approximately 25% of ordinary professional fees. In legally-aid civil matters in the same triennium the average percentage paid was approximately 17%: ibid at 1739.

344 Ibid: above n 342. In 1966, in a report to the Law Council of Australia, the Secretary of the Law Society of South Australia said that "the main deficiency is the smallness of the Government grant towards solicitors' costs": (1966) (July) 2(2) *The Law Council Newsletter* at 10.

345 Legal Assistance Act 1962 (Tas).

346 Australian Government Commission of Inquiry into Poverty, n 27 above at para 2.264; *The Law Council Newsletter*, above n 344 at 10.

347 Australian Government Commission of Inquiry into Poverty, n 27 above at para 2.264.

348 Ibid at para 2.265.

349 Above at pp 62-65.

Australia and Tasmania.[350] The amount of state funding was inadequate to enable the scheme to operate effectively. This generated its major and recurring operational problem, namely the lack of adequate funds to pay participating lawyers. In the five years 1964-69, payments to legal practitioners in the scheme averaged approximately 50 per cent of ordinary professional rates.[351] The lawyer recipients believed these payments were demonstrably and seriously inadequate and lamented the fact that they did "not even approach the bare overhead of the average solicitor's office".[352] The Legal Aid Committee, which administered the Victorian scheme, agreed in its 1967 report that "some guaranteed minimum dividend at something more than 'overhead' level, [was] urgently required" to retain the professional support necessary to ensure the future viability of the scheme.[353] In the mid-1960s, the Legal Aid Committee also encountered difficulties in providing eligible accused with legal representation in long and complex criminal trials.[354]

In Western Australia, the charitable scheme was in an even worse predicament. At least the law society schemes in the other States had some public funding, even if in dangerously inadequate amounts. In Western Australia, it was not only that legal aid scheme had no state funding. As elsewhere, changes in the post-war lawyer services industry were adversely affecting its operations.[355] In mid-1966, the Secretary of the Law Society explained to the Law Council of Australia that the scheme could only assist those applicants "who are virtually destitute".[356]

These problems prompted the Law Society of Western Australia to seek state funding. Approaches to the Federal Government in 1967 were apparently unsuccessful.[357] However, the State Government responded with a degree of interest. In 1966, the Law Society began negotiations with the government to obtain its financial support for the establishment of a public law society scheme, similar to the scheme which had been introduced in Queensland in 1965.[358] However, after these negotiations the Law Society was not convinced that the State Government would provide sufficient money to enable it "to conduct anything more than a very limited Scheme for Legal Aid".[359] Furthermore, it believed that the changes which the government contemplated were inadequate. For instance, they did not extend to legal aid in divorce and ancillary matrimonial proceedings.[360] Accordingly, the Law

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350 Above at pp 57-58. The Victorian scheme also had special administrative problems, including the demarcation of functions with the Public Solicitor's Office: "Report of the Legal Aid Committee for the year ending 30 June 1967" (1968) 42 *Law Institute Journal* 25 at 27-28.

351 Victoria PD 1969 Vol CCXCVI at 1537.

352 "Report of the Legal Aid Committee for the year ending 30 June 1967", above n 350 at 27.

353 Ibid.

354 Ibid.

355 Above at pp 56-58; below at pp 73-75.

356 *The Law Council Newsletter*, above n 344 at 10.

357 WA PD 1967 Vols 176-178 at 2270-2271.

358 *The Law Council Newsletter*, above n 344 at 10. The story of the Queensland public law society scheme is discussed below at pp 63-64.

359 Ibid.

360 Ibid.

Society advised the State Government that it would first be necessary to make realistic provision for payment of participating lawyers, if comprehensive and adequate new arrangements for legal aid in Western Australia were to be introduced.[361]

The *cri de cœur* of the Law Council

By 1964, the crumbling of the law society schemes, and the otherwise inadequate arrangements for legal aid throughout Australia, had attracted the attention of the Law Council.[362] The Council sent a proposal to the Commonwealth Attorney-General advocating the introduction of a federally-funded national legal aid scheme.[363] The proposal envisaged "a modern legal service established, not on bureaucratic lines, but run by the profession and subsidised by the State, as in the United Kingdom."[364] A meeting of its national executive, in Melbourne in November 1964, reported "strong support" for this proposal amongst legal practitioners, especially those practising in States where no law society schemes had been established.[365] The national executive also "resolved to establish a committee ... to give consideration to more proposals and to seek a deputation to the Attorney-General".[366]

In early 1965, a deputation from the Law Council met the Attorney-General, who was not convinced of their argument for a national legal aid scheme. Whilst he conceded - somewhat condescendingly - that the United Kingdom public law society scheme was "credited with success in its field", it was nevertheless "designed to suit a unitary system, whereas we in Australia have six State jurisdictions and a Federal jurisdiction".[367] Moreover, it was clear that the Attorney-General linked the possibility of Commonwealth participation in a national scheme with the proposals of the Federal Government to establish a new federal superior court.[368] The only outcome of the meeting was that both parties agreed the Law Council should reconsider its proposal. and that the Attorney would then listen to its further submissions.[369]

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361 WA PD 1967, Vols 176-178 at 2270-2271.

362 The material which follows is based on secondary accounts. On 12 May 1993, a written request was made to the Secretary-General of the Law Council for access to its archival records. Ms Marjory Nicoll of its Secretariat advised that Law Council minutes and related documents of the 1960s were held unsorted in a warehouse in Fyshwick. ACT. Inspection would involve the preliminary process of compilation. This was not possible in the time available to complete the thesis - nor was it warranted given its eventual focus.

363 (1964) (December) 1 (1) *The Law Council Newsletter* at 8; H Reps Deb 1965 Vol 47 at 1120.

364 J R Kerr, "The Rule of Law and the Role of the Lawyer" (address to the Summer School of the Western Australian Legal Profession, Perth, 1965) (1965) (May) 1 (2) *The Law Council Newsletter* 6 at 6.

365 *The Law Council Newsletter*, above n 363 at 7.

366 Ibid. The legal aid sub-committee was based in New South Wales. It was chaired by Mr. K Smithers. Other members were M J N Atwell. H H Glass QC, D S Hicks QC. B J McMahon & R F Turner. Its recommendations are published at (1965) (October) 1 (4) *The Law Council Newsletter* at 10.

367 H Reps Deb 1965 Vol 47 at 1120.

368 Ibid.

369 Ibid.

The task of reconsideration fell to the newly-established legal aid sub-committee, which in late 1965 presented a report to the Law Council Executive.[370] The sub-committee recommended reaffirmation of Law Council support for the United Kingdom model as an appropriate basis for a national legal aid scheme.[371] Moreover, it cautioned that its support for a public law society scheme carried the proviso that "the necessary funds to administer the scheme and to remunerate the profession were made available from Government sources".[372] The legal aid sub-committee believed that the optimal solution was "a uniform legal aid and advice scheme throughout the whole of the Commonwealth covering all matters, whether Federal or State, with grants from State Governments and appropriate subsidies from the Federal Government".[373] However, as pragmatic lawyers its members considered that - as law society schemes were already operating in many States - State Governments would be unwilling to contribute to the operating costs of a national legal aid scheme. They concluded that a comprehensive national public law society scheme did "not appear at present practicable".[374]

Instead, the legal aid sub-committee report opted for a national public-law society scheme "limited to Federal Courts, with possibly a similar scheme to include legal advice ... for the Australian Capital Territory and later for the Northern Territory".[375] Its plan was that the new scheme would be a cooperative venture between the Law Council and the federal government. The former would administer the scheme "with grants ... by the Federal Government towards the cost of administration and to reimburse the profession to the extent of 90% of their proper costs".[376] The sub-committee envisaged that legal representation would be available in Federal civil proceedings in Commonwealth courts and tribunals and State Courts exercising Federal jurisdiction.[377] Eligibility would be restricted to poorer people whose net annual income did not exceed the Commonwealth basic wage by £100, and whose capital assets did not exceed £1,000.[378]

The Law Council submitted the report of its sub-committee to its constituent State and Territory professional associations[379] In mid-1966, its Executive resolved to

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370 (1965) (October) 1 (4) *The Law Council Newsletter* at 10.

371 Ibid.

372 Ibid.

373 Ibid.

374 Ibid. The sub-committee also considered that a national legal advice scheme in Federal matters would be impracticable because "in many cases the assisted person would not know whether he came within the ambit of any such scheme until he actually obtained the advice which he sought".

375 Ibid. The report also proposed that a Suitor's Fund similar to the scheme in the State appeals costs legislation, above n 299, be established in respect of Federal appellate court proceedings.

376 Ibid. In the States, the law societies would administer the scheme as agents of the Law Council. The sub-committee believed that legal aid committees might be necessary "in the larger country centres".

377 Ibid.

378 Ibid. Income deductions were allowed for dependants, income tax, etc. Capital deductions were allowed for £3,000 equity in a home, clothing, furniture and tools of trade, and the subject matter of the proceedings.

379 A copy of the Report was also sent to the Commonwealth Attorney-General for information.

accept the proposal for a Federal public law society legal aid scheme.[380] Copies of the resolution were sent to the Standing Committee of Attorneys'-General, and the Commonwealth Attorney-General.[381] The Executive also resolved to convene a conference of its members and senior Commonwealth law officials to consider the proposed scheme in detail. In particular, there were questions affecting funding it wished to discuss.[382] On 1 October 1966, a meeting - which does not appear to have been very fruitful - of representatives of the Law Council and Commonwealth officials was held in Melbourne.[383] Subsequently, "representations were made to the Federal Attorney-General who has indicated that he will in due course discuss the matter further with the Law Council".[384] No significant further discussions appear to have taken place. Late 1966 or early 1967 saw the question of Commonwealth involvement in national legal aid laid to rest for the rest of the decade.

The Evolution of the Public Law Society Schemes

One of the questions the Law Council sought to discuss at the Melbourne meeting was the issue of interest from the Solicitors' Guarantee Funds, and its impact on legal aid funding. The States had first enacted legislation to guarantee the integrity of money deposited with practising solicitors' in the 1940s.[385] The legislation established statutory reserves, which were administered by the law societies, to compensate members of the public who lost money if solicitors stole or otherwise misappropriated trust account funds. The income of these statutory funds - the Solicitors' Guarantee Funds - was generated from annual payments by practising solicitors, penalties imposed on defaulting solicitors and interest.[386]

For the first ten or fifteen years, the statutory guarantee scheme generally operated satisfactorily. However, the efficacy of the Victorian scheme was threatened in the late 1950s when the monetary value of the claims against the Solicitors Guarantee Fund increased appreciably. Between 1959 and 1964, six claims for amounts of compensation exceeding £5,000 - the maximum amount payable under the Legal Profession Practice Act 1958 (Vic) - were submitted to the Law Institute. The problem was that the total amount of the money in the Solicitors Guarantee Fund was insufficient to fully satisfy outstanding claims.[387] The claims, and the shortfall in the

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380 *The Law Council Newsletter*, above n 370 at 10.

381 Ibid.

382 (1966) (July) 2 (2) *The Law Council Newsletter* at 10. The principal issue was Federal funding for the scheme. A related issue was the problem of financing legal aid for Federal matters heard in State courts. The Law Council was also aware that interest on trust accounts had become available in some States for financing legal aid schemes. It rightly saw this development as having implications for legal aid, and as needing discussion at a national level: (1966) (November) 2 (4) *The Law Council Newsletter* at 8-9. Below at pp 62-63.

383 Ibid; (1967) (October) 3 (2) *The Law Council Newsletter* at 15.

384 *The Law Council Newsletter*, above n 383 at 15.

385 R Cornall, "Considerable sums of money: A short history of the Solicitor's Guarantee Fund" (1995) 69 *Law Institute Journal* 12 at 12; Legal Practitioners Act 1944 (WA).

386 Ibid.

387 R Cornall, above n 385 at 12.

Fund, were probably yet another instance of the changing reality and assumptions of post-war legal practice - and the political economy of the private legal profession.[388]

In 1963, the Law Institute suggested to the Victorian Government that the income of the Guarantee Fund could be increased by requiring banks to annually pay interest on solicitors' trust account deposits.[389] The Institute proposed a variation to the original scheme, whereby solicitors would be required to annually deposit an amount of money - equivalent to the lowest balance in their bank trust accounts in the preceding year - into a new statutory investment. The Institute, as trustee of the Guarantee Fund, would manage these new bank trust accounts.[390] The annual income generated from investing these deposits would be added to the statutory pool available to pay compensation claims arising from the actions of defaulting solicitors.[391] The banks and some members of the Law Institute opposed the idea. However, it was supported and accepted by the Victorian Government, and the necessary legislation was passed in 1964.[392]

These new arrangements for the administration of solicitors' trust accounts had implications for the funding of the Victorian semi-charitable law society scheme.[393] The expanded income base of the Guarantee Fund meant that its annual income was now likely to exceed annual demands for payments of compensation claims. Accordingly, the Legal Profession Practice (Amendment) Act 1964 (Vic) permitted part of any surplus unallocated annual income to be made available for expenditure on legal aid.

Between 1965 and 1970, most other States made comparable changes to their statutory guarantee scheme legislation.[394] Only Tasmania rejected the idea, its Law Society believing that funding legal aid "should be a direct responsibility of Federal and State governments".[395] In the other States, the emergence of this new 'source' of public income provided both State governments and the law societies with a partial solution to the funding and related problems of the charitable and semi-charitable schemes. In the late 1960s, this was to supply temporary salvation of a kind.

Queensland was the first jurisdiction to take advantage of the availability of the income from solicitors' bank trust accounts. In 1963, its Law Society began to develop proposals for a public law society scheme.[396] The following year, it

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388 Above at pp 56-60; below at 73-75.

389 Ibid. At the time, according to Cornall, "Victoria's solicitors controlled a more-or-less permanent capital base of £26.5 million".

390 This was necessary to circumvent the rules of the Reserve Bank of Australia, which at the time prohibited the payment of interest on current accounts.

391 Cornall, above n 385 at 12.

392 Ibid: Legal Profession Practice (Amendment) Act 1964 (Vic).

393 Above at pp 58-59.

394 PART II Legal Assistance 1965 (Qld); PARTS II-IV Legal Contribution Trust Act 1967 (WA); ss. 22-24d Legal Practitioners Act 1936-1969 (SA); s 15 Legal Practitioners (Legal Aid) Act 1970 (NSW).

395 *The Law Council Newsletter*, above n 382 at 10.

396 H Gregory, above n 166 at 173.

presented the State government with a proposal for a comprehensive scheme. Its actions were partly in response to the renewed interest of the Queensland Government in legal aid. However, the Law Society was not the only influence upon the design of the scheme, or the shaping of policy. In early 1965, informal discussions took place between the Minister for Justice, the Law Society, the Queensland Bar Association and leading English lawyers, including the Attorney-General, Sir Elwyn Jones, at the Commonwealth and empire Law Conference held in Sydney.[397] Shortly afterwards, these influences bore fruit when the Queensland Parliament enacted the Legal Assistance Act 1965, introducing a public law society scheme. The administrative framework, eligibility criteria and scope of the scheme reflected the influence of the Legal Advice and Assistance Act 1949 (UK).[398] However, there were also important differences, including the fact that it was not to be funded from consolidated revenue.[399]

The hybrid origins of the Queensland scheme were also reflected in its structure and scope. All Queensland residents were eligible to apply for legal aid, but means tests and other internal limitations restricted eligibility for grants of legal aid.[400] Restrictions were also placed upon the availability of legally-aided lawyer representation in the scheme, the types of legal proceedings and problems in which legal representation was available. The scheme was initially restricted to civil and criminal proceedings in Queensland courts and tribunals in which no other legal aid was available.[401] Conversely, it was innovative in making provision for free legal advice, and other assistance falling short of taking actual legal proceedings, to enable people to protect their legal rights.[402] Its most significant innovation, which was made practicable by access to income from the Solicitors Guarantee Fund, was that participating solicitors could now be paid a more realistic proportion of their professional fees in providing legal aid.

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397 Qld PD 1965 Vol 242 at 2015; Australian Government Commission of Inquiry into Poverty, above n 27 at paras 2.60 & 2.63-2.66; "Legal Aid in Queensland" (1966) 40 *Australian Law Journal* 146 at 146.

398 In some cases, resemblance went so far as replication - the definitions of "legal assistance" and "legal aid" in the ss 3 & 16 of the Queensland Act were similar to those in ss 1 & 7 (2) of the British 1949 legislation. However, there were also clearly local influences, including parallels with parts of the Legal Aid Act 1961 (Vic).

399 There were other notable differences. The Queensland Act did not codify existing provision for legal aid in civil and criminal proceedings. It was intended to complement existing statutory provision for legal aid. There were also significant differences in the costs rules. The Legal Advice and Assistance Act 1949 (UK) removed the procedural privileges previously enjoyed by parties conducting proceedings *in formâ pauperis*. Legally-aided civil litigants could be required to pay party and party costs, subject to a statutory maxima fixed by considerations of reasonableness. In the Queensland scheme, the liability of legally-assisted civil litigants was tempered only by the presence of a limited judicial discretion - in ss 15(2), 20(2)(e) & 27 of the Act - to order payment of party and party costs from the Legal Assistance Fund. A comparable approach to costs was followed in the other Australian public law society schemes described below at pp 65 - for instance s 11 Legal Aid Act 1969 (Vic); Australian Government Commission of Inquiry into Poverty, above n 27 at paras 2.214 & 2.216 at 56; (1971) 45 *Law Institute Journal* 360.

400 Ss 19 & 20 Legal Assistance Act 1965 (Qld).

401 Australian Government Commission of Inquiry into Poverty, n 27 at para 2.74: ss 19 (2) (a)-(f).Legal Assistance Act 1965 (Qld).

402 Ss 17 & 23 Legal Assistance Act 1965 (Qld).

The Queensland model offered a solution to the impasse which existed in Western Australia.[403] In 1967, the Parliament of Western Australia enacted a new legal aid scheme which was in all respects comparable to the Queensland public law society scheme.[404] The scheme contained in the Legal Contribution Trust Act 1967 (WA) replaced the existing semi-charitable law society scheme which had operated since 1960. In 1969, South Australia and Victoria followed in reforming the administration of legal aid - although neither adopted the Queensland model.[405] New public law society legal aid schemes replaced the existing semi-charitable arrangements. However, the administrative framework, eligibility criteria and scope of the schemes in South Australia and Victoria adapted existing arrangements for legal aid, varied only in the sense that there was now a new source of 'public' funding via the Guarantee Funds.[406] Moreover, in Victoria the new law society scheme was part of a general reform of statutory arrangements for legal aid.[407]

The Reforms to Criminal Legal Aid

Throughout the 1960s, the poor prisoners' defence provisions remained the principal machinery of criminal legal aid in the States. However, some States reformed or expanded their arrangements for legal aid in criminal proceedings. In some cases, this reflected the appearance of the public law society schemes. In others, it was part of changes in public administration. For instance, in 1960 the New South Wales Bar Council and the Attorney-General agreed that barristers - if requested to do so by the Public Solicitor - would defend accused facing trial for indictable offences.[408] This was not a major development, with only about ten requests for legal aid annually over the years 1960-66.[409] On the other hand, in Queensland in 1961 there was a more significant change in the administration of criminal legal aid. The power of the Minister for Justice to grant legal aid to poorer people in criminal and quasi-criminal proceedings was increased. For the first time, legal aid was also made available in Children's Court and Magistrates Court proceedings and coronial inquiries.[410] The functions of the Office of Public Defender were expanded accordingly.[411] Similar eligibility criteria to those which had governed the operation of the Queensland poor prisoners' scheme applied, although interpreted liberally in practice.[412] In 1967, the

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403 Above at pp 59-60.

404 PARTS II-V: Australian Government Commission of Inquiry into Poverty, above n 27 at paras 2.223-2.231, 2.235, 2.240-2.256 & 2.259.

405 S 24e-24o Legal Practitioners Act 1936-1969 (SA); PART II Legal Aid Act 1969 (Vic); Australian Government Commission of Inquiry into Poverty, above n 27 at paras 2.171-2.183.

406 Australian Government Commission of Inquiry into Poverty, above n 27 at paras 2.152-2.153 & 2.254. 2.198-2.208 & 2.195-2.196; (1968) 42 *Law Institute Journal* 176.

407 See below at p 66 for details of the changes to criminal legal aid.

408 (1966) (July) 2(2) *The Law Council Newsletter* at 10. Participating barristers were initially paid £12.12.0 per day. By 1966, the daily fees had increased to £17.17.0. A solicitor could also be retained in some situations.

409 Ibid.

410 Australian Government Commission of Inquiry into Poverty, above n 27 at para 3.61.

411 Ibid, para 3.61 & 94-95; above n 298.

412 Australian Government Commission of Inquiry into Poverty, above n 27 at para 3.64.

administration of criminal legal aid in Queensland was changed yet again when a Public Defender's Office was established within the Department of Justice.[413]

In Victoria, Part I of the Legal Aid Act 1969 made administrative reforms and increased the availability of criminal legal aid.[414] Existing provisions for legal aid, based on the poor prisoners' and criminal appeals legislation, were repealed although equivalent provisions were reformulated in the new Act.[415] However, new statutory provisions now enabled those charged with murder, treason or manslaughter to apply for legal aid.[416] The administration of criminal legal aid remained vested in the Attorney-General, who was able to grant legal aid to accused and appellants without adequate means if it was desirable in the interests of justice.[417] In 1969, comparable reforms, including statutory reestablishment of the Office of Public Defender, were also made in New South Wales.[418]

The Experience in the Mainland Federal Territories

In the 1950s and early 1960s, the operation of the Poor Persons Rules in the Supreme Courts of the Australian Capital Territory (ACT) and the Northern Territory were supplemented by non-statutory civil and criminal legal aid schemes.[419] The major change occurred in the ACT, where a public law society scheme was introduced in 1966. This scheme had its origins in 1961 and 1962, in discussions about legal aid between the Law Society and the Commonwealth Attorney-General.[420] Whilst no agreement was reached, the Society began to investigate the practicability of introducing a legal aid scheme.[421] No further action was taken until early 1966, when the Attorney-General proposed that the Society should establish a panel of solicitors to administer a semi-charitable legal aid scheme. The Law Society rejected his proposal, replying that it would not provide a panel until it was itself "incorporated and a proper legal aid scheme established".[422] Later that year - apparently prompted by the Law Council having placed legal aid on the national agenda - the Federal Government agreed to establish an interim public law society scheme in the ACT.

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413 Ibid, para 3.55-3.59.

414 Ibid, paras 3.78-3.80: J E Willis, "Legal Aid in Criminal Proceedings-The Public Solicitor's Office" [1973] 9 *Melbourne University Law Review* 241.

415 S 3 (1) & (2) Legal Aid Act 1969 (Vic).

416 Ibid, s 3 (1) (d).

417 Ibid, s 4. Australian Government Commission of Inquiry into Poverty, above n 27 at paras 3.83-3.84.

418 S 3 Public Defenders Act 1969 (NSW); NSW PD 1969 Vol 80 at 596 & 746-747.

419 These schemes adopted the financial eligibility criteria applied by the Public Solicitor in New South Wales. In criminal proceedings, an applicant was required to establish an absence of adequate means to obtain legal representation. In magistrates' courts in the Northern Territory poor persons procedures exempting civil litigants from payment of court fees and charges were available: S M W Withycombe. Ethos *and Ethics: A History of the Law Society of the Australian Capital Territory 1933-1993*, (1993) at 38: (1966) (July) 2(2) *The Law Council Newsletter* at 10. The Social Welfare Ordinance 1964 (NT) had also increased the availability of legal aid in the Northern Territory.

420 S M W Withycombe, above n 419 at 38.

421 Ibid at 38. In 1963, the Law Society began to investigate the operation of law society legal aid schemes elsewhere in Australia, including the scheme for a national public law society aid proposed by the Law Council (above at pp 66-62).

422 Ibid at 38-39: H Reps Deb 1965 Vol 46 at 1623.

For an initial period of two years it agreed to pay the costs of legal aid provided by Law Society members.[423] Payment in criminal proceedings was to be at an agreed rate of professional fees, in legally-aided civil matters it was to be a rate not less than 75% of the professional fees fixed by the costs scales.[424] The operation of the agreement was extended in October 1968, and it was still operating in 1973 when the interim national legal aid scheme was established.[425]

The Scene Outside the Official Framework

Informal arrangements remained part of legal aid provision in the 1960s. Practising barristers and solicitors continued to provide free or discounted services to poorer people, which continued to be important for individual recipients. However, the systemic significance of personal charitable acts by individual lawyers continued to decline.

The trade unions, related bodies and a few State administrative agencies provided the major alternative sources of legal aid. Legal aid provided by the trade unions and trades and labour councils in the States and Territories was generally restricted to advice and assistance relating to industrial accidents and workers' compensation claims.[426] Administrative agencies - State Public Trustees and equivalent officials - continued to provide legal advice, assistance and referral to poorer people with legal problems. This type of legal aid was also available locally from chamber magistrates, clerks of petty sessions and magistrates' court staff in association with actual or pending civil, family law and criminal proceedings. These public officials were an important source of legal advice for poorer people, especially in New South Wales.[427] In South Australia, the Department of Community Welfare provided paralegal representation in magistrates' courts for women seeking maintenance awards, affiliation orders and for related problems.[428]

Several social organisations also provided limited access to legal aid. For example, the Divorce Law Reform Association provided legal advice in undefended divorce proceedings and related matters. Motorists' associations in several States also provided legal assistance and advice to their members. Legal aid in connection with repatriation and pension claims were available to members of the Returned Servicemen's League. In some States, Citizens Advice Bureaus provided advice and

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423 S M W Withycombe, above n 419 at 39.

424 Ibid.

425 Ibid. The Law Council actively supported the extension of the agreement: (1969) (February) 4(3) *The Law Council Newsletter* at 20.

426 Australian Government Commission of Inquiry into Poverty, above n 27 at para 4.33; Commonwealth Legal Aid Commission. *Report of Funding and Providing Legal Aid Conference*, (June 1981) at 23-25.

427 Australian Government Commission of Inquiry into Poverty, above n 27 at para 4.32; M Cass & R Sackville, *Legal Needs of the Poor*, (1975) at 000. Newspaper advice columns were another important source of legal advice for poorer people: R Cranston & D Adams, "Legal Aid in Australia" (1972) 46 *Australian Law Journal* 508 at 510; Qld PD 1973-74 Vol 264 at 2933; J R Davies, "A Newspaper Ombudsman" (1967) 2(2) *Politics* 222.

428 Australian Government Commission of Inquiry into Poverty, above n 27 at para 4.27.

referral about legal problems - and Councils of Civil Liberties provided legal advice on an informal basis to members of the public.[429]

The Developments of the Early 1970s

In 1970, it was only three years before the first steps would be taken to establish the post-war national scheme. Yet there were few - if any - signs of an impending major change to the organisation of Australian legal aid. In 1972, the arrangements in the States for both civil and criminal legal aid remained substantially the same as in 1969. In 1970, a public law society legal aid scheme - comparable to those operating in Queensland, South Australia, Western Australia and Victoria - was established in New South Wales.[430] However, its scope differed significantly, being intended to assist "middle income earners" ineligible for legal aid from the Public Solicitor, who was to retain "sole responsibility for providing aid to poorer people".[431] In Tasmania in 1971, the Law Society had established the first of the State duty solicitor legal aid schemes.[432] Its members provided duty solicitor services on a charitable basis, apparently in both civil and criminal proceedings, at Courts of Petty Sessions in Hobart, Burnie and Launceston.[433]

Similarly, there had also been a few minor changes in the Federal system.[434] In 1972, the public law society scheme in the ACT was reestablished by statute, and the Federal Government reached an agreement with the Law Society of the Northern Territory to establish a joint legal aid scheme.[435]

However, in the early 1970s the really significant developments occurred outside the mainstream legal aid system. One was the emergence of legal aid specifically for Australian indigenous peoples. The other was the establishment of the first community legal centres. The origins of both these developments, which were the become key parts of the national legal aid system in the later 1970s, 1980s and 1990s, are discussed briefly below.

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429 Ibid generally at paras 4.33.

430 Legal Practitioners (Legal Aid) Act 1970 (NSW); Australian Government Commission of Inquiry into Poverty, above n 27 at 7-21. Conventional wisdom attributes the absence of a law society legal aid scheme in New South Wales in the 1950s and 1960s to the presence of the Public Solicitor and the Public Defender; ibid at para 2.2 ; B H Davidson, "Legal Aid in Civil Cases" (1964) *Law Society Journal* 78.

431 Australian Government Commission of Inquiry into Poverty, above n 27 para 2.2; NSW PD 1969-71 Vol LXXXV at 4150-4151; s 3 (1) Legal Practitioners (Legal Aid) Act 1970 (NSW).

432 In "duty solicitor" or "duty lawyer" schemes legal representation or advice is provided by lawyers at or in connection with, and only for the purposes of, imminent civil hearings, or defending criminal prosecutions otherwise than by prior arrangement with a legally-aided person or pursuant to a grant of legal assistance.

433 Australian Government Commission of Inquiry into Poverty, above n 27 para 4.14.

434 S 48 Conciliation and Arbitration Act 1972 (Cth) inserted provision for legal aid into s 141A Conciliation and Arbitration Act 1904 (Cth).

435 Legal Aid Ordinance 1972 (ACT). Sen Deb 1973 Vol 56 at 2368; Legal Assistance Act 1972 (NT).

The Foundation of the Aboriginal Legal Services

In the post-war period, the balance of the indigenous experience of law and its processes continued to be unfavourable. Like the poor, Aboriginal and Torres Strait Islander litigants and accused were generally disadvantaged by lack of access to lawyers' services in civil matters and civil and criminal proceedings.[436] This situation was frequently compounded by discrimination against indigenous accused in many parts of State criminal justice processes.[437]

In 1970, no specific legal aid provision existed for indigenous peoples. Aboriginal welfare legislation in some States empowered public officials to make arrangements for the representation of Aboriginal accused.[438] Legal practitioners also sometimes provided legal aid on a charitable basis, often at the request of Aboriginal community welfare associations.[439] In the later 1960s, some attempts had been made by these community associations and others to negotiate special access for Aboriginal people to the State statutory and law society legal aid schemes.[440] These attempts had mixed results. The mainstream legal aid system in the 1960s lacked the resources, focus and capacity to provide the range of legal services required by indigenous people and their communities.[441]

It was in this context that a legal aid scheme to serve the needs of Aboriginal people was established in New South Wales. In 1970, a group of Aboriginal and other residents of the Redfern, an inner-city suburb of Sydney, legal practitioners, academic lawyers and students concerned with improving indigenous access to law established the Aboriginal Legal Service (NSW) Ltd.[442] The following year, the Federal Government provided a grant of $24,250 to help support the new legal aid scheme.[443] In 1972, a second Aboriginal legal aid service was established at Fitzroy in inner-city Melbourne, opening its doors in February 1973 with the aid of Commonwealth and State financial grants.[444]

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436 E Eggleston, *Fear, Favour or Affection: Aborigines and the Criminal Law in Victoria, South Australia and Western Australia*, (1976) at 91; House of Representatives Standing Committee on Aboriginal Affairs, *Aboriginal Legal Aid*, (1980) at 7; C Tatz, "Aborigines and civil law" in P Hanks & B Keon-Cohen, *Aborigines and the Law*, (1984) at 103.

437 E Eggleston, above n 436 at 306; House of Representatives Standing Committee on Aboriginal Affairs, above n 436 at 36-44 & 72-75; Justice M C Kriewaldt, "The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia", (1960) 5 *University of Western Australia Law Review* 1; M W Daunton-Fear & A Frieberg, "'Gum-Tree' Justice: Aborigines and the Courts" in D Chappell & P R Wilson, (eds), *The Australian Criminal Justice System*, (1977).

438 E Eggleston, above n 436 at 93-97.

439 Ibid at 92.

440 Ibid at 99-107.

441 House of Representatives Standing Committee on Aboriginal Affairs, above n 436 at 7-16 & 61-70.

442 Ibid at 24 & 188; R Chisholm, "The Aboriginal Legal Service" (1971) 4 *Justice* 26.

443 House of Representatives Standing Committee on Aboriginal Affairs, above n 436 at 24.

444 E Eggleston, "Aboriginal Legal Services" (1974) 1 (4) *Legal Service Bulletin* 93 at 93.

The Appearance of the Community Legal Centres

The Australian community legal centres originated in the legal referral services for poorer people established in 1971 and 1972 by law students, legal practitioners and social agencies in Melbourne and Sydney.[445] These services - like Aboriginal legal aid - reflected a new and growing interest of some lawyers, law students, reformers and social welfare groups in improving access to the legal system through legal aid.[446] The first 'true' community legal centre was the Fitzroy Legal Service, which began in Melbourne in December 1972.[447] Within six months, approximately six other community legal centres had opened in and around Melbourne.[448]

Conclusion

In 1945, we have seen that the provision of legal aid in post-war Australian society was an issue - but a minor and insignificant one. The structures and politics of legal aid in the States continued to describe pre-war patterns, and this situation did not substantially change in the remaining years of the 1940s. In defining the peacetime functions of the LSB, the Commonwealth Parliament had merely extended its original role as an adjunct of the war time state, with its functions instead now geared towards civil rehabilitation and resettlement. Over the next 10 or 15 years, as these social demands subsided, so did the role of the LSB. Moreover, it is something of a romantic illusion - however tempting - to interpret the defeat of the Chifley Labor Government as an opportunity lost for the earlier establishment of a national legal aid scheme. Dr Evatt's attempt to expand the role of the LSB in late 1949 "to deal with legal questions arising out of certain social services claims" did not reflect a national policy position towards legal aid.[449] Realistically, this was simply an incident of his superintendence of the work of the LSB, and of the pursuit of wider Federal social welfare objectives. The interest of the Federal Labor Government in introducing major social reforms, like a national legal aid scheme, had come and

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445 J Basten, R Graycar, and D Neal, "Legal Centres in Australia." (1983) 6 *University of New South Wales Law Journal* 163 at 170-173: J Chesterman, "Twenty Years of Fitzroy Legal Service" (1992) 17 *Alternative Law Journal* 257: D Neal (ed), *On Tap, Not On Top: Legal Centres in Australia, 1972-1982*, (1984).

446 P J Hollingworth, *The Powerless Poor: A comprehensive guide to poverty in Australia*, (1972) at 127-128. Hollingworth notes the student referral services in Carlton in the city of Melbourne in the early 1970s (the Church of All Nations and the CAB legal referral service). The main problems presented were matrimonial, tenancy and hire purchase disputes.

447 J Basten, R Graycar, and D Neal, above n 445 at 170-172. From their inception, the community legal centres - and the community legal centres 'movement' - has generated its own extensive literature. In the late 1990s - more than 20 years after they first appeared - we are beginning to see the publication of detailed histories, like K Greenwood, *It Seemed Like A Good Idea At The Time: a history of Springvale Legal Service 1973-1993*, (Springvale, Springvale Legal Service, 1994) & J Chesterman, *Poverty, Law And Social Change: the story of the Fitzroy Legal Service*, (Carlton, Melbourne University Press, 1996). The author is aware of this literature. However, it has not been necessary to consider it, or conduct a detailed examine of the history of the origins of the Australian community centres, for the purposes of the thesis.

448 J Basten, R Graycar, and D Neal, above n 445 at 170.

449 Cth Parl Deb 1949 Vol 204 at 775-776.

gone. As Gillespie comments in the context of its proposals to reform medical practice in connection with a national health scheme:

> Delay killed the already slim chances of a radical change in medical practice. By the end of the war the popular enthusiasm for sweeping social reform had considerably diminished. The failure of the fourteen powers referendum in 1944 was an important sign that a large part of the Australian electorate - otherwise prepared to vote Labor - was becoming impatient with government controls. The central welfare reforms of the Curtin and Chifley governments were on the statute books and despite the electoral and referendum victories of 1946, little was achieved that did not build on the foundations laid in 1944 and 1945.[450]

If this was true of the prospects of change in medical practice, it was even more so in the case of Commonwealth involvement in national legal aid, which had been neither on the agenda of the Ministry of Post-War Reconstruction nor Labor's proposals for expansion of Commonwealth social welfare powers. Moreover, in the political atmosphere of 1946-49 - when Australia was divided over nationalisation, civil conscription and other 'socialist' issues - any attempt by the Chifley Government to exercise the amorphous Commonwealth powers over legal aid would inevitably have been bitterly contested. In any event, its attention was focused on its social welfare reforms and marketing control and increasingly preoccupied in resolving the civil and political unrest of the late 1940s.[451]

In 1951, in defining the guidelines of the LSB, the Menzies Government was not merely bringing its operations back into the official fold. It was also removing the potential for departure from the standing Commonwealth policy on legal aid, limiting it to servicing Commonwealth law and federal functions. This minimalist approach, which it had pursued since Federation, was reaffirmed in the mid-1960s in its negotiations with the Law Council, and was to remain the basis of Commonwealth legal aid policy until 1973.[452] However, whilst its policy conformed to the pre-war pattern, the capacity of the Commonwealth in the 1950s to introduce and administer a national legal aid scheme did not. The financial, governmental and political powers of the federal welfare state had been greatly enhanced by the administrative demands of World War II, and the events of 1946-49.[453] It now enjoyed new and unprecedented powers to engage in making and projecting national social welfare policies - through the distribution of grants and encouraging the development of particular policies.[454] However, unlike many comparable welfare state governments in this period, the Menzies Government was "unwilling to expand its social welfare role and social service expenditure was tightly controlled [relying] increasingly on the voluntary sector".[455] This attitude did not merely retard federal involvement in

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450 J A Gillespie, *The Price of Health: Australian Governments and Medical Politics 1910-1960*, (1991) at 234.

451 G Sawer, above n 240 at 155ff.

452 Below at pp 79-83.

453 C Sharman, "Federalism and Commonwealth-State Relations" in S Prasser, J R Nethercote & J Warhurst (eds), *The Menzies Era*, (1995) at 139.

454 Ibid at 140.

455 M A Jones, above n 134 at 56.

legal aid for its poorer citizens. It was typical of the attitude of the Menzies Government towards social policy in the Australian welfare state. Therefore, we have to be careful not to overstate - or misinterpret - the absence of Commonwealth activity in citizens' legal aid in the 1950s and early 1960s. Throughout the 17 years of the Menzies administration of the federal welfare state, social welfare policy - of the kind which had the potential to produce a national legal aid scheme - was:

> ... an area of modest action or incremental change when compared with activity in other countries or with activity in Australia the periods before and after the long interval of Liberal-Country Party governments. First, whereas social expenditures grew rapidly in OECD countries, Australian expenditures grew slowly in the 1950s and 1960s. Second, compared with the 1940s and 1970s, there were relatively few new policies introduced. However, those innovations that were made had a distinctive feature: they were of most benefit to the middle classes or even to the middle and upper classes. With the exception of child endowment, this was not a period of universal programs as was the case in some countries. Nor was it a period of focussing on the most disadvantaged ... Rather, the policies of the Menzies era were intended, in the rhetoric of the day, 'to encourage thrift and self-reliance'. The groups which gained most were those with the capacity to help themselves, especially middle class families.[456]

In the States in the 1950s and early 1960s, this "dullest period in Australian social history" was similarly reflected in developments in legal aid.[457] The most notable change was the expansion of the law society schemes in Queensland, Tasmania, Victoria and Western Australia. These 'professionally' administered, charitable and semi-charitable schemes were the prevailing national social policies backdrop, with its emphasis on voluntarism and associated notions of the 'deserving poor'. In retrospect, the developments in legal aid in the States in this period - both 'positive' and 'negative' - could equally well have occurred 20 years before. They show that until 1960 - and even beyond - the conception of a distinctive 'post-war period' in Australian legal aid is a somewhat artificial - and not terribly useful - perspective.

The 1960s were a turning point for Australian legal aid. By the end of the decade, it was clear that the law society schemes in most States - even the new public versions - were faltering, and the statutory schemes were threadbare.[458] The "pattern of legal aid provision" was inadequate, for reasons later described in detail by the Commissioner for Law and Poverty[459] The organised provision of legal aid displayed "an uninspired mixture of interstate differences, gaps in services, harsh eligibility requirements, overlapping jurisdictions and a multitude of anomalies", a description which is by now entrenched in our recollections of the post-war experience.[460]

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456 G Gray, "Social Policy" in S Prasser, J R Nethercote & J Warhurst (eds), above n 453 at 211.

457 M A Jones, above n 134 at 39.

458 The *in formâ pauperis* procedures were increasingly historical remnants - "little known and rarely invoked": R Cranston & D Adams, "Legal Aid in Australia" (1972) 46 *Australian Law Journal* 508 at 514.

459 J J Spigelman, "Poverty and the Law-The Limitations of Australian Legal Aid" (1969) 2 (2) *Australian and New Zealand Journal of Criminology* 91 at 103; Australian Government Commission of Inquiry into Poverty, above n 27 at 118-163.

460 Ibid at 191.

However, we have paid less attention to the reasons for the breakdown of the legal aid system in the 1960s. The legends of the post-war experience have been all too ready to blame the legal profession. This overlooks the role of Australian governments, who neither provided adequate funding for citizens' legal aid, nor placed it on the social policy agenda. The running - in financial, policy, organisational and delivery terms - was left to the organised legal profession and the lawyers. The continued existence of the law society schemes - operated at real institutional and personal cost - demonstrated their genuine commitment to the ideals of legal aid for the 'poor'. Nevertheless, throughout the 1960s practising lawyers generally, and solicitors in particular, were becoming increasingly unwilling to continue to express these ideals through their unpaid or subsidised participation in the law society schemes. Prima facie, this was a paradoxical position, sometimes mistakenly interpreted as revealing the hypocrisy of the legal profession. Instead, it was a product of the rising cost of providing lawyer functions in the legal services industry in the 1960s, especially in 'ordinary' solicitors' firms - the backbone of the law society schemes.

The rising cost of lawyer functions reflected changes in the political economy of the legal profession, especially from the mid-1950s. In these years, according to the professional orthodoxy, the Australian profession remained in its "long and languorous" phase, a state it is supposed to have enjoyed until the mid-1960s.[461] However, this is somewhat of a liberal gloss, we have indicated above that significant changes in the organisation of solicitors' practices first occurred in the 1920s and 1930s.[462] These transformative trends were renewed in the context of the post-war economy.

The first change which increased the cost of lawyer functions was the professionalisation of the solicitors' services sector, the solicitors' firms which dominated the legal services industry. Until the mid-1950s, law clerks - who were neither qualified lawyers, nor generally could realistically aspire to become so - had provided a major part of the workforce in solicitors' firms.[463] They were relatively low paid workers, with narrow career prospects and income expectations, who nevertheless performed many lawyer functions. The post-war boom changed the employment profiles in solicitors' offices. The expansion - and diversification - of the Australian economy provided law clerks with alternative opportunities for employment in other occupations, as sales representatives, insurance agents, finance company workers and similar types of white-collar jobs. These occupations offered greater prospects for social and financial advancement.[464] Younger people, who may otherwise have been destined for legal clerical work, now had similar opportunities.[465]

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461 D Weisbrot. *Australian Lawyers*. (1990) at 2.

462 Above at p 43: O Mendelsohn & M Lippman, above n 205 at 81.

463 O Mendelsohn & M Lippman, above n 205 at 80.

464 Ibid at 82.

465 Ibid at 80.

Solicitor employers responded by replacing the 'lost' law clerks with lawyers. Firms "increased their intake of articled clerks working toward professional qualification through university law schools or admission board courses".[466] Furthermore, the breakdown of the law clerk system had coincided with the availability of increasing numbers of law graduates - "young men (infrequently women) anxious to become lawyers" - as the university sector began its post-war expansion. By the early 1960s, the number of law graduates began its so-far unending upward spiral.[467] Thereafter, the pace at which qualified solicitors replaced law clerks in solicitors' practices built up momentum, with the former increasingly performing the functions performed in earlier decades by non-professionals. This process of 'replacement' continued, and by the end of the 1960s the historical profile of employment in Australian solicitors' practices had been substantially transformed.

Professionalisation increased the cost of providing solicitors' services. This process continued throughout the 1960s. It had a direct impact at the enterprise level, the provision of lawyer functions in solicitors' firms. One reason is obvious - "solicitors had to be paid more than clerks".[468] The second is less so. Professional training encouraged a tendency towards manufacturing transactional complexity amongst service providers. In the leading commercial firms, the replacement of law clerks with solicitors had "reinforced the otherwise reflexive movement ... towards providing more complex, hence more expensive, legal services, which legitimately demanded the attention of skilled lawyers".[469] It also reduced the opportunities for enterprise owners to simplify or standardise legal work, which they had been able to do with a more compliant legal workforce. Another impact of professionalisation at the enterprise level was that the changed profile also meant that the effect of the changed structures were exacerbated.

Indirectly, professionalisation led to increased cost of service provision in the context of changes in the labor market, including in a few of the leading 'commercial type' solicitors' practices. Sustained national economic growth from the early 1960s onwards and low unemployment increased the cost of labor, including the wages of secretarial and clerical workers, which were a significant cost factor in operating solicitors' firms. The diversification of the post-war economy enhanced and rewarded other, 'non-lawyer' segments of the skilled labour market. Comparisons with the status, career prospects and incomes of its employees - and white-collar employment generally - increased the profit and salary expectations of solicitor principals and employees. The early 1960s also saw a major shift in the activities of capitalism - the "whole style of Australian business activity changed with the huge inflow of capital from multi-national corporations, the aggressive expansion of many

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466 Ibid.

467 'bid. In 1960, law faculties existed at the Universities of Sydney, Adelaide, Tasmania, Western Australia and Queensland. Throughout the 1960s and early 1970s, new university law schools were established at the Australian National University, Monash University, the University of New South Wales, Macquarie University and the New South Wales and Queensland Institutes of Technology: J Disney, P Redmond, J Basten & S Ross, above n 72 at 254-256; D Weisbrot, above n 461 at 2.

468 O Mendelsohn & M Lippman, above n 205 at 82.

469 Ibid at 83.

... companies and a new government interest in the way business was done"[470] This generated new demands for new types of lawyer services and presented special opportunities for a few of the leading 'commercial type' solicitors' firms.[471] They transformed themselves into corporate-type law practices, specialist providers of commercial legal services to business and government, and "a more sophisticated (and profitable) style of legal service". [472] Gradually, throughout the 1960s, the corporate firms, their principals and employed solicitors emerged as a high-income elite - further raising income benchmarks throughout the solicitors' segment of the legal services industry.

By the early 1970s, for these and other reasons - it was generally a period "of remarkable growth and change" for Australian legal practice - the cost of providing lawyer functions in solicitors' firms increased significantly. Consequently, 'ordinary' solicitors' practices became less able to comply, by adjunct participation in the law society schemes, to fulfil the professional objective of controlling legal aid. It was these practices, who bore the cost of professional control of legal aid - and not the leading 'commercial type' or new corporate practices, who were becoming progressively less and less interested in servicing individual clients, whether 'rich' or 'poor'. It overstates the argument to claim that 'ordinary' solicitors and their firms were becoming financially unable to participate in the law society schemes, or the charitable provision of legal aid. However, it was for many solicitors becoming increasingly costly to do so. And there were positive disincentives against participation in the schemes. Achieving 'acceptable' levels of profitability and income was one, the other was the presence of a healthy market of non-poor clients able and prepared to pay for legal work in connection with real property, general legal services, probate and administration of estates and personal injury transactions.[473]

Finally, we need to note another development affecting legal aid in post-war society, namely the growing awareness of the presence of systemic poverty. It was not only that it was realised that poverty had not been vanquished by post-war prosperity. The 1960s also saw "a dramatic expansion in the knowledge about poverty" amongst Australian researchers and policy-makers.[474] Beginning modestly in 1959, the first major development was in 1964, when the Institute of Applied Economic Research at the University of Melbourne began its project on poverty.[475] In 1969, when the

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470 Ibid: D Weisbrot, above n 461 at 2.

471 O Mendelsohn & M Lippman, above n 205 at 84-90.

472 Ibid at 84.

473 The type and range of the work of 'ordinary' lawyers did not change significantly until the later 1970s. The provision of these 'personal' types of legal work predominated amongst solicitors in Victoria in the mid-1970s, and would broadly have been the same across Australia. Generally, the image of legal practice until the late 1970s is that of a busy industry sector - although with significant differences in income, and growing bifurcation: M Hetherton, *Victoria's Lawyers*, (1978), Fig 5.1 at 82-83: M Hetherton, *Victoria's Lawyers*, (1981) at 92-93; R Tomasic & C Bullard, *Lawyers and their work in New South Wales*, (1978).

474 M A Jones, above n 134 at 57.

475 Ibid at 58.

research was published it showed "about 7 per cent of the population of Melbourne to be poor after payment for housing and another 4 per cent to be marginally poor". This research project represented the first attempt at systematically measuring poverty in Australia.[476] Moreover, by the early 1970s, social reformers were beginning to draw attention to the links between poverty and legal aid. In 1972, the Right Rev Peter Hollingworth, the Director of the Brotherhood of St Laurence, concluded a review of the legal aid system and the poor with the following observation:

> The present legal aid system is as unsatisfactory in its operation as are all our other welfare systems. The basic problem lies in the fact that we have a tripartite system where the rich buy services from private solicitors and where the poor are either dependent upon the discretion of [the] Public Solicitor or upon the private charity of the Legal Aid Service. We need a scheme which is far better integrated, which seeks to reach out to areas where there is greatest need and which finally seeks to ensure that every citizen is innocent until finally proven guilty in the court. This can only occur with adequate representation, and that representation should be of the same quality regardless of whether it is being privately paid for or publicly prescribed.[477]

The same year - four months before the election of the Whitlam Labor Government in December - the McMahon Liberal/Country Party Federal Government established an independent, non-parliamentary Commission of Inquiry into Poverty.[478] It was to examine the extent of poverty and groups at risk, the income needs of 'poor' people, housing and welfare services.[479] The question was how the new Federal Government would deal with the decay of the system of legal aid, and how it would respond to the legal needs of poorer Australians, during its period of office.

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476 Ibid.

477 P J Hollingworth, above n 446 at 140-141.

478 The inquiry was to be conducted by Professor R. F. Henderson, Director of the Institute of Applied Economic and Social Research.

479 Its terms of reference appear at Australian Government Commission of Inquiry into Poverty, *Poverty in Australia*, (1975) First Main Report, Vol 1 at vii.

Chapter Four
The National Scheme Emerges

> I declare open this special meeting of Commonwealth and State Attorneys-General to discuss legal aid services in Australia ... One of the commitments of the new Commonwealth Government was to review legal aid to see whether a rationalised system of legal aid could be worked out in the Commonwealth. Having in mind the diversity, not that that is bad in itself, the fact that the Australian Legal Aid Office had grown over the last 3 years, having in mind that there were numbers of State legal aid systems both at a governmental level and also at a voluntary professional level, it seemed to my Government to be desirable that we have a look at the overall question of legal aid and see whether we can work out something that we think will not only be adequate to the country as a whole but also adequate to the States and Territories.
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> Extract from opening remarks, The Hon R J Ellicott QC, Commonwealth Attorney-General, special meeting of State and Commonwealth Attorneys-General, Hobart, 4 March 1976

Introduction

From every partisan perspective, the three years of the Whitlam Government from late 1972 until late 1975 were a "turbulent time" in Australian society and politics.[480] It was the first Federal Labor Government in 23 years. From the outset its legitimacy was disputed, its administration was "beset by unprecedented economic problems", and it lacked a majority in the Senate and consequently effective governmental capacity. It was also increasingly internally divided.[481] Moreover, in 1972 Australia had already emerged from its post-war stupor and was experiencing a time of great and impending social and cultural changes and shifting hierarchies.[482]

It was in this politically uncertain and socially vibrant context that the national legal aid scheme emerged. Like other social reforms initiated by the Whitlam Government, its emergence was not unaffected by the wider national political context. Indeed, it was part of the context, playing various roles as actor, victim and victor. The stories of its emergence, as they are typically retold, are deeply infected by this partisan context. In fact, as this chapter reveals, the reality of the developments in legal aid in this period are far less dramatic and heroic than these memories and legends suggest.

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480 G Freudenberg, *A Certain Grandeur: Gough Whitlam in Politics*, (1978) at 407.

481 Ibid at 406-407; G Whitlam, *The Whitlam Government 1972-1975* , (1985) at 9; A Patience & B Head, "Australian Politics in the 1970s" in A Patience, & B Head (eds), *From Whitlam to Fraser: Reform and reaction in Australian politics*, (1979) at 282-289.

482 G Little, "Whitlam, Whitlamism and the Whitlam Years", in Fabian Papers, *The Whitlam Phenomenon*, (1986) at 60-76.

The chapter begins in early 1973, when the Whitlam Government first acted to reverse the existing Federal policy towards Commonwealth involvement in the national provision of citizens' legal aid. It goes on to describe the content of its new policy, which was an interim policy pending the report of an expert committee established to review needs for legal aid throughout Australia. The chapter then proceeds to explain the developments in the interim new arrangements for legal aid over 1973-75. In particular, the establishment of the Australian Legal Aid Office, the recommendations of the Australian Legal Aid Review Committee and the role of the Commissioner for Law and Poverty are discussed.

By late 1975, the emerging national scheme - like the rest of Australian society - could not escape the aftermath of the dismissal of the Whitlam Government. The chapter describes how its plans for a national, federally-administered national scheme collapsed , and was replaced by the 'co-operative federalist' plans of the incoming Liberal/National Party Government. It explains how the Fraser Government pursued this approach in early 1976 to reach an 'in principle' agreement with the States for a joint national approach to legal aid. This agreement finally supplied the financial and administrative basis for the national legal aid scheme in the post-war Australian welfare state.

The chapter then relates the story of implementation of the Australian national scheme, namely the signing of the first Commonwealth-State legal aid agreements, the establishment of the legal aid commissions and the dismantling of the Australian Legal Aid Office. It concludes with a brief review of developments outside the national scheme from the ascension of the Whitlam Government until 1980 by describing the expansion of the Aboriginal legal services and the growing number of community legal centres. In combination with the final version of the national scheme, these agencies were to constitute the Australian legal aid system throughout the 1980s and 1990s.

The Reversal of Federal Legal Aid Policy

On 19 December 1972, Senator L K Murphy, QC, was appointed as the first Attorney-General in the Whitlam Government. Twelve months later, he would make an announcement in the Senate explaining the policy of the new Federal government towards legal aid.[483] This announcement officially marked the end of the policy of non-intervention in citizen's legal aid on a national basis, which had been the consistent policy of the Commonwealth since Federation.[484]

However, it is not clear when the decision to reverse Federal legal aid policy actually occurred. The Australian orthodoxy of the 1980s and 1990s has entrenched the idea that the Whitlam Government assumed office with a definite intention of establishing a national scheme.[485] In fact, the historical reality is more complicated. The Federal

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483 Above n 3 at 2800-2803. An extract from his statement appears below at p 120.

484 Above at pp 29-30 & 70-71.

485 The Australian 'legal aid orthodoxy', which emerged in the mid-1970s. is outlined below at pp 110-111.

Labor Party election policy platform in 1972 certainly included plans for the establishment of a national "system of legal aid to ensure ready and equal access to the courts".[486] However, it was not "a particularly prominent part of the platform" - only one of 31 proposals for national law reform.[487] Furthermore, these plans were "not in fact mentioned at all in the 1972 ALP policy speech, though other [law reform] matters ... were stressed".[488] Indeed, neither legal aid nor law reform were at the forefront of the Labor Party's policies for social reform. For instance, earlier in 1972, in a collection of Fabian Society essays on social reform, Senator Murphy wrote on the subject of the social ecology of science and technology.[489] Neither law reform nor legal aid appeared in this collection as a discrete essay topic.

Nevertheless, in late 1972 there can be no doubt that there were good prospects for Federal involvement in legal aid. The background atmosphere of social change had "injected ... a 'middle class radicalism'" into Australian politics - which augured well for the prospects of the prominence of legal aid in the agendas of the new Federal Government:[490]

> 'Quality of life' issues began to gain significance: a concern about the social and environmental costs of economic growth began to stir people's consciences; urban planning and development were debated, poverty deplored; health and education took on a new urgency.[491]

In January 1973, the Whitlam Government quickly set about an ambitious program of law reform.[492] Indeed, so ambitious that some critics have described it as "resembling nothing so much as the man who flung himself upon his horse and rode madly off in all directions".[493] Its endeavours were spearheaded by Senator Murphy, who was to demonstrate in 1973, 1974 and 1975 a consistent, informed and passionate interest in law reform, legal aid and other issues of social justice.[494] The

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486 Australian Labor Party, Federal Platform and Policy, March 1973, cl XXII at 5 cited in G Hawker, "The Rise and Fall of the Australian Legal Aid Office" in S Encel, P Wilenski & B Schaffer, B (eds), *Decisions: Case Studies in Australian Public Policy*, (1981) at 62.

487 Ibid: G Little, above n 482 at 598-599.

488 G Hawker, above n 486 at 62.

489 L K Murphy, "Mobilization of science and technology 'towards ecological living" in J McLaren (ed), *Towards A New Australia*, (1972).

490 S Encel, "Capitalism, the Middle Classes and the Welfare State" in E L Wheelwright & K Buckley (eds), *Essays in the Political Economy of Australian Capitalism*, Vol 2, (Sydney, 1978) at 162 cited in A Patience & B Head, above n 481 at 284 .

491 Ibid.

492 J A Scutt (ed), *Lionel Murphy: A Radical Judge*, (1987); G Sawer, "Towards A New Federal Structure?", M Crommelin and G Evans "Explorations and Adventures with Commonwealth Powers", A R Blackshield, "Judges and the Court System" & E Campbell, "Ministers, Public Servants and the Executive Branch" in G Evans (ed), *Labor and the Constitution 1972-1975*, (1977) at respectively 3-16, 24-66, 105-126 & 136-165.

493 M Crommelin and G Evans, above n 492 at 45.

494 In early 1975, he was appointed as a justice of the High Court of Australia where he pursued his destiny as a law reformer until his untimely death in 1986. In both life - his ministerial and judicial roles - and death he remains a controversial figure, sanctified by some, and demonised by others: J Ely & R Ely

decision to reverse Federal legal aid policy was certainly allied with the pursuit of the program of law reform in early 1973. In mid-1973, Senator Murphy announced the adoption of the Government's interim new legal aid policy.[495] Yet, precisely when this decision was taken and its actual circumstances are unclear.

According to Hawker, it impossible to "document or date, or even identify, the initial decision to take action".[496] Hawker is partly right - and partly wrong. He is right in claiming that there appears to be no documentary record of the decision to establish a national legal aid scheme.[497] However, Hawker is wrong in so far as he - like most interested parties - neglects to distinguish between the presence of two separate decisions. The first - and seminal - decision was the decision of the Whitlam Government to reverse existing Federal legal aid policy. The second - and instrumental - decision was to establish the Australian Legal Aid Office. The latter was really a manifestation of the new Federal policy, and technically one can argue that it occurred on 6 September 1973, being documented by a ministerial directive.[498] The timing, documentation and circumstances of the former decision, namely the seminal decision to change Federal legal aid policy, is more problematic. As Hawker suggests, it is probably impossible to ascertain precisely when it was taken. However, the contextual evidence of the timing and circumstances of the making of the decision is more substantial than Hawker indicates.

By implication, the decision to change Federal legal aid policy had clearly been taken by 25 July 1973, when Senator Murphy announced the adoption of the interim legal aid scheme. Indeed, the parliamentary record indicates that the decision had been made at least three months before. On 30 April 1973 Senator Murphy "announced Government approval of a grant of $2m to the States on a per capita basis ... [as] an interim grant ... designed to effect a quick improvement in the

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(eds), *Lionel Murphy: The Rule of Law*, (1986) at 2-5; J A Scutt (ed) above n 492. In 1996, the 10th anniversary of his death spawned a series of retrospective assessments in the national press: C Merritt, "Murphy's Law" *Australian Financial Review* 18 October 1996, M Steketee, "History judges a Labor man" *The Weekend Australian* 19-20 October 1996; N Wran, "Neither sinner nor saint, his good deeds survive his tormentors" *The Weekend Australian* 19-20 October 1996; B Lane "The Legacy of Lionel Murphy" *The Weekend Australian* 19-20 October 1996; M Kirby "Reformer who brought our legal system back home" *Australian* 22 October 1996; MacCallum M, "The Troubled Life of Murphy: A Labor Mate" *The Weekend Australian* 19-20 October 1996 & "Murphy's reform and policy legacy", *Australian* 22 October 1996.

495 Below at p 83.

496 G Hawker, above n 486 at 62.

497 In 1992, the author made application under the Archives Act 1983 (Cth) to the Commonwealth Attorney-General's Department for access to the official records covering this period. The application was not processed, but the responsible senior officer advised him that he could have informal access to the relevant files. At the time, the author was unable to immediately act on this permission. In 1995, when he sought to do so the responsible official had changed - and the Department had no record of the author's earlier application. The author was advised (Margaret Brown, Acting Director, Legal Aid and Family Services, 9 August 1995) that he was required to make a fresh official application, which has not been possible within the time constraints of completing the thesis.

498 Below at pp 83-84.

availability of legal aid".[499] This, as is explained below, was part of the interim legal aid policy of the Whitlam Government.[500]

Therefore, the decision must have been taken in January or February, or possibly March. This timetable is consistent with a hitherto unrecorded version of its surrounding circumstances. In early 1973, according to Mr. J B Harkins, a delegation comprising some State Attorneys'-General and leading members of the legal profession arrived in Canberra for an unscheduled meeting with the Attorney-General, who had just returned from overseas.[501] Senator Murphy agreed to meet with them to discuss their proposals for legal aid. The meeting was attended by Senator Murphy, the delegation, Mr. Clarrie Harders, then Secretary of the Attorney-General's Department, Mr. Harkins and another senior departmental officer.[502] At the meeting - of which no formal record was kept - Harkin's says that two members of the delegation spoke, presenting Senator Murphy with a 13 point proposal for a national scheme.[503] The proposal contemplated a Commonwealth funded, State based scheme which was to be administered by the legal profession. As the Attorney-General had effectively been 'door stopped' by the delegation, there was no opportunity for the Commonwealth officials to adequately brief him on a response to their proposal. Harkins recalls that Senator Murphy read the delegation's proposals, noted their State orientation, and then - in a forceful 'off the cuff' speech - addressed the meeting, arguing for a national federally-oriented approach to legal aid. Such was the flair and brilliance of his argument - according to Harkins' clear recollection - that he convinced the assembled ministers and lawyers of the desirability of a Commonwealth response to the problems facing Australian legal aid.[504]

After the delegation had left the meeting, Senator Murphy canvassed with Harders, Harkins and the other official the possible courses of action open for a Federal national legal aid scheme. According to Harkins, Senator Murphy turned to him and said words to the effect, "Well, what are we going to do, Joe?" Harkins replied that

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499 Ministerial Statement, above n 3 at 2800.

500 Below at pp 83-87.

501 J P Harkins interview, above n 260. In 1972-73, Mr. Harkins was a Deputy Secretary in the Attorney-General's Department.

502 On 6 May 1993, the author interviewed the late Sir Clarrie Harders at University House, ANU, and asked him about this meeting. Sir Clarrie had no recollection of the meeting, which is not surprising given that legal aid was only a small part of his many and varied responsibilities as Secretary of the Attorney-General's Department. Indeed, the advent of a Commonwealth presence in legal aid was not welcome by all within the Department, including its senior levels: G Hawker, above n 486 at 66. It is said, not unkindly, of Sir Clarrie himself that he expressed concern that legal aid meant that members of the public would be present in the corridors of the Department. In any event, by 1993 Sir Clarrie's recollections were dominated by his role in the events of 11 November 1975, when the Whitlam Government was dismissed by the Governor General.

503 In the energised climate of federal public policy in early 1973, it was not unusual for policy to be made 'on the run', or for the documentary record to be minimal - or ex post facto. One of the points which emerged from the interview with Harders, above n 502, was his emphasis upon the unprecedented scale and pace of the effort required to establish new agencies of federal government and administration in the early months of the Whitlam Government.

504 J P Harkins interview, above n 260.

he had worked in the LSB earlier in his career and that he believed that its great strengths had been its success in providing people with legal advice, and the way in which it cooperated with the practising legal profession. Senator Murphy then asked Harkins to go away and write a submission for a Federal response based on these experiences, which Harkins did, and Senator Murphy subsequently accepted.[505]

It is not necessary for the present purpose to engage with the credibility of Harkins' version of the circumstances of the original decision to reverse Federal legal aid policy. Other than to say, that there is no reason to doubt - and every reason to accept - his account.[506] Furthermore, his dating of the decision in very early 1973 is corroborated by the parliamentary record. By the time of the first parliamentary session in February 1973, it appears that the Attorney-General's Department had already been briefed to consider national arrangements for legal aid. On 28 February, the Attorney-General replied to a question in the Senate about the availability of legal aid in the proposed reforms to the Commonwealth matrimonial causes legislation, saying inter alia that:

> I think there is a very strong and special case for the provision of legal aid. That can be done in many forms. Many forms of doing so have been tried in the community. The Attorney-General's Department is now engaged in formulating proposals for the provision of legal aid. They will be taken up at the next meeting of the Standing Committee of Commonwealth and State Attorneys-General and concurrence with them will be sought.[507]

The fact that a decision with respect to Federal legal aid policy had already been made is also evident from a reply of Senator Murphy on 7 March 1973 to another question in the Senate. On this occasion he was asked about the availability of legal aid in divorce proceedings. Senator Murphy replied inter alia that the "Government has proposed a Commonwealth legal aid scheme".[508] Later that same day, in reply to a question concerning cases of hardship in litigation, he said that he believed that it was "important that there be a proper scheme of legal aid for those affected ... such a scheme is being formulated, and as soon as I can do so I will inform the Senate of it in some detail".[509] Three weeks later, he again referred in the Senate to increasing legal aid in matrimonial causes proceedings, a "matter in respect of which proposals are already in hand".[510]

By the end of April 1973, the direction of the proposed Federal involvement in legal aid was beginning to take shape. On 5 June, when Senator Murphy was asked about

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505 Ibid.

506 Harkins' credit is incontestable. Moreover, in relating his version of these events he was at pains not to be interpreted as diminishing the key role of Senator Murphy in the decision for the Commonwealth to enter legal aid. Harkins emphasised that it was the Labor Attorney-General's decision, and his brilliant advocacy and vision for a national response to legal aid, which swung the debate.

507 Sen Deb 1973 Vol 55 at 38.

508 Ibid at 208.

509 Ibid at 215.

510 Ibid at 598.

why the arrangements in the Northern Territory - adopted by the previous government in 1972 - had not been implemented, he was able to reply that the Whitlam Government now

> ... has a different approach to legal aid ... [in] accordance with a scheme now being worked out to implement Government policies to supplement, by grants for federal matters, legal aid programs already existing in the States, I am re-examining the whole basis of the Northern Territory scheme".[511]

The Interim New Federal Response

Whatever the historical reality of the background events in the first six months of 1973, the result was that the Whitlam Government reversed existing Commonwealth policy towards the provision of legal aid for its citizens. On 25 July 1973, the Attorney-General announced the adoption of an interim Federal legal aid policy - a new policy with three key components, each of which are discussed briefly below.[512]

The first component was the establishment of an effective national organisation, a step which was central to implementing the new legal aid policy. This process began modestly on 6 September 1973, when the Attorney-General directed that the Legal Service Bureaux thenceforth be known as the Australian Legal Aid Office (ALAO).[513] Initially, the new organisation was in effect only a revitalised version of the LSB. However, its functions differed significantly from those of its predecessor. The ALAO was to administer a new and comprehensive national Federal legal aid scheme, establish a national network of lawyers' offices and assist in providing and coordinating legal aid in the federal legal system.

This new Federal scheme incorporated the legal aid scheme previously administered by the LSB.[514] Legal aid was to continue to be available to eligible serving and former members of the armed forces and their dependants. However, the new scheme expanded the scope of Federal legal aid to include social security pensioners, migrants, assisted overseas students, and others for whom the Federal government claimed 'special responsibilities' under Commonwealth law. People falling within these categories became eligible for legal aid in respect of any legal problem.[515] The scheme also provided that everyone who was unable to afford the cost of legal representation or assistance in respect of problems generated by Commonwealth law was eligible for legal aid. Legal aid was made available to all 'Commonwealth people' in respect of any legal problem, and to all other citizens - provided they were financially eligible - in respect of 'Commonwealth matters'.

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511 Sen Deb 1973 Vol 56 at 2368.

512 Above p 80.

513 J P Harkins, above n 139 at 5 & Attachment "D" at 47-50.

514 Above at pp 46-50.

515 Ministerial Statement, above n 3 at 2802; J P Harkins, above n 139 at Attachment "D" at 48-49.

These twin concepts of 'Commonwealth people' and 'Commonwealth matters' defined the general limits of the new legal aid scheme. The ALAO was not intended to provide legal aid to every citizen of the Commonwealth.[516] Officers of the ALAO were directed to refer applications for civil and criminal legal aid in proceedings by non-'Commonwealth people' to the State and Territory public and law society schemes. Similar directions applied in respect of applications for legal aid in proceedings in 'Commonwealth matters' by those who were financially ineligible under the Federal scheme. Moreover, in general ALAO staff were directed to refer those ineligible for legal aid to the existing schemes in the States, or - if this was impracticable or inappropriate - to private lawyers.[517]

However, the general scope of the scheme was subject to several exceptions. The first was that all poorer people, irrespective of whether they were 'Commonwealth people' or parties in 'Commonwealth matters', were eligible for legal advice and referral from the ALAO.[518] They were also all eligible for legally-aided non-representative lawyer services. For instance, ALAO staff lawyers were authorised to prepare legal correspondence, wills, powers of attorney and other simple legal documents, negotiate settlements and perform limited advocacy functions for poorer people.[519] Moreover, if legal aid was otherwise unavailable, they were also permitted to represent poorer people in civil proceedings in State and Territory magistrates' court s.[520]

The interim Federal legal aid policy conferred a second function on the ALAO, which further distinguished it from the LSB. The ALAO was directed to establish a national network of 'store front' solicitors' offices. In part, this was merely a co-requisite of the administration of the expanded availability of Federal legal aid. However, it was also part of a wider - if inchoate - policy to "present a new image of accessibility to the law".[521] It was intended that the 'store front' solicitors' offices would not only assist the ALAO in the performance of its primary function but

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516 From 1974, the ALAO published eligibility criteria and guidelines for the provision of legal aid under the Federal scheme: Attorney-General's Department, "OMS sent to all ALAO Offices", 10 October 1974 to 31 August 1987, (unpub memoranda).

517 The ALAO was required to maintain a panel of private practitioners willing to accept referrals of legally-assisted clients: Cl 3 (d) Directive by the Attorney-General Senator Lionel Murphy, Q C: Establishment of Australian Legal Aid Office dated 6 September 1973 in J P Harkins, above n 139 at Attachment "D" at 47-48.

518 Ministerial Statement, above n 3 at 2802.

519 Clause 3 (a), (f) & (g) Directive by the Attorney-General, J P Harkins, above n 139 at 47-48.

520 Ibid. cl 3 (c).

521 J P Harkins, above n 139 at 6-7. The experience over 1974-75 contains several instances of the pursuit of this objective. In mid-1974, Senator Murphy announced proposals to obtain premises in capital cities and regional centres to provide "one-spot shopping" for legal aid. The goal was to improve the effectiveness of legal aid to the public by locating the operations of the ALAO, law society schemes and the legal referral services at the same location. Accommodation was leased in Adelaide for a pilot "store-front" scheme - but agreement could not be reached with the Law Society on establishment, removal and other costs. The proposal lapsed with the demise of the Whitlam Government (below at p 95). A pilot scheme involving law students assisting the ALAO, which was under consideration, also lapsed: J P Harkins, above n 139 at 23.

"provide administrative support bases for community advice centres and legal or welfare advice groups generally".[522]

The new policy also contemplated that the ALAO would assist in providing and coordinating legal aid in the federal legal system, including cooperation with the Aboriginal legal services, which the new Federal legal aid policies also proposed to expand.[523] Furthermore, the plan proposed that ALAO staff lawyers would provide legal representation for poorer people in undefended divorce and ancillary family law proceedings arising under Commonwealth law and duty lawyer services in other federal courts and jurisdictions.[524]

The second component of the new policy was the provision of Commonwealth funding for legal aid on a national basis.[525] In the financial year 1973/74, the Whitlam Government made $2m available to assist public and law society schemes and community legal centres in the States and Territories. In a few cases, Commonwealth funds were also made available to improve access to legal aid services by 'Commonwealth people'. For instance, in Western Australia a special grant was made to the Law Society to establish a 'flying lawyer' legal aid scheme to service the needs of residents in the isolated north-western region.[526]

The third component of the interim response was the establishment of Australian Legal Aid Review Committee. Its terms of reference were to investigate areas of 'need' for legal aid and the optimal form of provision of a national legal aid scheme, including the practicability of deploying public salaried lawyers.[527]

The Interim Response at Work

By the end of 1973, the machinery required to implement the interim Federal response was in place.[528] The ALAO had begun to establish itself, and during 1974-75 continued to expand its operations and to consolidate its functions. The Australian Legal Aid Review Committee had begun its inquiry, and the Commission of Inquiry into Poverty had commenced its inquiries into the impact of the law on poorer Australians, including the provision of legal aid.

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522 Cl 2 Directive by the Attorney-General, ibid at 47.

523 Ministerial Statement, above n 3 at 2802: below at pp 107-108.

524 Cl 3 (b) & (e) Directive by the Attorney-General, J P Harkins, above n 139 at 47. These jurisdictions were the 'Special Federal Court' at Sydney and magistrates' court s in the Australian Capital Territory and the Northern Territory.

525 Ministerial Statement, above n 3 at 2802: J P Harkins, above n 139 at 6-7.

526 J P Harkins, above n 139 at 23.

527 Attorney-General's Department, *Australian Legal Aid Review Committee. Report*, February 1974, (1974) at 8.

528 In July 1973, the Federal Government had also established a new scheme in the Northern Territory, pending the establishment of a regional ALAO office: Sen Deb 1973 Vol 56 at 2368.

The Australian Legal Aid Office

The LSB had bequeathed few staff and little infrastructure to the ALAO. The LSB offices had been located in the State and Territory capital cities, typically in premises occupied by the Commonwealth Deputy Crown Solicitors. This type of accommodation was inadequate and unsuitable for the role of the ALAO in the new Federal legal aid scheme.

In early 1974, the ALAO began a concerted effort to establish a national network of branch and regional offices, and to recruit additional staff.[529] By 1975, branch offices of the ALAO had been reestablished in new premises in the States and Territories. Fifteen regional offices were opened and over 200 staff, including almost 100 solicitors, were employed.[530] The national reach of the ALAO and its services continued to expand throughout the year, with ten more regional offices established by September.

In 1974 and 1975, ALAO staff provided legal aid in accordance with the principles of the new scheme, with individual entitlement for legal aid being determined in accordance with newly prescribed financial criteria.[531] These criteria were adjusted to reflect changes in national wages and living standards, and variations in legal aid policy.[532] The scope and emphasis of the new scheme were also reflected in the operations of the ALAO. It deliberately made special provision for 'Commonwealth people', especially migrants. ALAO offices were established in suburbs with high immigrant populations, including Fairfield and Leichhardt in Sydney, and Brunswick in Victoria. Moreover, it was ALAO policy to recruit lawyers and administrative staff conversant with the language of the major local immigrant groups in these districts for employment in its local office.[533] The operations of the ALAO in 1974 and 1975 also reflected the focus of the new scheme on 'Commonwealth matters'. Its major activity was providing legal aid in family law matters, which comprised "some 40% of personal interviews conducted and some 80% in number and value of legal aid matters referred to the private profession".[534]

However, the ALAO also provided legal aid in criminal law proceedings. Duty lawyer services were provided in Magistrates' courts, Courts of Petty Sessions and other courts of summary jurisdiction located near regional offices. ALAO lawyers attended these courts to advise unrepresented accused apply for bail or adjournments

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529 J P Harkins, above n 139 at 9-10.

530 Between June 1974 and September 1975, ALAO regional offices were established at Blacktown, Leichhardt, Fairfield, Ryde, Bankstown, Newcastle, Wollongong and Tamworth in New South Wales; Sunshine, Brunswick, Broadmeadows and Geelong in Victoria; Inala, Ipswich, Townsville, Rockhampton, Southport, Cairns and Mackay in Queensland; Elizabeth in South Australia; Fremantle and Midland in Western Australia; Burnie and Launceston in Tasmania; and Alice Springs in the Northern Territory: J P Harkins, above n 139 at 13-14 and Attachment 'F' at 55.

531 Above at pp 83-84.

532 J P Harkins, above n 139 at 7 & Attachment "E".

533 Ibid at 21.

534 Ibid at 14-15.

and present simple pleas of guilty.[535] ALAO regional offices proximate to isolated areas operated mobile or visiting lawyer services to provide residents with access to legal aid. In Tasmania, lawyers from its office at Burnie visited west coast mining towns with no resident solicitor. In Queensland, a lawyer from the ALAO's Rockhampton office made monthly visits to outback towns - including Blackall, Longreach, Winton Maryborough, Bundaberg and Gladstone - to increase local access to legal aid.[536]

The functions of the ALAO in coordinating legal aid in the federal legal system also expanded. In changing Commonwealth policy, the Whitlam Government had not abandoned the connection between legal aid and the performance of Commonwealth and national governmental functions. In 1974 and 1975, it established five new statutory or administrative legal aid schemes. In 1974, the Commonwealth Parliament enacted new trade practices legislation which included provision for legal aid.[537] In addition, a "special scheme for the provision of legal aid in cases raising environmental or conservation issues [was] developed in conjunction with the Minister for Environment and Conservation".[538] This scheme applied to matters having a "national aspect", although legal aid was sometimes available in matters having "vital local significance".[539] In 1975, reform of the Commonwealth matrimonial causes jurisdiction made further statutory provision. S 117(3) of the Family Law Act 1975 (Cth) enabled a party to a matrimonial cause or proceeding to apply to the ALAO for legal aid, which was also available for the separate representation of children.[540] In connection with these developments, the ALAO established a duty lawyer service in the new federal Family Court to assist deserted wives, and other unrepresented parties, to obtain adjournments, handle urgent matters and, if legal representation was required, to facilitate the making of a statutory application for legal aid.[541] The Commonwealth made statutory provision for legal aid in its new racial discrimination legislation, and in connection with its new Administrative Appeals Tribunal.[542]

The Reports of the Australian Legal Aid Review Committee

Immediately after it was established, in July 1973, the Australian Legal Aid Review Committee (ALARC) began to investigate community needs for legal aid, and ideas about the possible organisation of a national scheme. It convened meetings with the

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535 Ibid at 21-22.

536 Comparable arrangements operated in the Northern Territory. ALAO lawyers in Darwin used airline services to provide legal aid in Gove, Katherine and other remote towns and courts. The ALAO in Alice Springs provided similar services in Tennant Creek, and elsewhere: ibid at 22-23.

537 Ibid at 15-19: s 170 Trade Practices Act 1974 (Cth).

538 Sen Deb 1973 Vol 58 at 2800; Department of the Environment and Conservation, *Report for period December 1972 to June 1974*, (1975) at 58-59; J P Harkins, above n 139 at 15.

539 J P Harkins, above n 139 at 15.

540 S 65 Family Law Act 1975 (Cth) & Family Law Regulations, cl 114, Statutory Rules 210/1975.

541 J P Harkins, above n 139 at 22.

542 S 25ZB (1) Racial Discrimination Act 1975 (Cth); s 69 Administrative Appeals Tribunal Act 1975 (Cth).

administrators of the State public and law society legal aid schemes, and invited public submissions on its terms of reference. A few ALARC members also carried out some examination of post-war developments in legal aid in other Western countries. By April 1974, the Committee was ready to present its first report to the Attorney-General.[543]

The first ALARC report was inevitably tentative.[544] It highlighted the major public policy questions which the ALARC believed impinged upon the national public provision of legal aid. The report also recommended initiatives to improve public access to lawyer services, and defined what it saw as the necessary constituents of a national scheme which would satisfy its terms of reference.[545] As part of this process, the ALARC offered its preliminary conclusion that the scope and accessibility of the existing arrangements were demonstrably inadequate to meet the 'needs' of poorer Australians for legal aid. Its members believed the only satisfactory response to this problem was increased public funding to create a legal aid scheme with the flexibility to address the special 'needs' of poor people. They also cautioned the Attorney-General that the success of any national scheme would depend upon the careful costing of its service delivery programs - and the continued support of the legal profession, social welfare workers and community groups. The first ALARC report also advised the Attorney that the organisation and funding of any national scheme should be integrated with related arenas of social policy and administration.[546]

Following the presentation of its report, the ALARC continued to consider its terms of reference, assisted once again by consultation with the public and the legal profession. It also began to cooperate closely with the inquiry that was being conducted by the Commissioner for Law and Poverty into the provision of legal aid for the poor.[547] In March 1975, the ALARC presented its second report to the Attorney-General, which contained three principal recommendations.

Its first recommendation was that the States introduce duty lawyer schemes on a pilot basis to determine the practicability of establishing a national service in magistrates' courts.[548] Its second principal recommendation affirmed a prior recommendation of the Commissioner for Law and Poverty. The ALARC agreed that a Legal Services Commission should be established to coordinate legal aid on a national basis, and

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543 Attorney-General's Department, above n 527 at 9-10. Little evidence was available about the work and operations of the ALAO.

544 Ibid at 9.

545 Ibid at 00-00. For instance, the ALARC recommended that money be provided for legal representation in trials, other criminal proceedings and duty lawyer schemes in magistrates' courts. It also addressed questions affecting the organisation and administration of a national scheme - canvassing the pros and cons of the Judicare and salaried models of legal aid, the problems of servicing remote regions, legal insurance, the establishment of a Federal advisory body and the inter-governmental coordination.

546 Ibid at 10-11.

547 Attorney-Generals Department, *Australian Legal Aid Review Committee, 2nd Report*, (1975), para 1.3: below at pp 89-90.

548 Ibid, paras 1.5 & 2.1-2.7.

advise the Commonwealth on related expenditure.[549] However, its members urged that the proposed Commonwealth commission would function best within a general Federal framework of "dynamic and co-ordinated law reform".[550] The third principal ALARC recommendation in its second report was that Commonwealth funding of the State public and law society schemes should be continued at current levels. ALARC believed this was a necessary interim measure, pending assessment of national long-term funding requirements for legal aid.[551] In presenting this report, the ALARC had discharged its functions - and by mid-1975 its work was discontinued.

The Inquiry of the Commissioner for Law and Poverty

In March 1973, the Whitlam Government had appointed four additional members to the Commission of Inquiry into Poverty to broaden its scope by including educational, economic, socio-medical and legal aspects of poverty.[552] Professor Ronald Sackville - from the Faculty of Law at the University of New South Wales - was appointed Commissioner for Law and Poverty. Shortly afterwards, he commenced work on several references relating to law and poverty, including the availability of legal aid for poorer people.

In November 1974, Professor Sackville released a discussion paper "for the purpose of eliciting comment from interested persons, groups and organizations".[553] It contained the findings of an inquiry conducted by the Commissioner and his staff into legal aid for poor people, and reported their conclusions that existing arrangements for legal aid in civil and criminal proceedings were inadequate to meet the needs and legitimate expectations of poorer Australians.[554]

The paper also contained two major recommendations. The first was that the existing national infrastructure should be retained, pending any future amelioratory Commonwealth action. The Commissioner agreed that the Federal Government should continue to supplement the funding of the public and law society schemes.[555] His second major recommendation was a new and comprehensive Commonwealth, financed national scheme was necessary that in the longer-term. This new national scheme should focus on the provision of legal aid for poorer and disadvantaged people, providing its services via a network of neighbourhood or local law centres.[556]

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549 Ibid, paras 3.7-3.10. ALARC members were however unable to agree (paras 1.7 & 3.2-3.23) whether the proposed Commonwealth commission should administer the ALAO.

550 Ibid, paras 3.24-3.25.

551 Ibid, paras 1.8 & 4.1-4.2 at 26.

552 Australian Government Commission of Inquiry into Poverty, above n 479 at vii.

553 Australian Government Commission of Inquiry into Poverty, *Legal Aid in Australia*, Discussion Paper, (1974), frontispiece. In March 1974, the Commission of Inquiry into Poverty had released an interim report of its investigations - Australian Government Commission of Inquiry into Poverty, *Poverty in Australia*, Interim Report, (1974).

554 Australian Government Commission of Inquiry into Poverty, Discussion Paper, above n 553 at 402.

555 Ibid.

556 Ibid.

These locally-managed law centres should employ lawyers to provide comprehensive, localised legal aid.[557]

The discussion paper cautioned the Whitlam Government against seeking to use its financial power to dominate the presence any national legal aid scheme. The Commissioner and his staff believed it was important that the scheme should emphasise and encourage participation at the regional and local level, by the community and private lawyers.[558] They also recommended that an 'independent' Commonwealth Legal Services Commission should be created to administer the scheme, coordinate local law centres and allocate funds to the State and Territory legal aid schemes.[559]

In April 1975, a revised version of the discussion paper, which incorporated corrections and comments made following public consultation in late 1974 and early 1975, was published in the form of a final report to the Poverty Commission.[560] However, its basic recommendations remained "substantially the same" as those contained in the discussion paper and outlined above.[561]

The inquiry into legal aid was not the only investigation which the Commissioner for Law and Poverty conducted into the plight of poor people in the legal system. In 1975, he published national reports on legal 'needs', migrants and the law and tenancy - portraying a general picture of "widespread ignorance of the scope and function of legal aid services".[562] Over the next two years, Professor Sackville and his staff published related reports on homelessness, bail and social security, debt recovery and poverty and the legal profession.[563]

The Climax of the Interim Federal Response

By the end of 1974, the Whitlam Government was ready to convert its interim response into a permanent national scheme of legal aid. Its interim national policies, which are described above, had been in place for about 15 months. The

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557 Ibid at 402 & 407-411 for detailed recommendations on the operations of the proposed local law centres.

558 Ibid at 403.

559 Ibid at 402-407 & 412.

560 Australian Government Commission of Inquiry into Poverty, above n 27.

561 Ibid at xxiii & 164-192.

562 Australian Government Commission of Inquiry into Poverty, *Legal Needs of the Poor*, Research Report, Law and Poverty Series, (1975) at 89-92. Australian Government Commission of Inquiry into Poverty, *Legal Needs of the Poor*, Research Report, Law and Poverty Series, (1975); Australian Government Commission of Inquiry into Poverty, *Migrants and the Legal System*, Research Report, Law and Poverty Series, (1975); Australian Government Commission of Inquiry into Poverty, *Poverty and the Residential Landlord-Tenant Relationship*, Research Report, Law and Poverty Series, (1975); Commission of Inquiry into Poverty, Debt Recovery in Australia, Research Report, Law and Poverty Series, (1977).

563 Australian Government Commission of Inquiry into Poverty, Research Report, *Homeless People and the Law*, Research Report, Law and Poverty Series, (1976); Australian Government Commission of Inquiry into Poverty, *Essays on Law and Poverty: Bail and Social Security*, (1977); Australian Government Commission of Inquiry into Poverty, *Poverty and the Legal Profession in Victoria*, (1977).

infrastructure of the ALAO was now established - and it had quickly achieved widespread popular support.[564] A public survey commissioned by the ALAO in May 1975 indicated that its national public profilem, which had been reinforced and promoted in 1974 by television advertising and other media coverage, was high and favourable.[565] The ALAO also enjoyed a significant degree of cross-partisan political support.[566] However, the reaction of the organised legal profession to the ALAO was not as positive.

The organised profession - together with many practising lawyers - had reacted with hostility to the presence of the ALAO and its work.[567] On 20 February 1975, members of the Law Institute in Victoria resolved, at an extraordinary general meeting, to initiate High Court proceedings challenging the ALAO's legality and funding.[568] Other law societies expressed their opposition less dramatically - but no

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564 In 1974/75, the ALAO had provided legal advice to over 99,000 people - and referred over 20,000 legally-assisted matters to private lawyers. In June 1975, a month which probably represented the peak of its operations, ALAO staff provided legal advice (approx. 50% crime, 15% civil and 35% family law) to approximately 10,000 people: (1976) 1(12) *Legal Service Bulletin* 346.

565 ANOP, "The Australian Legal Aid Office: A Research Study of the Implications and Communicative Effectiveness of its Introduction", July 1975. The survey indicated that there was strong public awareness about the need for the ALAO. People saw it as serving the legal needs of poorer and disadvantaged people, primarily with respect to marital problems, property, rent and eviction matters. However, the survey also indicated that the ALAO should clarify what services it actually provided.

566 G Hawker, above n 486 at 68.

567 Professional hostility was not assuaged by the fact that the ALAO was intended to coexist with the established functions of the private legal profession, and that its operations were to complement the existing public and law society legal aid schemes: cl 2 Directive by the Attorney-General, J P Harkins, above n 139 at 47; Ministerial Statement, above n 3 at 2802; Attorney-General's Department, Office Memorandum No 1/75, Referrals to Private Practitioners by Central Office - Australian Legal Aid Office, n 519 above. However, this was not how influential groups within the organised profession portrayed the intentions of the Whitlam Government. These groups fostered something of a whispering 'scare campaign' - suggesting secret agendas, raising fears of nationalisation of the legal services industry etc. Their reasons for this were manifold. In part, it was the fault of the Whitlam Government. The objectives of its new legal aid policies - especially the role of the ALAO - were not clearly defined. Furthermore, there was the controversial personal style of Senator Murphy as Commonwealth Attorney-General - and the vigorous approach of the Whitlam Government to the processes of law reform: L Maher, "Murphy the Attorney-General" in J A Scutt (ed), above n 492, 36 at 38-44; above pp 79-80. Another factor was the very speed at which the ALAO had established its national network and public profile, and its decision to employ salaried lawyers: above pp 86-87. Other reasons included the political interests of the organised profession. It had been the dominant actor in legal aid throughout the post-war period (see Chapter Three). The Commonwealth had finally entered the field of national legal aid, but it was not on terms which were to the liking of the State and Territory law societies and bar associations. They were concerned about the independence of the private profession, and the constitutionality of the operations of the ALAO: Letter 19 February 1975, V F Wilcox, Attorney-General of Victoria, to Mr. Gordon Lewis, Executive Director, The Law Institute of Victoria; Letter 4 March 1975, Kep Enderby, Attorney-General of Australia, to Mr. Dawson, President, The Law Institute of Victoria.

568 The resolution was subsequently ratified in a special referendum by a majority of members of the Law Institute. A writ was issued on 12 July 1975 - on behalf of the Victorian Attorney-General at the relation of the Law Institute - challenging the constitutional validity of the ALAO. The defendants were the Commonwealth of Australia and its Attorney-General. The writ claimed that the establishment of the ALAO lacked statutory authority, the appropriation of Commonwealth funds for its purposes was unlawful and invalid and sought declaratory and injunctive relief. No further action appears to have been

less forcefully. In the Australian Capital Territory, the Law Society challenged the right of legal practitioners employed by the ALAO to hold practising certificates.[569] In South Australia, the Law Society protested to the ALAO about its advertising of legal aid services.[570]

Nevertheless, professional hostility had peaked by mid-1975, and the organised legal profession and practising lawyers had come to a kind of begrudging acceptance of the presence of the ALAO. This was not surprising, given that in the financial year 1974-75 the ALAO referred 20,346 cases - with an estimated value of $6.071 m - to private lawyers.[571] In the coming financial year, the number of legally-aided 'private' referrals was set to double - and the associated expenditure would increase by almost 100 per cent.[572]

However, by early 1975, notwithstanding the reaction of the legal profession, the Whitlam Government was ready to convert the interim scheme into a permanent national scheme of legal aid. It had in hand the first ALARC report, and was anticipating its final report.[573] The discussion paper on legal aid for the poor prepared by the Commissioner for Law and Poverty was in public circulation, and the thrust of his views were now known.[574] Moreover, the Federal Government had established a national profile as a financier of legal aid. Commonwealth expenditure had risen from a total of slightly more than $1.1 m in 1972-73 (Table 1 below) to $8.29 m in 1974/75. Whilst approximately 32 per cent of this expenditure was on the Aboriginal legal services, the majority ($5.6 m) was spent on the State and Territory public and law society schemes and the ALAO (Table 1 below).[575]

In February 1975, the new Commonwealth Attorney-General, the Rt Hon K E Enderby, began to discuss the Federal plans for the future of legal aid with the Law Council of Australia, the legal profession and other interested parties.[576] By the end

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taken, and the writ presumably lapsed or was withdrawn: "Writ Issued Against Commonwealth" (1975) 49 *Law Institute Journal* 339; J P Harkins, above n 139 at 27; (1975) 1(7) *Legal Service Bulletin* 183.

569 Re Bannister and Legal Practitioners Ordinance 1970 (ACT); ex parte Hartstein (1975) 5 ACTR 100; S M W Withycombe, above n 421 at 72-74; "President's Message", (1974) *Law Society Journal* 186; "ALAO. Case Note" (1975) 1 (8) *Legal Service Bulletin* 204.

570 J P Harkins, above n 139 at 6-7.

571 Ibid at 59.

572 In 1975-76, the number of ALAO referrals to the private profession increased to 45,716, with an estimated value of $11.782 m: J P Harkins, above n 139 at 58.

573 Above pp 87-88.

574 Above pp 89-90. In October 1975, a second general report into law and poverty in Australia was published by the Commission of Inquiry into Poverty - Australian Government Commission of Inquiry into Poverty, Second Main Report, Law *and Poverty in Australia*, (1975).

575 The establishment of the national Aboriginal legal aid scheme is discussed below at pp 107-108.

576 Mr. Enderby was appointed Attorney-General on 19 February 1975, following the appointment of Senator Murphy to the High Court (above n 494): H Reps Deb 1975, Vol 95 at 3472; Letter 19 February 1975, Kep Enderby, Attorney-General of Australia, to Mr. K F O'Leary, President, Law Council of Australia. The Federal plans included the formation of an interim Australian Legal Aid Council pending the creation of a statutory Commonwealth legal aid commission.

Table 1: Federal expenditure on legal aid 1972-80

Legal aid scheme	Financial Year, ASm (figs. are rounded)							
	1972-73	1973-74	1974-75	1975-76	1976-77	1977-78	1978-79	1979-80
Legal Service Bureau	.229	-	-	-	-	-	-	-
Special circumstances (including special appropriations)	.029	.028	.020	-	-	-	.084	.073
ACT/NT legal aid schemes	.108	.180	.282	.320	.225	.075	-	-
Grants to supplement State legal aid schemes	-	2.0	1.550	1.0	1.0	.080	-	-
State and Territory legal aid commissions	-	-	-	-	-	.758	4.511	9.007
Australian Legal Aid Office		.340	3.775	11.208	16.9	19.186	17.022	13.888
Commonwealth Legal Aid Commission	-	-	-	-	-	.078	.35	.557
Aboriginal national legal aid scheme[1]	.741	1.235	2.671	3.656	3.711	3.89	4.208	4.983
Grants to voluntary schemes	-	-	-	-	-	-	.021	.175
	1.107	3.783	8.298	16.184	21.836	24.067	26.197	28.684

Notes: 1. Includes a total of $52146 over 1972-78 for special projects, social welfare and legal expenses involved in national issues.

Sources: H Rep Deb 1981 Vol 123 at 2632-2634; Appendix 8, H Reps St Comm on Aboriginal Affairs, (1980)

of April, progress had been made towards settling draft legislation to establish a framework for a permanent national scheme managed by the Commonwealth. In June, Mr. Enderby introduced the Legal Aid Bill 1975 (Cth) into the Parliament. The Bill envisaged incorporation of the ALAO as a statutory authority with comparable functions to its non-statutory predecessor.[577] The reconstituted ALAO would continue to provide legal aid to 'Commonwealth people', in 'Commonwealth matters' - and within Federal law and government.

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577 Cls 4. 5. 7, 37-40 & Part III Legal Aid Bill 1975 (Cth); H Reps Deb 1975, Vol 95 at 3472. Cls 3 (2), 6 (1)-(2) & 31-34 of the Bill intended that the statutory ALAO would provide legal aid in accordance with the policy and administrative guidelines specified in cl 8 (1), a statutory transformation of the administrative warrant and legal functions of the existing ALAO.

Clause 6 (2) of the Legal Aid Bill proposed that the statutory Australian Legal Aid Office was to be empowered to provide legal aid via its own employed lawyers - or by referral to those in private practice.[578] It was also to be empowered to make law reform recommendations to the Attorney-General in relation to legal aid, and to conduct educational programs designed to promote greater public understanding of Federal laws.[579] The Legal Aid Bill also contemplated the formation of another new statutory authority, which was to be known as the Australian Legal Aid Commission. Its proposed functions were to advise and make recommendations to the Attorney-General on the provision of legal aid, and to conduct related educational programs and research.[580] The administrative arrangements incorporated in the Legal Aid Bill included special provisions intended to keep the operations of its proposed national scheme within the limits of the constitutional powers of the Commonwealth Parliament.[581] They also defined an eligibility regime for the provision of legal assistance, legal advice and other legal aid services.[582]

However, neither the Legal Aid Bill nor its proposed national scheme were ever to become part of the legal machinery of the Australian welfare state. On 9 October 1975, when the second reading debate was resumed in the House of Representatives, the further passage of the Bill was opposed by the Federal Opposition. Mr. R J Ellicott, QC and Mr. J Howard, who were the principal Opposition spokesmen in the debate, did not object to the basic policy underpinning the new Commonwealth profile in legal aid. Indeed, as Mr. Howard made very clear, the Federal Opposition supported the principle of Commonwealth participation in a national legal aid scheme:

> We support legal aid and we have made that clear before. We make it clear again and nothing that we will do during the course of the debate can be honestly represented as being other than total support for the provision of adequate legal services. But the Government apparently intends to argue that, just because doubts may be expressed about the method that it has chosen to implement legal aid, those who have expressed the doubts are therefore against legal aid.[583]

However, the Opposition rejected - for various reasons - the proposals for a national scheme as expressed by the Whitlam Government in the Legal Aid Bill. In some instances, Federal Opposition took objection to particular clauses of the Bill, for instance, its plan to create a statutory Australian Legal Aid Office. Its spokesmen also questioned the desirability of a permanent separation between Commonwealth and State provision of legal aid.

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578 Cl 9 Legal Aid Bill envisaged that lawyers employed by the statutory Australian Legal Aid Office would be subject to similar professional duties - and enjoy similar privileges - as those applying to private lawyers.

579 Ibid, cl 8 (2).

580 Ibid, cl 14-16 & 17 (1); J P Harkins, above n 139 at 31.

581 Ibid, Part VI.

582 Ibid, cl 29.

583 H Reps Deb 1975 Vol 97 at 1973.

Ultimately, the Opposition's objections went beyond concerns about the machinery provisions of the proposed national scheme. Mr. Howard and Mr. Ellicott also voiced concerns about the likely total financial cost of the proposed permanent scheme. Both men believed there had been inadequate consultation with the private legal profession. Furthermore, they were concerned about the possible impact of the proposed scheme upon the 'independence' of both the private legal profession and the performance of the statutory functions of the new Australian Legal Aid Office.[584]

The consequence was that Mr. Howard moved that further parliamentary consideration of the Legal Aid Bill be deferred and a joint committee established to "consider the important legal, social and constitutional issues involved".[585] His motion was seconded by Mr. Ellicott, but defeated in a division on 16 October.[586]

Yet, unbeknownst to the Whitlam Government, the destiny of the Legal Aid Bill 1975, and its own fate as a national government, was being settled elsewhere. On the 11 November 1975, the Governor-General dismissed its ministers from office, prorogued the Commonwealth Parliament, and appointed an interim Federal Government to be administered by the Leader of the Federal Opposition, the Rt Hon Malcolm Fraser. Accordingly, the Legal Aid Bill lapsed, and its provisions were never to be revived.

The Establishment of the National Scheme

National elections for a popularly constituted new Federal government were held on 13 December 1975, and a Liberal/National Country Party coalition led by Mr. J M Fraser was elected to office. A few days before Christmas. Mr. R J Ellicott, QC was appointed as its first Attorney-General.

The policy of the new government towards Commonwealth participation in a national legal aid scheme was already public knowledge. It was less than two months ago that its ministers - including Mr. Ellicott - had opposed the passage of the Legal Aid Bill 1975.[587] Moreover, since 1974 it had been the official Liberal Party policy to abolish the ALAO, notwithstanding contemporary evidence of considerable support amongst the ranks of some Liberal Members of Parliament in early 1975.[588] Therefore, whilst the Fraser Government supported continuing Commonwealth involvement in national legal aid, it believed there were alternatives to the 'Commonwealth-centric' plans of the Whitlam Government for a permanent national scheme.

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584 Ibid at 1974-1975 & 1982-1985.

585 Ibid at 1977 & 1982.

586 Ibid at 2252.

587 Above at pp 94-95.

588 Liberal Party of Australia, *Federal Platform*, (1974) at 18: G Hawker, above n 486 at 68, explains this dissipated throughout 1975 as the wider political conflicts intensified.

The Ellicott Review of National Arrangements for Legal Aid

To explore these alternatives, in mid-January 1976 Mr. Ellicott announced the Federal Government would conduct a national review of legal aid, excluding the Aboriginal legal services.[589] The review, which began almost immediately, was intended to determine "exactly how the provision of legal aid could best be managed, in the public interest, bearing in mind the need of citizens for legal aid and the efficiency and economy of its administration".[590] The Attorney-General discussed his proposals for revised Commonwealth participation in legal aid with the Law Council of Australia and other interest groups.[591] Meetings were also held at the administrative level with State officials to discuss the future of Commonwealth involvement. By the end of February, the preliminary consultative phase of the review was completed.

The review culminated in a special meeting of the Standing Committee of Commonwealth and State Attorneys-General in Hobart on 4 March.[592] Mr. Ellicott had previously circulated a position paper to the States outlining five options to reorganise the national provision of legal aid. Each of these options had one common element - they all proposed the disbandment of the ALAO and the absorption of its functions and staff into a new national scheme.[593] The Fraser Government preferred two of these options, and this was disclosed to the State Attorneys-General at the opening of the meeting.

The preferred Commonwealth options favoured the creation of a permanent national scheme administered by new statutory authorities, to be established in the States and Territories. These agencies would be administered by boards of management, who were 'independent' of governments in their deliberations and functions. Whilst the Commonwealth would have representation, Mr. Ellicott proposed that representatives of the legal profession should constitute the majority of the membership of the boards of management of the new legal aid agencies.[594] These managing boards should administer the operations of the new national scheme, which would be financed by the Commonwealth and State governments in accordance with funding agreements. The funds to be committed through these inter-governmental agreements would be negotiable, although the Commonwealth anticipated making "a very substantial commitment in terms of funds".[595]

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589 Commonwealth Attorney-General, Press release 3/76. "Review of Legal Aid", 15 January 1976; J P Harkins, above n 139 at 33-35.

590 J P Harkins, above n 139 at 34.

591 Ibid at 35.

592 The meeting was attended by the Commonwealth Attorney-General, the New South Wales Attorney-General and Minister for Justice, the Attorneys-General of Victoria, Queensland, South Australia and Western Australia, and the Chief Secretary of Tasmania.

593 Transcript of the special meeting of State and Commonwealth Attorneys-General, Hobart, Thursday, 4 March 1976 at 6-7.

594 Ibid.

595 Ibid at 5.

The preferred options also proposed the establishment of a Commonwealth statutory representative body which was to be empowered to monitor the operations of the national scheme, and investigate, report and make recommendations to the Federal Government on national 'needs' for legal aid. Mr. Ellicott saw the Commonwealth options as addressing two important policy criteria. First, they recognised the significance of the legal profession and private lawyers in the national organisation and provision of legal aid. Secondly, they acknowledged the governmental and legislative responsibilities of the States.[596]

The special meeting of the Standing Committee of Commonwealth and State Attorneys-General discussed at length questions relating to the Commonwealth proposals, but ended without any final agreement having been reached. However, the law ministers did leave Hobart having agreed - in principle - that it was desirable for all Australian governments to cooperate in establishing a comprehensive national legal aid scheme, which minimised overlap in service provision.[597] They had also agreed to further meetings between Commonwealth and State public officials to discuss in detail the optimal form of the proposed national scheme.[598]

By mid-1976, the original 'in principle' agreements had been converted into a joint Commonwealth-State policy on legal aid which closely followed the preferred Commonwealth options outlined in Hobart. The Fraser Government and the States agreed to enter into formal agreements for the provision of legal aid. the Commonwealth was to constitute a national legal aid commission and, within each State and Territory, statutory agencies were to be established to administer the national scheme. The implementation of this policy over 1976-80 is considered below.

The Commonwealth-State Legal Aid Agreements

The linchpin of the permanent national scheme agreed to between the Fraser Government and the States was the execution of inter-governmental agreements for the funding and provision of legal aid. These were central to it organisation, definition and funding. By mid-1979, agreements had been signed between the Commonwealth and State governments in Western Australia, South Australia and Queensland.[599] Negotiations were in train with Victoria, which at the end of 1979 executed a legal aid agreement with the Commonwealth .[600]

These inter-governmental agreements were to fix the shape of the national legal aid scheme until the mid-1990s. However, outside the inner circles of Commonwealth-State legal aid administration they are its least-known feature. Accordingly, it is useful to outline the major principles and conditions which they contained. Whilst

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596 Ibid at 3-4.

597 Ibid at 73.

598 Ibid.

599 Commonwealth Legal Aid Commission, *Second Annual Report 1978-79* , (1979) at 3.

600 Ibid.

the original inter-governmental agreements were not identical, they were highly comparable.[601] Consequently, it is possible to consider one agreement - the 1978 agreement between the Commonwealth and Western Australia reproduced and appended at Appendix "A" - to exemplify the organisational basis of the joint Commonwealth-State national scheme.[602]

The primary function of the legal aid agreements was to divide governmental responsibilities within the national scheme, and to define its scope. The Federal Government, on its part, agreed to establish a Commonwealth commission to oversee the national provision of legal aid.[603] It also agreed that the Commonwealth would not establish new legal aid agencies in the contracting States for the duration of the agreements.[604]

The responsibility for providing legal services was assigned to the State statutory commissions.[605] These legal aid commissions were to absorb the functions of the ALAO as well as the public and law society schemes in the respective States.[606] The agreements contemplated that the legal aid commissions should be constituted by members representing the contracting parties, together with representatives of local social welfare bodies and the organised legal profession.

The agreements provided that the State commissions would assist people requiring legal aid in problems and proceedings arising under either Commonwealth or State law. Legal problems and proceedings arising under Commonwealth law were defined as "the Federal area", and legally-aided 'Federal matters' were to be paid for by the Commonwealth.[607] The value of these matters was to be calculated by reference to ALAO expenditure on 'Commonwealth matters' in a State in the year preceding the effective date of the respective legal aid agreement.[608] State commissions providing legal aid in the Federal area were required to observe relevant recommendations of the Commonwealth commission.[609] However, the obligation of States to provide 'Federal' legal aid was conditional. A State could

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601 The 3 April 1987 Agreement between the Commonwealth of Australia and the State of New South Wales is similarly comparable.

602 Below at pp 288-317.

603 Paras (A)-(F) & cls 2-4 agreement dated 12 January 1978 between the Commonwealth of Australia and the State of Western Australia in relation to the provision of legal aid.

604 Ibid, cl 22.1.

605 Ibid.

606 Ibid, cls 4.5, 6.1 & 13-15 inclusive. The agreements contained administrative arrangements for transfer of ALAO staff to the State commissions in accordance with the Commonwealth Legal Aid Commission Act 1977 (Cth): Commonwealth Legal Aid Commission, above n 599 at 4.

607 "The Federal area" included any matters relating to - or arising out of - State law in which the persons seeking assistance were members or discharged members of the Defence Force or their dependants, migrants, persons in receipt of benefits under Commonwealth social services legislation, indigenous people or students. It also included any State matters or proceedings which the Commonwealth Attorney-General may designate. Agreement above n 603 at cl 8.

608 Ibid, cls 8, 9-11 inclusive & 18-20.

609 Ibid, cl 5.1 & 5.2.

avoid the obligation if the cost exceeded its actual or anticipated income from Commonwealth funding, contributions paid by 'Federal' applicants and costs recovered in 'federal matters'.[610]

In legal problems and proceedings falling outside the Federal area, the States were required to fund all legal aid provided by the statutory commissions, and contribute towards their operating costs. The amount of operational funding was to be determined by reference to the net operating costs of the legal aid commission, an amount which represented total operating costs less "contributions by and costs recovered or to be recovered from applicants and statutory interest available in solicitors trust accounts and other trust accounts".[611]

In performing their statutory functions, the State legal aid commissions were to be 'independent' of both Commonwealth and State governments. Moreover, they were - with the agreement of the contracting governments - permitted to finance local voluntary legal aid bodies.[612] The inter-governmental agreements also regulated the delivery of lawyer services. A State legal aid commission was authorised to provide services via its own employed lawyers, or by referral to private lawyers. It was required to determine policies to allocate the distribution of legally-aided lawyer work while keeping in mind the desirability of maintaining internal professional lawyer skills. The States also agreed to ensure that local legislation enacting the national scheme would acknowledge the presence of a solicitor-client relationship between staff lawyers and their legally-assisted clients.[613] Finally, the inter-governmental legal aid agreements were intended to operate indefinitely, but there was reciprocal provision for termination on notice.[614]

By 1980, inter-governmental agreements had been executed, and were in force, between the Commonwealth and South Australia, Queensland, Western Australia and Victoria. The Federal Government and its negotiating Ministers and officials had been unable to settle the terms of an agreement with New South Wales and Tasmania.[615]

The Ellicott plan had always contemplated that the mainland federal territories should join the national scheme on terms comparable to those negotiated between the Commonwealth and the States. Following the meeting in early 1976, Mr. Ellicott had issued revised administrative instructions to the ALAO in both the Australian Capital Territory and the Northern Territory. Pending the establishment of statutory

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610 Ibid. cl 5.3.

611 Ibid. cl 12.1.

612 Ibid. cl 4.6.

613 Ibid. cls 16.1-16.2 & 17.1.

614 Ibid. cls 21.1-21.4.

615 The developments in New South Wales in 1976-80 are considered below at pp 105-106. In Tasmania, no action had yet been taken on a 1977 parliamentary report: Parliament of Tasmania, *Tasmanian Government 1977 Committee of Inquiry into Future Legal Aid Services in Tasmania*, (30 June 1978). Commonwealth-State legal aid agreements were eventually signed by the Hawke Federal Labor Government with New South Wales in 1987 and Tasmania in 1990.

commissions, its staff were directed to modify local operational practice to conform with the 'in principle' Commonwealth-State agreement.[616] In mid-1979, the Commonwealth Legal Aid Commission recommended that provision of legal aid in the Territories should be on similar terms to those in the inter-governmental agreements.[617] However, it was not until the late 1980s, when the mainland federal territories achieved self-government, that agreements were executed. In 1989, the Commonwealth entered into a legal aid agreement with the new government in the Australian Capital Territory, and similarly in the Northern Territory in 1990.

The Commonwealth Legal Aid Commission

In mid-1977, the Commonwealth established its national legal aid commission.[618] The statutory functions of the Commonwealth Legal Aid Commission reflected its role as an agent of the Federal Government in the administration of the national scheme.[619] Its primary function was to monitor the operation of the national scheme and advise the Attorney-General on Federal and national interests in the provision of legal aid. In effect, it assumed the national coordination functions performed by the ALAO. The Commission was also required to provide and manage the infrastructure for effective Commonwealth participation in the national scheme. For instance, it was to conduct research, and represent the Federal Government in the State and Territory legal aid commissions.[620] It was also to assist in the administration of the national statutory and non-statutory schemes.[621]

The State and Territory Legal Aid Commissions

It was the State and Territory legal aid commissions which were very much the public face of the new national scheme. The first legal aid commission was established by Western Australia in 1976, followed by South Australia and the Australian Capital Territory in 1977.[622] In 1978, commissions were established in Victoria and Queensland.[623] By 1980, these five commissions were fully operational.[624]

The statutory schemes enacted in the Australian Capital Territory, Queensland, South Australia, Western Australia and Victoria were highly comparable, as were the later

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616 J P Harkins, above n 139 at 38; H Reps Deb 1976 Vol 98 at 1204-5.

617 Commonwealth Legal Aid Commission, above n 599 at 5.

618 S 4 Commonwealth Legal Aid Commission Act 1977 (Cth); H Reps Deb 1977 Vol 105 at 2032-2033. The Commission was constituted by eight members representing the Commonwealth, the States which had established legal aid commissions, the Law Council and the Australian Council of Social Service Inc.

619 S 6 (a)-(j) Commonwealth Legal Aid Commission Act 1977 (Cth).

620 Address to the North Queensland Legal Convention, Townsville, 9 October 1977, by the Commonwealth Attorney-General, Senator the Hon Peter Durack, QC, quoted in Commonwealth Legal Aid Commission. *First Annual Report 1978* (1978) at 6.

621 S 6 (k)-(m) Commonwealth Legal Aid Commission Act 1977 (Cth).

622 Legal Aid Commission Act 1976 (WA); Legal Services Commission Act 1977 (SA); Legal Aid Ordinance 1977 (ACT).

623 Legal Aid Commission Act 1978 (Vic); Legal Aid Act 1978 (Qld).

624 Commonwealth Legal Aid Commission, above n 599 at 9.

schemes in New South Wales, the Northern Territory and Tasmania.[625] They charged the legal aid commissions with two primary statutory functions.

The first was to administer the statutory accounts into which the funds paid to the commissions to administer the schemes were to be deposited.[626] The principal source of these operational funds was the annual financial grants paid by the Commonwealth under the inter-governmental agreements. The remainder was to be derived from State and Territory financial grants, interest from solicitors' trust accounts, client contributions and recovered costs and interest on investments.

The second primary statutory function of the commissions was to provide legal aid in the most effective, efficient and economical manner in accordance with the provisions of the respective schemes.[627] The scheme required the commissions to provide legal aid consonant with the organisation of the legal services industry, and nominated social justice objectives. In the case of the former, they were directed to ensure that an appropriate balance was achieved between the organised public provision of legal aid, and maintaining an independent private legal profession.[628] They were also required to be cognisant of the different and sometimes competing interests of staff lawyers and private lawyers - including different sub-groups of private lawyers - in allocating and distributing legally-aided matters.[629] In the case of the social justice objectives, the commissions were required to take steps to establish

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625 Legal Aid Commission Act 1979 (NSW); Legal Aid Commission Act 1990 (Tas) & Legal Aid Act 1990 (NT). This appears to be not so much a product of a policy dictated legislative model as the typical Australian legal aid experience of adapting existing statutory arrangements to broadly correspond with a national initiative. Harkins, above n 139 at 37, records that following the Hobart meeting of the Standing Committee of Attorneys-General (above pp 96-97), Mr. Ellicott asked his departmental officers to draft model legislation for the establishment of the State and Territory legal aid commissions. Copies of this draft legislation were provided to the State Attorneys-General and the Law Council of Australia for comment. The draft legislation provided inter alia for the right to practise of lawyers employed by the legal aid commissions, public advertising of their services, eligibility criteria, review committees and contained mechanisms for community consultation to assist in the provision of services. However, in late 1976, in a television interview Mr. Ellicott denied that this draft was "model legislation", saying that it was merely "a first or second draft Ordinance for the Australian Capital Territory and the Northern Territory. When the final draft is available then that could well be the basis on which the States might be asked to approach (sic) the matter": Commonwealth Attorney-General, Press release 77/76 (1976).

626 S 12 (1) (b) Legal Aid Commission Act 1976 (WA); s 23 (4) Legal Services Commission Act 1977 (SA); cl 41 (3) Legal Aid Ordinance 1977 (ACT); Legal Aid Act 1978 (Qld), s 42 (3); s 9 (1) (b) Legal Aid Commission Act 1978 (Vic).

627 S 15 (a) Legal Aid Commission Act 1976 (WA); s 11 (a) Legal Services Commission Act 1977 (SA); s 10 (1) (a) Legal Aid Ordinance 1977 (ACT); s 11(1) (a) Legal Aid Act 1978 (Qld); s 9 (1) (a) Legal Aid Commission Act 1978 (Vic), which also required that legal aid should be provided "in a manner which dispels fear and distrust."

628 Eg, s 15 (1) (AA) Legal Aid Commission Act 1976 (WA) & s 11 (1) (b) Legal Aid Act 1978 (Qld).

629 The legal aid commissions were required to liaise with professional bodies in order to facilitate the use, in appropriate circumstances, of services provided by private legal practitioners: s 15 (abb) Legal Aid Commission Act 1976 (WA); s 10 (1) (h) Legal Aid Commission Act 1978 (Vic); s 11 (1) (d) Legal Aid Act 1978 (Qld). The legislation also contained various arrangements with respect to the compilation and management of panels of private legal practitioners - eg, ss 30 & 40 (2)-(8a) Legal Aid Commission Act 1978 (Vic).

local legal aid offices to promote access to lawyers' services and provide community and public legal education.[630]

The statutory scheme neither gave poorer people a right to legal aid nor conferred upon ordinary citizens a universal juridical right to have legal representation provided at public expense. Instead, it adopted a mechanism which was applied in many comparable Western post-war legal aid schemes.[631] It created a general right to apply for lawyers' services to be provided at public expense and to have that application made the object of the statutory discretions lawfully exercisable by the commissions. In the Australian Capital Territory, Queensland, Victoria and Western Australia, the ambit of those discretions varied according to whether an applicant sought legal advice, duty lawyer services or legal assistance.[632] In these four jurisdictions, commissions were empowered to grant applications for legal advice and duty lawyer services without charge or the imposition of a means test.[633] However, their powers to approve or refuse applications for legal assistance was subject to two statutory constraints. The first constraint were limitations arising out of the status and residence of applicants and the forum of the subject proceedings.[634] Secondly, the discretion to determine applications for legal assistance was required to be exercised in accordance with prescribed financial and 'merits' eligibility criteria.

The prescribed financial criteria required that the legal aid commissions in the Australian Capital Territory, Queensland, Victoria and Western Australia be satisfied that an applicant would be unable to afford the cost of lawyers' services if he or she were to seek to 'buy' them from a private lawyer. In making this determination, the commissions were required to give attention to all relevant matters, including an applicant's income, the cash readily available or accessible to him or her, their debts, liabilities and other financial obligations, the local cost of living, the cost of private lawyers' services and any other matters affecting their ability to meet the cost of obtaining legal services. The prescribed 'merits' or equity criteria took the form of a requirement that legal assistance could only be provided where it was reasonable in all the circumstances to do so. For instance, s 28 (3) (a) and (b) of the Legal Aid Ordinance 1977 (ACT) provided that[635]

> (a) the nature of any benefit that may accrue to the person, to the public or to any section of the public from the provision of the assistance or of any detriment that

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630 Eg, s 15 (b) Legal Assistance Act 1976 (WA), s 11 (b) Legal Services Commission Act 1977 (SA) & s 10 (h) Legal Aid Act 1978 (Qld).

631 J Gordley, "Variations on a Modern Theme" [1972] 24 *Stanford Law Review* 387 at 391-406.

632 Similar provision was later made in the Northern Territory.

633 Eg, Legal Aid Commission Act 1976 (WA), s 34 (1).

634 The commissions could approve legal assistance to resident natural persons for the purposes of legal proceedings in any jurisdiction and legal assistance to non-resident natural persons for the purposes of proceedings or matters within the local jurisdiction. Legal assistance could also be granted to corporate applicants, although in several instances they were required to follow special procedures, eg, s 27 (6) Legal Aid Act 1977 (ACT).

635 The subsequent legislation in the Northern Territory and Tasmania provided the same.

may be suffered by the person, by the public or by any section of the public if the assistance is not provided; and

(b) in the case of assistance in relation to a proceeding in a court or before a tribunal – whether the proceeding is likely to terminate in a manner favourable to the person.

South Australia was the exception, in its scheme the power to determine applications for legal aid was undifferentiated.[636] The Legal Services Commission - or its principal officer - was empowered to establish different procedural and eligibility criteria to determine applications for legal aid.[637] However, the exercise of this power was subject to the governing principles prescribed by s 10 (2) of the Legal Services Commission Act 1976 (SA). Its overriding principle was that "legal assistance should be granted ... where the public interest or the interests of justice so require." Its subsidiary principle was that "legal assistance should not be granted where the applicant could afford to pay in full for that legal assistance without undue financial hardship." All the legal aid commissions were empowered to make administrative guidelines distinguishing between specific classes of applicants, types of proceedings and the cost of legal services to assist in deciding which applications for legal assistance in civil, criminal and family law matters should be approved.

The statutory scheme also conferred a range of incidental powers on the legal aid commissions with respect to applications for legal assistance. For instance, they could impose conditions requiring successful applicants to pay out-of-pocket expenses or execute a mortgage or charge to secure payment of the cost of providing legal assistance.[638] The commissions were also required to determine the type and extent of the services to be provided to a legally-aided person.[639] Furthermore, they were empowered to determine guidelines for the allocation of legally-assisted matters between staff and private lawyers.[640]

To varying degrees, the statutory scheme permitted a legally-assisted person to express a preference for a specific private lawyer.[641] In Victoria and Western Australia, the legislation entitled a legally-aided person to select a private lawyer

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636 The same was the case later in New South Wales and Tasmania.

637 Eg, ss 5 & 17 Legal Services Commission Act 1977 (SA).

638 Eg, s 39 (1) (b) (iii) Legal Aid Commission Act 1976 (WA).

639 S 39 (1) (a) Legal Aid Commission Act 1976 (WA); ss 27 (1) & 28 (b) Legal Aid Commission Act 1978 (Vic); s 32 (1) Legal Aid Ordinance 1978 (Qld).

640 Eg, s 11 Legal Aid Ordinance 1977 (ACT) which provided that in determining allocation guidelines the ACT Legal Aid Office should have regard to the need for legal services to be readily available and easily accessible to disadvantaged persons, the need to make the most efficient use of the moneys available to the Commission, and the desirability of enabling a legally-assisted person to obtain the services of a lawyer of his choice, of maintaining the independence of the private legal profession and enabling its officers to utilise and develop their expertise and maintain their professional standards by conducting litigation and doing other kinds of professional legal work.

641 South Australia was the exception.

from a list established and maintained by the commission.[642] If this right was waived, it could make its own selection from the list - if it did so, the commission was required to give paramount consideration to the interests of the legally-aid person, but also to consider the equitable allocation of referrals amongst listed lawyers.[643] In the Australian Capital Territory and Queensland, legally-aided people were not entitled to select their own lawyer.[644] However, their personal preference was a paramount consideration for the legal aid commission when making a selection from the names of enlisted private lawyers, also having regard to the equitable allocation of work amongst panel members, and the nature of their practices and expertise.[645]

The statutory scheme also included review and appeal procedures. Applicants who were aggrieved by a decision with respect to an application for legal assistance could obtain redress. In the Australian Capital Territory, Queensland, Victoria and Western Australia, an aggrieved applicant could invoke the review and appeal procedures by initially asking to have a decision reconsidered by the primary decision-maker.[646] If he or she was dissatisfied with the outcome of this preliminary review, they could appeal to a statutory committee empowered to confirm or vary the original decision - or substitute its own. Once again, South Australia was the exceptional case. Its legislation did not provide for an initial process of preliminary review. The Commission itself was nominated as the review body.[647] In all jurisdictions, legal aid was not generally available for an appeal and decisions of reviewing authorities were final and conclusive.[648]

The Dismantling of the Australian Legal Aid Office

Over 1973-75, the ALAO had embodied the hopes of many for law reform and improved access to law.[649] However, in the end it "lived a less heroic existence" than many of its supporters - both then and now - would have us believe.[650] As the

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642 S 40 (1) Legal Aid Commission Act 1976 (WA) & s 30 (1) Legal Aid Commission Act 1978 (Vic). Comparable provision was later made in s 12 (f) Legal Aid Commission Act 1979 (NSW).

643 S 40 (2) (3) & (5) Legal Aid Commission Act 1976 (WA) & s 30 (2) (3) & (5) Legal Aid Commission Act 1978 (Vic).

644 This was also the subsequent legislation in the Northern Territory and Tasmania.

645 S 32 (7) Legal Aid Ordinance 1977 (ACT); s 33 (7) Legal Aid Act 1978 (Qld).

646 S 36 (1) Legal Aid Ordinance 1977 (ACT); s 37 Legal Aid Act 1978 (Qld); s 34 Legal Aid Commission Act 1978 (Vic) & s 48 Legal Aid Commission Act 1976 (WA). Similar provisions were later included in s 35 Legal Aid Act 1990 (NT).

647 PART VI Legal Services Commission Act 1977 (SA). Subsequently, the legislation in New South Wales and Tasmania made provision for appeals made directly to a legal aid review committee: PART III Division 3 Legal Aid Commission Act 1979 (NSW) & Legal Aid Commission Act 1990 (Tas).

648 PART VI Legal Ordinance Act 1977 (ACT); ss 38-41 A Legal Aid Act 1978 (Qld); Parts IV and VI Legal Aid Commission Act 1978 (Vic); PART IV Legal Services Commission Act 1977 (SA); Part V Division 4 Legal Aid Commission Act 1976 (WA).

649 G Hawker, above n 486 quoting from ACOSS, "ACOSS Statement: ALAO - The Future of Legal Aid", October 1976; E G Whitlam, "The Labor Government and the Constitution" in G Evans (ed), above n 492 at 314.

650 G Hawker, above n 486 at 62.

machinery of the permanent national scheme was constructed, the scope of the operations of the ALAO was dismantled and its brief national presence gradually faded. In the late 1970s, ALAO staff and functions in the Australian Capital Territory, Queensland, South Australia, Western Australia and Victoria were absorbed into the legal aid commissions. The ALAO offices continued to operate in New South Wales until 1987 and in the Northern Territory and Tasmania until 1990 when legal aid commissions were established in accordance with the Commonwealth-State agreements.

In 1976, the ALAO's central office became a division of the Attorney-General's Department, where it continued to assist in providing and coordinating legal aid in the Federal legal system.[651] These functions - which in policy areas overlapped with the role of the Commonwealth Legal Aid Commission - included the administration of its ten national administrative and statutory legal aid schemes. The number of secondary national legal aid schemes increased over 1976-80. In 1976, Commonwealth provision of legal aid was extended with the enactment of a scheme to protect the land rights of Aboriginal peoples in the Northern Territory.[652] Administrative schemes were also introduced - or newly operating.[653] In 1979, the number of secondary national schemes increased again when legal aid was made available for the purposes of application to the Commonwealth Security Appeals Tribunal for review of security assessments.[654]

The Developments outside the National Scheme

The emergence of the national scheme was the major development in Australian legal aid in the 1970s. However, it was not the only change in the national system. The changes to legal aid outside the story of the national scheme fall into two categories. First, there were those which had some direct relationship to the changes in Federal legal aid policy. Secondly, there were changes which occurred separately

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651 In 1976, the ALAO represented Australia at the 13th Session of the Hague Conference on Private International Law reflecting the goal that the national reorganisation of legal aid should be "without discrimination as to nationality or residence and to endeavour to make reciprocal arrangements by Treaty or otherwise for the provision by other countries of adequate legal aid for Australian nationals, particularly in such matters as custody of children": J P Harkins, above n 139 at 20. The Federal Government instructed the ALAO to seek to have existing provisions for legal aid in the Convention Relating to Civil Procedure widened to include nationals of Convention countries not habitually resident in the country in which the relevant legal proceedings would take place. The ALAO was also instructed to press the Australian case that the eligibility test should be reformulated in terms of inability to afford the cost of the subject legal proceedings, and to include provision for payment of financial contributions: ibid at 20. In 1976, the ALAO also assumed responsibility for the administration of a new Federal non-statutory scheme whereby *ex gratia* financial assistance was provided to eligible Australian citizens to enable them to take civil proceedings in foreign jurisdictions in which legal aid was unavailable: ibid at 19-20.

652 Ss 54C(1) & 74A(1) (c) Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).

653 Eg, the Special Circumstances (Overseas) Scheme and several schemes implementing Australia's obligations under the Convention on International Access to Justice (above n 655): J P Harkins above n 139 at 19-20.

654 S 72 (1) Australian Security Intelligence Organisation Act 1979 (Cth).

to the national scheme although indirectly influenced by mainstream national public policy developments in the period - including legal aid.

In the first category were the developments in the public, law society and other schemes in the States and Territories. In the interim phase of the new national approach - 1973 to late 1975 - this arena saw few changes. In 1973, the Law Society of the Australian Capital Territory established a Legal Aid Bureau to provide free legal advice. There were also minor changes to the public scheme in New South Wales.[655] In 1974, Queensland repealed its poor prisoners' defence legislation, statutorily established its Public Defender and enacted reforms to criminal legal aid which were comparable to those introduced in New South Wales and Victoria in 1969.[656]

The major change in the States in this period was the growth in law society and other legal referral schemes, a development which was most marked in the two most populous States.[657] By 1974, there were 23 Citizens Advice Bureaux, social welfare offices and other advice and referral services centres at which people could obtain legal advice operating in Melbourne and provincial cities elsewhere in Victoria.[658] In New South Wales in 1975, the Law Society members voluntarily staffed 21 similar referral services in metropolitan and provincial centres.[659] Another significant development was the increased availability of duty lawyer services. In 1974, the law society schemes in Queensland, South Australia, Victoria, and Western Australia provided duty solicitors in a restricted number of metropolitan magistrates' courts.[660]

However, after 1976 the focus in legal aid in States was inevitably upon implementing their 'in-principle' agreement with the Commonwealth. Until 1978, the Federal Government continued to provide the law society schemes with supplementary funding (above Table 1). This gave a final boost to these otherwise flagging schemes, particularly those in South Australia and Tasmania.[661] However, over 1977-80 the State legal aid schemes - both the public and law society versions - in the Australian Capital Territory, Queensland, South Australia, Victoria and Western Australia were absorbed into the legal aid commissions.

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655 S M W Withycombe, above n 419 at 72: The Legal Aid (Miscellaneous Provisions) Act 1974 (NSW) amended the Legal Assistance Act 1943. The amendments are discussed in E J O'Grady, "The N.S.W. Government & Legal Aid", (1975) 1 (8) *Legal Service Bulletin* 197.

656 Public Defence Act 1974 (Qld); above at p 65-66.

657 Commonwealth Legal Aid Commission, *Directory of Legal Aid Services in Australia*, (1980) at 111-114.

658 (1975) 1(6) *Legal Service Bulletin* 161.

659 (1975) 1(8) *Legal Service Bulletin* 215.

660 For instance, in Victoria the 'duty solicitor' scheme established by the Legal Aid Committee only operated at the magistrates' courts at Melbourne and Prahran. In South Australia and Victoria, these schemes operated on a charitable basis. Queensland and Western Australia made provision for payment of participating lawyers: Australian Government Commission of Inquiry into Poverty, above n 27 at paras 4.15-4.18.

661 Australian Government Commission of Inquiry into Poverty, above n 27 at paras 2.132, 2.264 & 2.297-298.

Direct supplementary Federal funding of State legal aid - outside the national scheme - continued in New South Wales, Tasmania and the Northern Territory, but was now channelled through the ALAO which acted as a de facto legal aid commission in these jurisdictions. In 1979, in a development quite independent of the national scheme, New South Wales established a new statutory legal aid agency.[662] Its new Legal Services Commission - in conjunction with the Public Defender, the law society scheme and the ALAO - provided the basis of legal aid in New South Wales until its agreement with the Commonwealth in 1987. Comparable coalitions operated in Tasmania and the Northern Territory until 1990, although the ALAO remained the major legal aid provider.

In the second category defined above - changes which occurred separately to the national scheme - there were two significant developments. First, there was the establishment of a national Aboriginal legal aid scheme and, secondly, there was an increase in the number of community legal centres. These two developments are discussed below.

The Establishment of a National Aboriginal Legal Aid Scheme

In 1972, the Whitlam Government had come to office with a definite program to improve the social welfare of indigenous Australians.[663] This program included policies to tackle the injustice which historically had stigmatised their relationship with the legal system. These social justice policies included the expansion of the existing program of federal expenditure on legal aid.[664] As in other arenas of Aboriginal affairs, the Whitlam Government acted promptly.[665]

Within a few weeks of assuming office, it had issued a policy statement which said that it would provide legal aid for Aboriginal peoples in all courts.[666] Furthermore, in March 1973 the Commonwealth Attorney-General's Department prepared a draft program for the establishment of federally-funded autonomous, self-managed legal aid services for indigenous people.[667] In April, a meeting was convened in Canberra between Commonwealth officials and interested parties to discuss the draft program. The meeting agreed upon the final content of a program to administer an expanded legal aid scheme, and its proposals were subsequently adopted by the Minister for Aboriginal Affairs.[668]

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662 Legal Services Commission Act 1979 (NSW).

663 This was a specific commitment in the Federal Labor Party 1972 election platform: G Whitlam, above n 481 at 466.

664 Above at p 83-84.

665 Eg, on 8 February 1973, it established an Aboriginal Land Rights Commission - Aboriginal Land Rights Commission, *First Report July 1973*, (1973).

666 A Collett & E McAdam, "Aborigines and the law: an overview" (1976) 2(4) *Legal Service Bulletin* 99 at 99.

667 House of Representatives Standing Committee on Aboriginal Affairs, above n 436 at 188.

668 Ibid and Appendix 22 at 242-243; Sen Deb 1973 Vol 58 at 2802; E Eggleston, above n 444 at 93; "A National Aboriginal Legal Service: Government Proposals" (1973) 47 *Law Institute Journal* 239. Three

In 1973 and 1974, new Aboriginal legal aid services were established in Western Australia, Queensland, South Australia and the Northern Territory. By 1975, legally-aided lawyer representation and legal advice in criminal and civil proceedings were provided at 23 locations throughout Australia.[669] In practice, the majority of legal aid provided to Aboriginal people through the scheme related to criminal proceedings.[670] However, legal aid was also available to local indigenous communities for the protection of community legal, social and cultural interests.[671]

The demise of the Whitlam Government also impacted upon Aboriginal legal aid. Initially, the Fraser Government sought to reduce the autonomy and self-management inherent in the program by restricting the eligibility criteria applied by the Aboriginal legal services. Accordingly, in October 1976 the Department of Aboriginal Affairs introduced draft revised guidelines for the provision of legal aid, proposing that the Aboriginal legal services should not provide legal aid in proceedings under the Family Law Act 1975 (Cth), or in Supreme Court and intermediate court proceedings where duty solicitor schemes operated.[672] The draft guidelines also proposed that the Aboriginal legal services should cease providing ancillary welfare services.[673] The guidelines - and their promulgation - were part of an attempt by the Fraser Government to shift the focus of the services towards replicating the range and type of services available within the national scheme.[674]

However, the draft guidelines were subsequently rejected by the Aboriginal legal services at a meeting with the Minister for Aboriginal Affairs.[675] In early 1977, their representatives proposed alternative guidelines which emphasised "the community base of the Services and the basic objective of Aboriginal self-determination".[676]

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points should be made in passing about the adoption a special legal aid program for Aboriginal people. First, they were not excluded from access to the national scheme. Secondly, the adoption of a separate program reflected the special needs of Aboriginal people for legal aid. Thirdly, the separate development of Aboriginal legal aid reflected the concentration of administrative and policy functions which characterised the Commonwealth response to its post-1967 responsibilities in Aboriginal affairs. A short history of these developments appears in H C Coombs, *Trial Balance*, (1981) at 278-295.

669 Department of Aboriginal Affairs, *Annual Report 1974-75*, (1976) at 15. Some restrictions applied to the use of Commonwealth funds. Legal aid was not available - other than to determine whether a defendant had reasonable prospects of success - in appeals where an Aboriginal legal service believed that "no good purpose" would be served by prosecuting or taking part in the appeal. Furthermore, conveyancing costs for individually acquired houses would not be met.

670 P Hanks, "Aboriginal Civil Matters" (1974) 1(5) *Legal Service Bulletin* 121 at 121: (1975) 1(7) *Legal Service Bulletin* 183, *Annual Report 1974-75*, (1976) at 16.

671 Department of Aboriginal Affairs, above n 669 at 15. Following an approach by the Aboriginal legal services to the Federal Government, applications for legal aid in community actions would be considered on a case by case basis .

672 A Collett & E McAdam, above n 666 at 99.

673 Ibid.

674 Ibid: P Slade, "The A.L.S.- funding and guidelines" (1976) 2(4) *Legal Service Bulletin* 144 at 144.

675 A Collett & E McAdam, above n 666 at 99-100.

676 "Aboriginal Legal Service Guidelines" (1977) 2(6) *Legal Service Bulletin* 218. The alternative guidelines emphasised the conduct of test cases, the active assertion of rights as yet unrecognised by the law, and the

This proposal was accepted by the Minister, who withdrew the original draft guidelines and announced that the Federal Government now agreed that each Aboriginal legal service should continue to determine its own guidelines for legal aid, consonant with its own budgetary constraints.[677]

Thenceforth, the Fraser Government continued to support the thrust of the Aboriginal legal aid policies introduced by the Whitlam Government.[678] In the four financial years 1976-77 to 1979-80, it expended $11.8 m on the Aboriginal legal aid scheme (above Table 1) which permitted a small but significant increase in the number of services.[679] By 1980, 13 Aboriginal legal services were operating, providing legal aid - according to Department of Aboriginal Affairs estimates in 1978-79 - to indigenous peoples in over 70,000 matters every year.[680]

The Growth of the Community Legal Centres

The other development in the second category of changes in legal aid outside the national scheme was the increased number of community legal centres. The new centres were established over 1973-80 and had similar origins to the community-oriented legal aid agencies of the early 1970s - emerging from local coalitions of social welfare interest groups, legal practitioners, other lawyers and law students.[681] Moreover, the continuation of this trend was consistent with the appearance of similar 'community'-based or non-state provision of legal aid in comparable Western countries since the mid-1960s.[682]

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role of the Aboriginal legal services in developing welfare organisations and improving access to existing welfare programs.

677 Ibid.

678 The 1976 conflict reflects the different social experience of Aboriginal legal aid. The distinctive political origins of Aboriginal legal aid had two major consequences. First, the political dimensions of Aboriginal legal aid were far more overt than in the national scheme: P Hanks, "Aboriginal Civil Matters" above n 670 at 122-3. Secondly, so were the political functions of the Aboriginal legal aid services. Inevitably, they included the promotion of social and political reform, which - in combination with self-management and autonomy and the special needs of indigenous people for accessible legal services - quickly led to conflicts with governments, administrators and other powerful interest groups: A Collett & E McAdam, above n 666 at 99: J H Downing, "Aboriginal Legal Services: N.T. Law Society Moves Against A.L.S." (1975) 1(9) *Legal Service Bulletin* at 241-2; E Eggleston, above n 443 at 93-95; N Mackerras, "Problems of Aboriginal Legal Services" (1975) 1(6) *Legal Service Bulletin* 143; "The way ahead: a five-point plan" (1976) 2(4) *Legal Service Bulletin* 149; J Fristacky, "Crisis in the Aboriginal Legal Service" (1976) 2(1) *Legal Service Bulletin* 16; C E Potter, "Poverty Law Practice: The Aboriginal Legal Service in New South Wales" (1973-76) 7 *Sydney Law Review* 237.

679 In 1976-77, there were nine Aboriginal legal services operating from 41 offices; in 1977-78, eleven services operating from 40 offices; and in 1979-80, there were eleven Aboriginal legal services operating from 38 offices: Department of Aboriginal Affairs, *Annual Report 1977-78*, (1978) at 34; Department of Aboriginal Affairs, *Annual Report 1975-76*, (1976) at 44; Department of Aboriginal Affairs, *Annual Report 1976-77*, (1978) at 30; Department of Aboriginal Affairs, *Annual Report 1978-79*, (1979) at 38; Department of Aboriginal Affairs, *Annual Report 1979-80*, (1980) at 30.

680 House of Representatives Standing Committee on Aboriginal Affairs, above n 436, Appendix 21 at 241.

681 Above at p 70.

682 R L Abel, above n 2 at 499-500.

By 1980, there were approximately eleven community legal centres operating in the capital cities. In Melbourne, the Fitzroy Legal Service had been joined by the Nunawading Legal Service, the Springvale Legal Service Co-operative Limited and the Tenants Advice Service. Student legal referral services continued to operated at the University of Melbourne and La Trobe University.[683] In Sydney, the Redfern Legal Centre had been established in 1977 and the Macquarie Legal Centre, the Marrickville Legal Centre and an advice and referral service at the University of Sydney had also commenced operations.[684] In Adelaide, The Parks and Bowden-Brompton community legal centre - and a student advice service at the South Australian Institute of Technology - were in operation.[685] In Brisbane, the Caxton Street Legal Service - and a student scheme at the University of Queensland - completed the national picture.[686]

Conclusion

The social impact of the three years of the Whitlam Government was unprecedented - and quite disproportionate to its short tenure. On the one hand, it was a bitter and divisive period, particularly in 1974 and 1975. There was an unrelenting atmosphere of open political conflict, a situation foreign to many Australians after 23 years of conservative government. Moreover, there was a growing realisation that the highpoint in post-war economic prosperity had been reached, and people - the middle class in particular - feared that "inflation had taken an unbreakable hold and was beyond control".[687] Its political legitimacy contested from the outset, the legality of its vice-regal dismissal was dubious and left deep political and social scars. On the other hand, the Whitlam Government had introduced important reforms in immigration and ethnic affairs, law, the welfare of indigenous peoples, education, health, social welfare, urban services and foreign policy - and expanded the focus of the Australian welfare state.[688]

This confronting mixture of hope and fear polarised significant parts of Australian society. It also left a mythology describing the aims and objectives of the Whitlam Government, including its role in the formation of the national scheme. From the mid-1970s onwards, one consequence of this mythology was the development of a legal aid orthodoxy, with polarised versions of the origins of the national scheme. This orthodoxy is still virulent today. One version - that favoured by the legal aid sector, social democratic politicians and 'radical' and Left-leaning lawyers - is that

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683 Commonwealth Legal Aid Commission, above n 657 at 90-102.

684 Ibid at 31-34 .

685 J Basten, R Graycar, and D Neal, above n 445 at 173-174; Commonwealth Legal Aid Commission , above n 657 at 66-67.

686 Commonwealth Legal Aid Commission , above n 657 at 54-57.

687 G Freudenberg, above n 480 at 404; M A Jones, above n 134 at 63; G Whitwell, "Economic Affairs" in H V Emy, O E Hughes & R Mathews (eds), *Whitlam re-visited : policy development, policies and outcomes*, (1993) 32 at 33-34.

688 A Patience, & B Head, "Australian Politics in the 1970s", in A Patience, & B Head (eds), above n 481, 283 at 284.

the scheme originated in the golden age heralded by the election of the Whitlam Government. These 'true believers' see the national scheme as an instrument of social justice forged by a visionary Commonwealth Attorney-General - Senator Murphy. In this version, his vision of social reform through legal aid was cruelly dashed in 1975 by the legal profession and by the re-ascendancy of reactionary politics following the election of the Fraser Government. The other version of the orthodoxy - harboured by the organised legal profession, conservative politicians and many private lawyers - interprets these events differently. Its countervailing mythology interprets the emergence of the national scheme in 1976 as reaffirming the social significance of the legal profession in achieving popular access to law. The political resistance of the Federal Opposition, the legal profession and lawyers to the interim national scheme of the Whitlam Government in 1974 and 1975 is portrayed as resistance to state control of lawyer services, ennobled by the social responsibility of the legal profession to protect the quality of popular access to law. Moreover, state control posed a threat to its 'independence', without which the legal profession believed it could no longer safeguard the 'rule of law' and protect individual rights in Australian society.

This chapter has illustrated the shortcomings of the Australian legal aid orthodoxy. It has also demonstrated - in three different ways - the complexity of the real story of the emergence of the national scheme. First, it has shown that whilst there are fragments of fact in the orthodoxy, it generally belies the historical reality. Secondly, the chapter shows that the election of the Whitlam Government was the catalytic event in the emergence of the scheme - as it was for other developments in the post-war welfare state.[689] Furthermore, the 'decision' - instigated by Senator Murphy in early 1973 - to reverse Commonwealth policy and adopt a new, interim national response to legal aid was indisputably its own. However, the chapter has demonstrated that this 'decision' was neither an inevitable result of the election of the Whitlam Government, nor of any clear, preconceived agenda of Senator Murphy.[690] This is not say that its election was unimportant, or that it had not targeted the legal aid system for reform. It was important, and the Federal Labor Party law reform program clearly included legal aid.[691] Neither does this conclusion imply that Senator Murphy was not passionately concerned with legal aid - and other aspects of law reform. His record as Commonwealth Attorney-General and judge demonstrates that he was, and this is a fact even his detractors would probably concede.[692] In the former role, Senator Murphy had clearly been remarkable, but it was not so remarkable for Australian government to produce reforming Attorneys-General. Victoria had done so in the 1920s, New South Wales in the 1940s and early

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689 M A Jones, above n 134 at 61-67: H Emy, "A Political Overview: from Social Democracy to the Social Market Economy" in H V Emy, O E Hughes & R Mathews (eds), above n 687 at 16.

690 Above at pp 78-83.

691 Above at p 79 & n 486.

692 See A R Blackshield, D Brown, M Coper & D Krever (eds), *The Judgments of Justice Lionel Murphy*. (1986) for a review of his judicial contribution to Australian law.

1950s and the Commonwealth in the late 1950s and early 1960s.[693] Moreover, these reformers had - to varying degrees - also sought to improve access to legal aid.[694] Therefore, the chapter demonstrates that these two factors - the election of the Whitlam government and the zeal of Senator Murphy - alone are not sufficient to explain the emergence of the national legal aid scheme in the post-war welfare state.

There were other important, background factors - revealed in this and earlier chapters - influencing the 1973 'decision'. If we accept Harkins' account, the seminal event behind the national scheme was the meeting in Canberra between Senator Murphy and ministers and lawyers from the States shortly after the Whitlam Government took office - an exchange meeting which prompted him, his ministerial colleagues and Commonwealth officials to take action.[695] Even if we reject this account - or discount Harkins' recollections - legal aid in Australia in early 1973 was in a parlous condition, and had been so throughout the 1960s. Moreover, since the Law Council first approached the Menzies Government in 1965, the nationwide problems of legal aid had been a looming Federal presence. Inevitably its problems would have emerged onto the agendas of Federal governments in the 1970s.[696] The likelihood of this occurring earlier - rather than later - was increased by the prevailing national climate of social change and reform in the early 1970s and the simmering presence of the national inquiry into poverty.[697] Furthermore, the Whitlam Government itself had law reform agendas which were far more pressing, and at least as socially significant as citizens' legal aid. In early 1973, Senator Murphy was considering other developments in social and legal reform. All of them had incidental consequences for the future direction of Federal legal aid. This reveals that his deliberations were influenced by other developments in Federal law and government, in particular, matrimonial causes reform, and the environment and Aboriginal legal aid. These developments were also part of a wider law reform agenda and work of the Attorney-General.[698]

Furthermore, the account of the 'decisional' history of the national scheme also demonstrates that it is a complex story. Existing accounts of its formation - including the orthodoxy - tend to portray the story as a seamless, singular event, beginning with the ALAO in late 1973 and ending with its 'destruction' by the Fraser Government two and a half years later. Conversely, this chapter has portrayed the scheme emerging in three distinct phases: first, the reversal of existing policy and the interim new Federal response in 1973 and 1974; secondly, the climax of new response in 1975 and the plan to establish a permanent statutory scheme; and, finally,

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693 Mr. Slater, Attorney-General in the Hogan Labor Government 1927/28; Captain C E Martin MC Attorney-General in the McKell Labor Government 1941/47 & the McGirr Labor Government Sir Garfield Barwick, Attorney-General Menzies Liberal/Country Party Government 1958-1964 (see Chapter Five below).

694 Above at n 46, n 217 & pp 81-82 & n 274.

695 Above at pp 37-39.

696 Above at pp 60-62 & 72-75.

697 Above at pp 77-78 & 89-90.

698 M Crommelin and G Evans, above n 492 at 45-52.

the establishment of the national scheme in 1976.[699] The presence of three phases - rather than a single, undifferentiated process - has important implications for explaining the emergence of the national scheme. It means that the first six months of 1973 - when the Whitlam Government changed Federal legal aid policy – are not the only point at which we should marshal relevant formative factors. We must also include in the changed or new factors influencing the other phases of the emergence of the national scheme.

By the start of the second phase - the climax of the Federal response in 1975 - Senator Murphy's ministerial role had ended, and a new Attorney-General carried the plans of the Whitlam Government for a permanent national scheme of legal aid.[700] In many respects, it is in describing this phase that the orthodoxy comes closest to describing the historical reality. By 1975, the Whitlam Government's plans had been injected with the vision of the Commissioner for Law and Poverty, who believed that in modern, post-war Australian society the provision of legal aid for poorer people was axiomatic.[701] Moreover, the objectives of the interim Federal response had become more publicly focused on the needs of poorer people. There were a number of reasons why this had occurred. In 1973 and 1974, Senator Murphy had been actively involved in promoting the ALAO. And he had similar views to Professor Sackville on the social significance of legal aid.[702] By 1975, the ALAO had established itself, and the public perception was that it served the legal needs of poorer people.[703] Moreover, it had attracted a small cadre of bright - generally young - lawyers to its ranks who were committed to social justice ideals. A few - but influential - similarly endowed and committed young and younger lawyers, who worked for the Fitzroy Legal Service and in some university law faculties, had adopted legal aid as the forum and vehicle to legally enfranchise the 'poor'.[704] Furthermore, the Commission of Inquiry into Poverty had given law and poverty a national profile, especially since Professor Sackville's appointment and the publication of his discussion paper on legal aid.[705] Lastly, since 1973 the Whitlam Government had vigorously pursued its objective of improving "the Australian social welfare system", including through well-advertised local ventures like the Australian Assistance Plan.[706] Behind these several developments in the latter part of 1973, 1974 and early 1975 was the conception of a national citizens' legal aid scheme for the poor, which is a key component of the 'lost' scheme mourned by the 'true

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699 Above at pp 85-104.

700 Above at p 90-94.

701 Below at p 122.

702 A colleague - John Gilchrist - who was a young lawyer in the Attorney's Department in 1973-75 suggests that the Whitlam Government's elevation of Attorney-General to the Federal Cabinet was another factor raising the national profile of law reform issues, including legal aid.

703 Above n 565.

704 Eg, the first edition of the Fitzroy Legal Service Bulletin was published in May 1974.

705 Above at pp 89-90.

706 M A Jones, above n 134 at 62 & 293-295.

believers'.[707] However, those developments - and their ideological context - also played a real part in the emergence of the national scheme.

In 1975, another key part of the orthodoxy - the resistance of the Federal Opposition, the legal profession and many lawyers - was also at its most forceful.[708] However, this chapter has demonstrated that their opposition was neither as straightforward - nor as significant - as either version of the orthodoxy suggests. The federal conservative parties were not inherently opposed to Commonwealth participation in legal aid. Like the legal profession and the lawyers, their objection was that the Whitlam Government's plan overlooked "the important legal, social and constitutional issues involved", and in particular those involving the role and 'independence' of the legal profession.[709] Neither the legal profession itself nor its mainstream members were inherently opposed to legal aid, including Commonwealth participation. Until the arrival of the Whitlam Government, the legal profession had acted as the principal delegate of Australian governments in running legal aid. In 1975, it was yet to relinquish this role. The profession and lawyers were still actively administering the State and Territory law society schemes. Furthermore, the Law Council had requested Commonwealth intervention in legal aid in 1965, as had the law society in Western Australia in 1967.[710]

Moreover, in the second phase the legal profession and mainstream lawyers did - as the orthodoxy records - vocally oppose the Whitlam Government's plans, both informally and in the press, in politics and in the courts.[711] Their motivations closely correspond to the orthodox explanation, at least overtly. They were often motivated by genuinely held fears about the desirability - and dangers - of a centrally-controlled national legal aid scheme. This was a response quite consistent with the professional ideals which had played an important part in the involvement of lawyers in legal aid since the 1920s and 1930s.[712] However, in opposing the Whitlam Government's plans, the Australian legal profession and mainstream lawyers were also motivated by self-interest, as they had been in the law society schemes since the 1920s, and as their overseas counterparts were in comparable post-war developments.[713] Whilst the professional, economic and political interests of lawyers in this phase were legitimate, their significance in this second phase is overlooked by the orthodoxy, ignored by the profession's version and over-simplified or parodied by the 'true believers'. Finally, another relevant factor in the second phase of the national scheme was the changed focus of the welfare state - a product of the Whitlam Government's policies in 1973 and 1974 which had shifted the balance of the welfare state. Previously, the main attention and the biggest budgetary share had

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707 Above at pp 110-111.

708 Above at pp 93-94.

709 H Reps Deb, above n 583 at 1977 & 1982.

710 Above at pp 60-62.

711 Above at pp 91-92 & n 569.

712 Above at pp 28-33: below at pp 129-133.

713 Above at p 36-37: below at pp 129-133; R L Abel, above n 2 at 503-504.

gone to cash benefits, but Labor's attention to health, education, and many generous specific-purpose programs shifted the emphasis to the government as a supplier of services. This was a crucial step, which made the welfare state much more visible than cash benefits and forced the government to be evaluated as a retailer of programs rather than as a wholesaler that allowed people to spend cash supplements as they saw fit.[714]

By the third phase - the 'decision' of the Fraser Government in 1976 - the national scheme was already carrying considerable baggage. This 'decision' added to the complexity of the story of its emergence. The Fraser Government acted almost immediately to commit the Commonwealth to finance and administer a new national legal aid scheme, which would, in conjunction with the Aboriginal legal services and the community legal centres, form the basis of the Australian system for the next twenty years.[715] Yet, it had come to power - only a few weeks beforehand - professing its intention to cap the new focus of the welfare state by reducing Commonwealth outlays on social welfare.[716] Moreover, its Attorney-General - who emerged as the real architect of the Australian post-war scheme - had led the opposition of the Federal Liberal Party to the Whitlam Government's plans for a permanent scheme only two months before.[717] Furthermore, the Fraser Government was a Liberal/Country Party coalition, the same breed of national government which had avoided involvement in citizens' legal aid throughout much of the post-war period.

The third phase has yet other complicating features. For those who most actively supported legal aid in 1973, 1974 and 1975 - the Labor Party, the ALAO, reforming and 'radical' lawyers, social democrats and reformers - the national scheme was second-best. Instead of welcoming the eventual Commonwealth commitment to legal aid in 1976 - in a national scheme building upon the law society experience since the 1930s - they condemned its domination by the organised legal profession and private lawyers. Prima facie, the scheme and the Commonwealth-State agreements represented an unqualified victory for the latter. However, the legal profession and private lawyers, in accepting regularised state funding and administration of legal aid, had mounted a Trojan horse. The inter-governmental agreements, and the legislation they spawned, enabled governments and their statutory agents to regulate and intervene in the organisation, distribution and unit cost of lawyers' work. In the short term, this was not a problem. Private lawyers' interests controlled the 'dangerous' parts of the new legal machinery. In the longer term, this machinery gave Australian governments the legal capacity to intervene in the legal profession and its work on a new scale - with its acquiescence, if not at its invitation.

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714 M A Jones, above n 134 at 64.

715 The Commonwealth statutory and non-statutory schemes, the Aboriginal legal services and community legal centres: D Fleming, "Legal Aid" above n 125 & D Fleming, "The Mixed Model of Legal Aid in Australia" in *Legal Aid in the Post-Welfare State Society*, (1995) at 165-244.

716 M A Jones, above n 134 at 65.

717 Above at p 93-94.

This chapter has concluded the three historical narratives in this part. Its description of the reality of the emergence of the national scheme - and the accounts of its modern and post-war background in Chapters Two and Three above - have addressed the substance of the second and third categories of the NLAAC report.[718] We now know more about and are in a better position to understand the social and historical context of Australian legal aid, and the origins of the national scheme. However, to complete our investigations - and this part of the thesis - it remains to consider the ideological context of the national scheme.

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718 Above at pp 7-8.

Chapter Five
The Ideological Context

> I come now to what might be termed my general remarks on legal aid. Legal aid is granted and given because of the wish to establish the principle of equality before the law. That is a nice, resounding phrase. If it means anything it should mean that the courts decide issues between citizen and citizen and between citizen and State on their merits, regardless of the importance or unimportance of the citizen. It may be true that the courts are fair, but the assurance does not help a person who cannot afford to go to court ... Legal aid is provided as an equalizer. Its aim is and should be to ensure, as far as humanly possible, that no man is thwarted or limited in the exercise of his rights merely because he cannot afford to go to law ...
>
> The Hon R R Downing, Leader of the Opposition, in the resumed second reading speech on the Legal Practitioners (Legal Aid) Bill 1970, 5 August 1970, NSW, PD 1970 Vol 136 at 4918-4919

Introduction

This concluding chapter of Part I examines the ideological context of the national scheme. It aims to complete the inquiry into the unanswered questions of the NLAAC report. Instead of an institutional historical focus, which has been the subject of the three preceding chapters, this chapter reviews the ideas behind the national scheme.

It undertakes this task in a deliberately unambitious and uncritical manner. The chapter portrays the ideas about legal aid - and legal aid schemes - as they were evident in the national scheme, and in the context of the background of modern Australian experience. In other words, this chapter's objective is to complete the story of the emergence of the national scheme while leaving the task of critical analysis of its origins and significance in post-war society to Part II below.

To achieve its objective, the chapter begins by describing the ideas evident in the joint Commonwealth-State legal aid scheme adopted in 1976. It continues to describe the background dimensions which defined the scheme's ideological context, beginning with the ideas of the Fraser Federal Government, and the plans and policies of its predecessor. The chapter continues to describe the historical substratum, namely the ideals behind the State schemes, and the legal aid ideology of the legal profession. Its review ends with noting - in passing - another ideological dimension implicit in the national scheme, namely the modern social and political ideals of the Australian legal system.

The chapter also reviews the significance of the ideals behind the national scheme in order to conclude its own portrayal of the ideological context and this part of the

thesis. It sketches the three ways in which these ideals are significant: in defining the ideological context of the national scheme, in completing the historical picture and in highlighting the limitations of conventional analysis in explaining the legal aid's origins and significance in the post-war welfare state.

The Ideas Evident in the National Scheme

Prima facie, the inter-governmental 'in-principle' agreement which constructed the national legal aid scheme was bereft of an ideological perspective.[719] In early 1976, the question of 'why' it was desirable for Australian governments to establish a national scheme does not appear to have crossed the minds of the Standing Committee of Attorneys-General.[720] If it did so, the meeting transcript suggests they thought it was a superfluous question, unnecessary to consider or discuss. It appears that all governments had already agreed that a national scheme was desirable - the only remaining question was how it should be administered. Mr. Ellicott - the Commonwealth Attorney-General - made this clear when he opened the meeting:

> One of the commitments of the new Commonwealth Government was to review legal aid to see whether a rationalised system of legal aid could be worked out in the Commonwealth ... it seemed to my Government to be desirable that we do have a look at the overall question of legal aid and see whether we can work out something that we think will not only be adequate to the country as a whole but also adequate to the States and Territories.[721]

The State ministers had a similar approach. For instance, Mr. Wilcox - the Attorney-General for Victoria - said that the meeting was "looking for a panacea to the problem of legal aid".[722] Consequently, the discussion at the Hobart meeting concentrated upon administrative and operational matters - issues like the division of administrative and financial responsibility, legislative requirements, delivery of legal services and the optimum balance between service delivery by employed and by private sector lawyers. Indeed, most of these issues - save for those specifically concerning lawyer services policy - were typical of those arising in any new public venture which was to be jointly financed and managed by Australian governments in the 1970s.

The absence of an overt ideological perspective permeated the instruments whereby the 'in-principle' agreement was translated into administrative reality. The legal aid agreements executed in 1978 and 1979 between the Commonwealth and Queensland, South Australia, Victoria and Western Australia simply formalised and implemented its objectives.[723] Neither they nor the subsequent agreements with the Australian Capital Territory, New South Wales or the Northern Territory contained any express

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719 Above at pp 96-97.

720 Transcript, above n 593 at 1.

721 Ibid.

722 Ibid at 7.

723 Above at pp 102-105; Appendix "A", below pp 288-317.

statements as to the ideas behind the national scheme, or legal aid itself. Nor were overt statements of ideological perspective or intent evident in the processes to implement the Commonwealth-State legal aid agreements. The relevant parliamentary debates did not reveal the goals or objectives of the national scheme, nor did the legislation which constituted the Commonwealth and State legal aid commissions.[724] The latter simply constituted the legal machinery of the national scheme, containing, as Hanks has commented, "very little (if any) reference ... to the goals and objectives towards which those processes are a means" and was by and large "cryptic on [the] vital questions" of the "goals and objectives of legal aid in Australia".[725]

Technically, Hanks is correct. The legal aid legislation was very sparring in its treatment of the ideology of the national scheme.[726] However, the legislation - together with the 'in-principle' agreement and the Commonwealth-State legal aid agreements - was only the public face of the national scheme. Behind its organisational facade lay two other dimensions which defined its ideological context. The first other defining dimension were the ideas associated with the national scheme, namely the views of the Fraser Government and those associated with the plans and policies of its predecessor. The second defining dimension was the historical substratum of the existing ideas about legal aid in modern Australian society. The impact of both these 'covert' sources of legal aid ideology is discussed below.

The Ideas Associated with the National Scheme

The ideas associated - by implication - with the ideology of the national scheme fall into two categories. First, there are the ideas which the Fraser Government brought to the making of the 'in-principle' agreement in 1976, the last emergent phase of the national scheme.[727] Within the second category are those ideas evident in the interventions associated with the Whitlam Government: the reversal of Federal policy, the interim scheme and the climax of its response.[728] Whilst these ideas had no direct impact on the ideological content of the national scheme, they did influence it indirectly through defining the ideological framework in 1973-75, through influencing policy-makers, 'designers' and legal drafters and via the structural legacy of the Legal Aid Bill 1975 (Cth).

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724 P Hanks, *Evaluating the Effectiveness of Legal Aid Programs: A Discussion of Issues, Options and Problems*, (1980) at 29-32.

725 Ibid at 25.

726 Effectively - as Chapter Four at pp 100-104 shows - the legislation constructed the legal framework necessary to administer the scheme across Australia.

727 Above at pp 96-97.

728 Above at pp 78-95.

The Ideas of the Fraser Government

The 'in-principle' agreement - and the legal machinery which it spawned - reflected the ideas of the Fraser Government towards a national scheme, and legal aid. These ideas originated in 1974, when plans for a national scheme were first included in the federal Liberal Party election platform, providing that its government would:

> Ensure an adequate and accessible system of legal aid, suitably publicised and operating through government and professional bodies, to assist those persons who are financially unable to incur the cost of litigation and whose just claims may otherwise be neglected.[729]

This promise was reaffirmed in the Liberal Party's policies for the 1975 federal election, although it was given negligible prominence by the temporary Prime Minister in his campaign policy speech.[730]

The foundation of the Fraser Government's ideas about legal aid are also evident in the second reading debates on the Legal Aid Bill in October 1975. Mr. Ellicott - as shadow Attorney-General - had expressed clear and defined views about the functions of a national scheme. Importantly, the ideas he canvassed were not restricted to organisational issues and opposition to the proposed statutory ALAO. They included the role of legal aid in Australian society:

> I wish to set out what I believe to be some basic principles to be applied in devising an efficient legal aid service in this country. Firstly, [it] should represent co-operative involvement between governments at State and Federal levels, the legal profession, other professionals who are involved, such as social workers, and the assisted public. Secondly, the Federal Government has a definite role in ensuring the provision of legal aid ... Obviously a Federal Parliament which passes laws creates rights, duties and obligations has a real consideration in relation to those citizens who are enforcing those rights. The Houses of Parliament are entitled to pass laws which effectively provide legal aid for people enforcing federal rights. So a Federal government has a clear involvement in legal aid.[731]

The other major Liberal Party spokesman in the debate - Mr. Howard - also took the opportunity to state "a few principles of the Opposition's attitude towards legal aid".[732] The central principle of legal aid - as the Liberal Party then saw it - was that "no person should be denied the benefit of legal advice or assistance through lack of financial resources".[733] However, the Liberal Party believed that the practical application of this principle should primarily benefit those citizens for whom the Commonwealth "has a direct constitutional legal responsibility".[734] This responsibility - according to Mr. Howard - extended to people who needed legal

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729 Liberal Party of Australia, above n 588 at 18.

730 M Fraser, *Policy Speech: 27 November 1975, Turn on the Lights*, (1975) at 11.

731 H Reps Deb, above n 583 at 1983.

732 Ibid at 1974.

733 Ibid.

734 Ibid at 1974-1975.

assistance in respect of the operation of federal laws.[735] Furthermore, Mr. Howard noted that the economic hegemony of the Federal Government enabled it to "support financially the provision of legal aid services".[736] In combination, these two factors - restricted constitutional responsibility and financial capacity - meant that the Commonwealth had "a very direct interest and responsibility in the provision of legal aid services throughout Australia".[737]

The Plans and Policies of the Whitlam Government

The opening gambit in the emergence of the national scheme was the reversal , in early 1973, of existing Federal policy towards legal aid.[738] In late 1973, the Whitlam Government publicly stated its intentions in reforming legal aid via a Ministerial Statement made by Senator Murphy.[739] In some respects, the objectives recorded in this statement are an ex post facto reinvention or gloss, given the circumstances of the 'decision' to reform legal aid. Nevertheless, it defined how the Whitlam Government conceived of its initiatives in legal aid. Senator Murphy explained to the Senate:

> The Government has taken action because it believes that one of the basic causes of inequality before the law is the absence of adequate and comprehensive legal aid arrangements throughout Australia. This is a problem that will be within the knowledge of every honourable senator who will on many occasions have had to inform citizens seeking assistance with their problems that there is nothing that he can do for them; that they will need to go and see a private solicitor. With some exception, we in Australia have been slow to respond to the need of the ordinary citizen for ready and equal assistance when confronted with a legal problem or court proceedings. The ultimate object of the Government is that legal aid be readily and equally available to citizens everywhere in Australia and that aid be extended for advice and assistance of litigation as well as litigation in all legal categories and in all courts.[740]

In 1974 and early 1975, the ideas associated with these plans are to be found in the work of the ALAO, the Australian Legal Aid Review Committee and the Commissioner for Law and Poverty.[741] Their ideas generally conformed to the essential principle of the Murphy statement that Commonwealth involvement in legal aid was ultimately in pursuit of the objective of citizens' equality before the law. However, the ideological framework generated by these agencies tended to emphasise the interests of a particular group of citizens, namely the poor and poorer Australians. In the case of the ALAO, this was not evident from its statements. It

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735 Ibid.

736 Ibid.

737 Ibid.

738 Above at pp 78-83.

739 Ibid.

740 Ministerial Statement, above n 3 at 2800.

741 Above at pp 85-90.

made few, if any. It was evident from its guidelines governing eligibility for legal aid as these focused on poorer and disadvantaged 'Commonwealth' people.[742]

For the Australian Legal Aid Review Committee in 1974, legal aid was primarily about promoting greater social justice and equality. Its members believed that "in any just society each person should have access to the legal process and that to deny a person that access is to perpetuate a life condition of social deprivation".[743] The Commissioner for Law and Poverty had a similar conception He was adamant that in a modern society the provision of legal aid for poorer people was axiomatic:

> Where one party to a dispute does not have access to the legal system in order to enforce his rights, or where enforcement is expensive or otherwise difficult to obtain, his ability to gain proper redress is impaired or frustrated altogether ... If a number of people experiencing similar problems suffer from an inability to gain effective access to the legal system, they have little chance of overcoming those problems and there is a danger that they will be subjected to systematic exploitation based on their inability to resist the practices perpetrated on them ... Unless all interest groups have access to legal resources to press their claims, the less powerful will find their interests ignored or suppressed. It is no accident that groups which have not had legal assistance readily available to them such as poorer welfare beneficiaries, consumers and tenants have not been able to secure changes that markedly improve their collective position.[744]

The work of the ALAO - and the ideas and proposed policies of the ALARC and the Commissioner - influenced the content of the Legal Aid Bill 1975 (Cth).[745] In introducing the Bill in the House of Representatives on 5 June 1975, Mr. Enderby - by then Commonwealth Attorney-General - said:

> Ready and equal access to the law and the legal process is the birthright of every Australian. The Government believes that if this is to become a reality under our federal system, State systems of legal aid will have to be complemented by an Australia-wide system of legal aid.[746]

There were marked differences between the scheme in the Bill, and the national scheme as it was enacted by Commonwealth and State legal aid commission legislation. However, there were also similarities, especially in defining the functions of the statutory agencies, which added to the continuum between the plans and policies of the Whitlam Government and the final version of the national scheme.[747]

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742 Above at pp 83-87.

743 Attorney-General's Department, above n 527 at 10.

744 Australian Government Commission of Inquiry into Poverty, above n 27 at para 1.4 .

745 H Reps Deb 1975 Vol 95 at 3472.

746 Ibid.

747 S 6 Commonwealth Legal Aid Commission Act 1977 (Cth) cf cl 17 Legal Aid Bill 1975 (Cth).

The Historical Substratum

The second other defining dimension of the national scheme was the historical substratum in the form of the existing ideas about legal aid in modern Australian society. The nexus between these ideas and the national scheme is not as obvious as with the ideologies directly associated with its emergence. Moreover, subsequent appreciations of the scheme - including the Australian orthodoxy - have tended to focus on its novel aspects. It certainly had important new aspects, including Federal Government involvement, its ministers talking about legal aid, significant Commonwealth expenditure and its cooperation with States in national legal aid provision. Furthermore, the emergence of the national scheme saw, for the first time, open conflict between the national government and the organised legal profession and lawyers over the direction and control of legal aid.

However, we have often overlooked the fact that the national scheme was also significant for what it did not change. While existing Federal policy towards legal aid, which had been applied since the 1900s, was reversed, the interim plans and policies of the Whitlam Government - and its successor as reflected in the national scheme -nevertheless remained closely linked to the performance of federal governmental functions. In 1973-76, the significant difference was that those functions increased to include legal aid in the national arena, which was a consequence of the legislative ambitions of the Commonwealth Parliament and the growing functions of the federal welfare state.[748] Furthermore, the Commonwealth-State legal aid agreements - whilst an innovation - reinforced the historical focus on the States as the forum for legal aid administration. In effect, the legislative obligations they imposed required State governments to consolidate their existing legal aid schemes - the statutory civil and criminal schemes, and the semi-charitable and public law society schemes.[749] These prior schemes carried with them their ideological baggage from colonial times, which is one of the reasons why Hanks was unable to identify the goals and objectives of the new legal aid legislation.[750] Moreover, this legislation itself actively involved the organised legal profession and private lawyers in the States, and was premised upon their continuing primacy in the market for lawyers' services.[751]

Therefore, for these aspects of continuum as reflected in public policy, administration and legislative links, the historical substratum played a significant part in defining the ideological context of the national scheme. The historical context of legal aid ideology in Australia in 1976 derived from two principal sources: the ideas behind the State legal aid schemes, and the legal aid ideology of the State legal professions.

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748 Another aspect of continuity which is frequently overlooked is that at the same time the Federal Government continued to expand its more 'traditional' role in legal aid through its minor statutory and non-statutory schemes (above at p 87 & 150).

749 Above at p 56-68.

750 Above at p 118-119.

751 Above at pp 97-103.

The Ideals behind the State Schemes

In criminal matters, the organised provision of legal aid for its - often desperately - poorer citizens had been part of State law and government since the 1880s.[752] Its first intervention, in the form of the informal scheme administered by colonial governments, reflected the formative presence of the metropolitan poor persons procedures - with modern modifications.[753] . Its provision of legal aid for poor accused was portrayed as an expression of the ancient duties of the Crown towards the fair and effective administration of justice.[754] This was now accepted as a responsibility of the modern state which was the 'embodiment' of the governmental functions of the Crown. But criminal legal aid remained a privilege restricted to impoverished accused facing trial for capital and other odious offences.[755]

These modified metropolitan conceptions were the predominant ideological force behind the poor prisoners' defence scheme which served as the legislative model for Australian criminal legal aid until the mid-1960s.[756] For example, in 1907 the Attorney-General in the Queensland Kidston Government - in moving the second reading of the Poor Prisoners' Defence Bill 1907 - said:

> Hon. members, I am sure, will agree that it is the duty of the State to see that innocent people are acquitted, and to prevent the terrible injustice – and injustices have occurred – which follows on the conviction of an innocent person, and it is just as much the State's duty to do this as to see that a wrongdoer is punished ... [757]

Moreover, he saw this objective as the "splendid, magnificent thing" to be said in favour of the legislation.[758] However, modern translations of the principles behind the poor persons procedures were not the only ideals influencing the poor prisoners' defence scheme - or criminal legal aid - in the 1900s and 1910s. The early State legislators also saw the scheme as an instrument of social justice, as "another step on the road to law reform ... an endeavour, in a small way ... to deal humanely with prisoners".[759] By providing poorer people with legal aid, should they "be put in the unfortunate position of being a person charged in a criminal court", social justice would be achieved by promoting equal justice for rich and poor:[760]

> And in those cases particularly the State should willingly and voluntarily provide assistance for men placed in that position ... There ought to be not only a law for the rich, but a law for the poor. That might be a trite saying, and people might take exception to it, but when they see the way I make use of it they will agree with the

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752 Above at pp 27-28.

753 Above at pp 17-22.

754 NSW PD 1907 Vol XXVII at 661.

755 Above at p 28.

756 Above at pp 65-66.

757 Qld PD 1907 Vol XCIC at 483.

758 Ibid at 484: NSW PD 1907 Vol 27 at 661.

759 Qld PD 1907 Vol XCIC at 484.

760 Ibid.

> meaning I attach to it. The rich individual or the man comfortably off, if he falls into trouble and is accused of any offence or crime, is able to provide assistance to defend himself and properly present his case to the court. The poor man is unable to do that, and for that reason there exists the necessity for a measure of this kind.[761]

Nevertheless, the early legislators stopped well short of recognising legal aid as a civil right of poor accused, as Mr. Wade, Attorney-General and Minister for Justice in the Holman Government, made clear in 1907 when introducing the Poor Prisoners Defence Bill (NSW):

> [It] must not be supposed that because the Crown is beneficent and prepared to extend the principle of defence to prisoners who are impecunious, therefore every man can with impunity break the law and rely on the Crown to defend him ...[762]

Consequently, legal aid in the poor prisoners' scheme retained its original 'public' flavour in that it was available to poor accused when the 'interests of justice' made it desirable.[763] This conception of justice was defined by reference to systemic considerations, and to legal paradigms defining the functions of the judge, the prosecutor and the criminal justice process.[764] Nevertheless, the personal plight of an accused - and the legal or forensic problems he or she would confront at trial - were relevant considerations in fixing the demands of the 'interests of justice', but always in a systemic context:

> I think, too, that in determining the matter one may regard the personal qualifications or disqualifications of the prisoner, or the intricacy of the case, either in point of law or fact or both, or possibly both these things together. It might be important, for example, if the prisoner was not out on bail, or was a foreigner and ignorant of the language, or dumb or nearly so, or very deaf, or very ignorant of the facts necessary to be proved. All those matters might have to be considered ...[765]

This mixture of ideas - especially the idea of state intervention justified on the basis of poverty and procedural justice - also influenced the other early 20th century development in criminal legal aid: the criminal appeals legislation.[766] Moreover, these ideas, including considerations of social justice, generally survived and continued to influence developments in criminal legal aid in the States into the post-war period. For instance in 1969, Mr. McCaw, Attorney-General in the Askin Liberal Government - in his second reading speech introducing the Public Defenders Bill (NSW) - said inter alia:

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761 Ibid at 483-484.

762 NSW PD 1907 Vol 27 at 661.

763 Above at pp 30-33.

764 *Re Matthew Forest* [1912] VLR 466 at 468-469: *Rex* v *Douglas* [1904] 10 Argus Law Reports 100 at 101.

765 Ibid.

766 Eg. Qld PD 1913 Vol CXV at 1054: above at pp 33. Similar ideals also lay behind the enactment of s 63 Judiciary Act 1903, the Commonwealth version of the poor prisoners' defence scheme: Cth PD 1903 Vol 14 at 1527-1528.

> For a long time the need for the State to provide legal assistance has been recognised on two grounds: first that a person held in custody and charged with serious crime should have the help of a trained legal adviser, and second that it is in the interests of the State, for smooth and efficient administration of justice, that legal assistance should be provided in these cases.[767]

These ideas about legal aid also influenced reforms in other areas affecting the administration of criminal justice. For example, in 1967 when the New South Wales Parliament made limited provision for costs in criminal cases. Mr. Maddison, then Minister for Justice - in his second reading speech - said inter alia that the provisions of the Costs in Criminal Cases Bill 1967 were "an honest and serious attempt by the Government to fulfil the moral responsibility it owes to the community".[768]

Other developments in legal aid in the States - which we will loosely label 'civil legal aid' - did not have the same institutional focus as the poor prisoners' schemes.[769] Nevertheless, it is still possible to identify influential ideological themes. As in criminal matters, the organised provision of 'civil legal aid' was influenced by the metropolitan poor persons procedures, with local modern modifications.[770] Until the 1910s, the *in formâ pauperis* procedures of the State Supreme Courts were the principal source of legal aid in civil proceedings. Whilst these procedures were already ineffective, their charitable ideals continued to influence developments in 'civil legal aid' until the 1960s - if not beyond.[771]

It was the ineffectiveness of the *in formâ pauperis* procedures which first prompted State intervention in 'civil legal aid'. The idea of State Parliaments was to reform the law. For example, the enactment of the Poor Persons Legal Remedies Act 1918 (NSW) was seen as a reform to make the law and courts more accessible to the poor. Mr. D R Hall, Attorney-General in the Holman Nationalist Government said in his second reading speech introducing the constituent Bill on 23 October 1918:

> I ask the House to consider the need for an alteration in our legal system as affecting the poor. Looking back over the development of that system one cannot help being struck with the fact that throughout the centuries men who have not had eminent lawyers to assist them in their legal struggles have always been placed at a tremendous disadvantage. The whole of our legal system proceeds upon the error that every man is presumed to know the law. Though every man may be presumed to know the law, we all know very well that nobody does really know it ... The whole effect in the development of our law has been that those who have not had the means available to employ eminent counsel have seen the law developed against their interests ... Other countries have developed more rapidly. I suppose there are very few countries where

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767 NSW PD 1969 Vol LXXX at 745-746; and 748-749.

768 NSW PD 1967 Vol LXVI at 3921.

769 Australia has never had the clear division between criminal and civil legal aid schemes that appears to exist in some other countries. Accordingly, 'civil legal aid' is used to refer to developments in the States which were not solely focused on criminal proceedings - like the reforms in Victoria and South Australia in the 1920s - although they may have assisted poorer accused as part of a general legal aid scheme.

770 Above at pp 33-36.

771 Below at p 128 & n 777.

> the interest of poor persons are less considered than in Great Britain and Australia, in England particularly ...[772]

Whilst this legislation reformed the law by introducing a semi-charitable law society scheme, the underlying conception of legal aid as a charitable privilege of the deserving poor remained. However, in other States in the 1920s - South Australia, Victoria and Western Australia - a new conception began to emerge in the statutory reforms to 'civil legal aid'.[773] Whilst these reforms contained administrative provisions akin to the *in formâ pauperis* procedures, eligibility for legal aid was also now being expressed in terms approaching a right of modern citizenship. For instance, in Victoria, Mr. Slater, Attorney-General in the Hogan Government, explained in his second reading speech that he believed the Poor Persons Legal Assistance Bill 1927 was:

> ... of tremendous importance to a section of the community to whom the elementary rights of justice are quite as important as to the most affluent in the land ... there is a fundamental conception of a right to equality before the law on the part of all individuals in the community."[774]

Therefore, access to legal aid - as an incident of equality before the law - began to be linked with political citizenship in early 20th century Australia, albeit in a hybrid fashion. This alternative ideological basis of State 'civil legal aid' received a boost with the wartime reforms in New South Wales. In 1943, Captain C E Martin, Attorney-General in the McKell Labor Government, said in his second reading speech introducing the Legal Assistance Bill:

> Of all social reforms, none, I suggest is more important than that the administration of justice should be improved. In a democracy a poor man should have as equal an opportunity in litigation as a rich man, but under present conditions, ashamed of it though we may well be, this is not the fact. As in other fields, so in the field of law, from time immemorial the social structure has always been so weighted that the poor are at a disadvantage when opposed by the wealthy and powerful. Bad though the position has always been, the ever-increasing complexity of life makes it daily worse. Criticism upon criticism has been levelled at the system of "justice," yet the great mass of people who think have been too busy about their individual affairs to appreciate the stark, and perhaps unpleasant, fact that justice has become almost completely beyond the reach of a large proportion of the populace. "Equality of all men before the law" is the proud boast of British jurisprudence, but it is no more than a boast when justice is withheld from thousands because of their inability to pay for it ... We are not, then, I suggest to this House, before our time in seeking to render litigation a practical remedy for the defence and enforcement of undoubted rights, no matter by whom possessed.[775]

This ideological duality - legal aid as a privilege of the modern poor as compared to as a political right of modern citizenship - was carried into the post-war period. In

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772 NSW PD 1918 Vol LXXIII at 2274.

773 Above at pp 33-36.

774 Vic PD 1927 Vol CLXXV LC at 2999.

775 NSW PD 1943 Vol CLXX at 2709-2710.

1950 for instance, Captain Martin - then Attorney-General in the McGirr Labor Government - introduced the Suitors Fund Bill, referring again to ideals of modern citizenship. He also noted that it was "the responsibility of the State to provide laws to regulate the affairs of its citizens".[776] Yet, in Victoria in 1961, when a semi-charitable law society scheme was introduced, the traditional ideals of legal aid as a privilege of the deserving poor were at the forefront:

> And whereas on behalf of members of [the legal] profession the Victorian Bar Council and the Council of the Law Institute of Victoria have voluntarily offered to provide legal assistance for poor persons and to appoint a committee to establish and administer a scheme for that purpose ...[777]

This ideological duality, together with ideas of law reform and the mixture of ideals influencing criminal legal aid, continued into the 1960s. In 1965, the Queensland Parliament - almost certainly unwittingly - progressed the political citizenship dimension of Australian legal aid by enacting a scheme modelled on the Legal Advice and Assistance Act 1949 (UK).[778] This new scheme created a universal statutory right to apply for legal aid - whilst real eligibility was significantly restricted by administrative criteria. However, this limitation, which was to be replicated in the national scheme, did not constrain the Hon P R Delamothe, Minister for Justice in the Nicklin Country Party/Liberal government, from proclaiming:

> For too long it has been said – perhaps not altogether without some reason – that justice – the remedy of wrongs and the assertion of rights – has been rather the privilege of the wealthy and not the absolute right of all, both rich and needy ... With the passage of this Bill, such a statement can never again be made in Queensland ... [779]

Nevertheless, elsewhere in the States in the 1960s there was a significant shift towards acknowledging legal aid as a right of citizenship. In 1967, Mr. Durack - in the second reading debate introducing the Legal Contribution Trust Bill 1967 (WA) - said inter alia that:

> ... the provision of adequate legal aid for all sections of the community, regardless of one's financial position, is an important social service. It is a social service perhaps not so urgent as medical assistance and like matters, but it is one which is of importance and which should be provided for members of the community.[780]

The final change to 'civil legal aid' in the States prior to the national scheme was in New South Wales in 1970, when a law society scheme intended to remedy the gaps in access of middle-income earners to the legal system was enacted. This scheme was portrayed both as law reform and as providing effective access to justice. Mr. Waddy, Assistant Minister in the Askin Government, said - in moving the second reading of the Legal Practitioners (Legal Aid) Bill - inter alia:

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776 NSW PD 1950 Vol CXCV at 1349.

777 Preamble, Legal Aid Act 1961 (Vic).

778 Above at pp 63-65.

779 Qld PD 1965 Vol 242 at 2014.

780 WA PD 1967 Vols 176, 177 & 178 at 2386.

> The Attorney-General sees in the contributory legal aid scheme proposed in this bill the most effective means of providing some assistance for the huge number of people in this State ... who, broadly speaking, come within the medium income range. We have in New South Wales judges and court officials of the highest standard, ready and able to adjudicate in the increasingly complex fields of human behaviour. It is of little use maintaining, in our democratic society, a sophisticated juridical system, if the average person is, through lack of means, denied proper access to justice. The courts must be available to every member of the community, and this bill will fill some of the gaps which have prevented this State from claiming that there is, indeed, equality before the law in New South Wales.[781]

Moreover, spokesmen for both major parliamentary actors - the New South Wales Liberal and Labor parties - strongly defended the changes to 'civil legal aid' in the context of civil and political rights of citizenship. The Minister for Decentralisation and Development said in his second reading speech in the Legislative Council on 25 March 1970 that in:

> ... a democratic society it is essential that every citizen shall have easy and equal access to the juridical system. If any sector of society is for any reason discriminated against in this regard, democracy becomes for it merely a theory rather than a practical reality ..."[782]

His ideas were echoed by the Hon R R Downing - Leader of the Labor Opposition - who said that the new legal aid scheme:

> ... represents nothing like the advance made by a Labor government in the Legal Assistance Act of 1943 and its subsequent amendments. This is a new age in which people realize more readily than they did in the past the necessity to have the full protection of the law. Unless legal assistance is given on a much wider basis, we cannot pride ourselves on being a democracy and cannot with justification claim that everyone is equal before the law ...[783]

The Ideology of the Legal Profession

By 1920, the organised legal profession had begun to participate in legal aid administration in the States.[784] Hitherto, its involvement had been negligible, being restricted to lawyers acting on a charitable basis who represented the few litigants conducting proceedings *in formâ pauperis* and defended poor accused granted criminal legal aid. The entry of the legal profession into legal aid administration was a significant step, both for the organised profession and for governments. Thereafter, organised professional involvement in the charitable, semi-charitable and public law society schemes - sanctioned by State governments - slowly became a feature of the Australian experience, especially in the post-war period.[785]

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781 NSW PD 1970 Vol LXXXV at 4638 & 4639-4640.

782 Ibid at 4869.

783 NSW PD 1970 Vol LXXXVI at 4922.

784 Above at p 33.

785 Above at pp 36-37 & pp 56-68.

The public record of this alliance between governments and legal profession in the Australian States is shadowy, and scholarly investigations have so far been negligible.[786] In Part II, the thesis will defend the proposition that this alliance, and its constituent ideology, was a product of legal modernisation.[787] However, the purpose of this chapter is simply to portray its accessible public record in the historical evidence. There are similar problems in seeking to reveal the ideas about legal aid harboured by the legal profession. Australian lawyers and their organisations have, until very recently, been remarkably reticent in publicly formulating their professional ideology. In the era before the national scheme, this reticence extended to statements about professional conceptions of legal aid. Once again, the explanations for this situation are pursued in Part II. The remaining part of this chapter simply describes some of the few instances when the profession did enunciate its ideology of legal aid.

What is clear is that in the 1900s and 1910s, State governments appear to have been ambivalent about organised professional participation in legal aid. However, in 1918, when the first state-sanctioned law society scheme was established, law-makers began to express their expectations of the legal profession. In introducing the Poor Persons Legal Remedies Bill 1918 (NSW), the Attorney-General, Mr. Hall, deliberately downplayed the significance of voluntary professional involvement in the new scheme, exclaiming that the lawyers were doing:

> ... only what the doctors are already doing in the hospitals. A poor person who has a disease or desires an operation is not denied the services of the most eminent medical men in Sydney.[788]

In the 1920s, while other State law-makers were similarly ambivalent about lawyers' participation in legal aid, they still believed that organised professional involvement was desirable. Yet their expectations were often negative, as the story of the establishment of statutory Public Solicitors in South Australia and Victoria indicated.[789] However, State law-makers continued to proclaim their right to expect professional participation. In 1943, the Attorney-General in New South Wales proclaimed in the context of its reforms to 'civil legal aid' that "the legal profession is a profession, and there is every good reason to expect that it should give the same social service as do other professions."[790]

These expectations were matched by the legal profession itself. By the early 1930s, the organised profession was creeping towards establishing a national profile. This process involved a degree of modest, public self-definition. In his address to the

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786 Until the 1970s, there was an absence of studies about the Australian profession generally: D Weisbrot, above n 461 at 10; J Fitzgerald, "A Sociologist Looks at Research on the Legal Profession" in R Tomasic (ed), *Understanding Lawyers, Perspectives on the Legal Profession in Australia*, (1978); P O'Malley, *Law, Capitalism, And Democracy: A Sociology Of Australian Legal Order*, (1983), note 26 at vii.

787 Below at pp 183-185.

788 NSW PD 1918 Vol LXXIII at 2271; above at p 30.

789 Above at pp 33-35.

790 NSW PD 1942-43 Vol CLXX at 2714.

Second Convention of the Law Council in 1935, the Chief Justice of the High Court - The Rt Hon Sir John Latham - said inter alia:

> It should be actively recognised that, in this sphere and others, it is the function and duty of the profession to serve the public ... It should never be forgotten by the members of the legal profession that the justification of the existence of the profession as a profession is to be found in the value of the service they render to the people. The effective protection of the rights of the citizens depends very largely upon the existence of a body of lawyers who are independent, honourable, capable and fearless.[791]

In 1948, the President of the Law Society of South Australia relied on this professional ideal to justify its semi-charitable scheme.[792] Its values continued to define the social foundation of the legal profession throughout the post-war years, with Sir Owen Dixon reaffirming in 1960 the obligation to make its "skill or knowledge ... available to the service of the State or the community".[793] Moreover, the professional ideal continued to be the overt basis of the involvement of the legal profession in legal aid. In 1961 in Victoria, Mr. Meagher, Minister without Portfolio in the Bolte Liberal Government, said in his second reading speech introducing the Legal aid Bill inter alia that enactment of a semi-charitable law society scheme would reflect the belief of:

> ... the members of the legal profession ... that no one should be without legal assistance because he is unable to pay for it, and accordingly have offered, through the Victorian Bar Council and the Council of the Law Institute of Victoria, to provide legal assistance for poor persons, and to establish a scheme for the purpose.[794]

In 1970, these traditions of professional participation in legal aid as a public service were still evident in New South Wales:

> One of the aims of law is the maintenance of social justice. Civilization rests upon social order and this rests on the maintenance of the law. The law, therefore, through the centuries, has ranked as a high calling, serving the most fundamental needs of the community, order and justice. Members of the profession have an ideal of public service which imposes on them a special code of conduct. It is in the best traditions of the profession that its members have done so much in the past to bring legal aid, and consequentially, access to justice, to the people of New South Wales under this scheme ...[795]

However, the involvement of the legal profession in legal aid had a reverse side, namely the protection and expansion of its socio-economic interests. Modern

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791 The Rt Hon Sir J G Latham, "Law and the Community" (1935) 9 (Supplement) *Australian Law Journal* 2 at 8.

792 D Bruce Ross, above n 207 at 57; above at pp 37-38.

793 Sir Owen Dixon, "The Profession of Accountancy" in *Jesting Pilate*, (1960) 192 at 192. See also E L Stevens, "The Place of the Solicitor in the Legal Profession and the Community" (1957) 31 *Australian Law Journal* 313.

794 Vic PD 1961 Vol. CCLXIV at 231.

795 NSW PD 1970 Vol LXXXV at 4869: above at p 68.

professionalism had involved the construction - and maintenance - of state-backed monopolies.[796] In the Australian legal profession, until 10 or 15 years after the national scheme emerged this was manifested in its "monopoly - conferred by statute law and judicial practice - over certain areas of lucrative work, especially property conveyancing".[797]

The profession was not unaware of the links between its participation in legal aid and its wider interests. However, it rarely articulated this nexus in the public domain. In part, this was a product of professional camouflage which protected the secrets of professional control. In part - and probably more importantly - it was because for the Australian profession for much of the century the public interest has been inextricably interwoven with its own. One exception to professional reticence was when the Law Institute in Victoria wrote to the government in 1937 in support of the introduction of a semi-charitable law society scheme.[798] The President, after enumerating the anticipated public benefits, continued to explain:

> From the profession's point of view, the most important benefit might well be to assist in absorbing the very large number of young practitioners who may be expected to be admitted in the near future. In this respect it will, in the first place, give to these young practitioners good clinical experience similar to that gained by doctors at the Public Hospitals. Moreover, as a satisfied client is the best advertisement, it will assist young barristers and solicitors to establish themselves in practice and may even prove financially advantageous to them.... It will also relieve the individual solicitor of the present necessity of deciding whether, by reason of the client's financial position, he ought to reduce his costs. It should go a long way to removing the abuses of "undercutting" and "ambulance chasing." Finally it should build up the same public good will as the medical profession, by reason of its hospital service, has always enjoyed.[799]

Similar sentiments were expressed in 1948, again by the Law Society of South Australia in the context of its legal aid scheme.[800] Consequently, the organised profession - or at least parts of it - was conscious of the benefits it derived from participation in legal aid. In particular, these benefits were seen in expanding the work prospects of young lawyers, developing legal competency, increasing demand for services and assisting internal self-regulation, as well as enhancing the public standing of the legal profession.

Active professional involvement in legal aid was also perceived as a means of discouraging state intervention in the profession and its market-place. This appears from the historical record in Queensland in 1945, and South Australia in 1948, where the President of the Law Society said that it was:[801]

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796 M S Larson, *The Rise of Professionalism: A Sociological Analysis*, (1979) at 53.

797 D Weisbrot, above n 461 at 231.

798 Above at p 38.

799 "Poor Persons Legal Assistance," above n 314 at 181.

800 D Bruce Ross, above n 207 at 57.

801 H Gregory, above n 166 at 171.

> ... greatly in the interests of the profession to make the scheme work and avoid any grounds for re-establishing a government department to provide legal aid. The general public are well served by the Scheme which gives much wider assistance than a public solicitor could. Moreover, the delays which would be unavoidable if all legal aid was placed in the hands of a State department are non-existent under our scheme for the reason that the whole of the profession are available to act when called upon...[802]

The Significance of the Ideals behind the National Scheme

Finally, we need to note in passing - before considering the significance of this review - a third and deeply implicit ideological dimension of the national scheme. In 1976, and throughout its 20th century experience of the ideals of legal aid, Australian society was governed by a modern central legal system. Moreover, this legal system had progressively established closer links with the political ideals of liberal democracy. The socio-legal ideal of equality before the law was deeply embedded in this matrix, as the above review has demonstrated. The managers of modern Australian law and government - the state, its executive governments, law-makers, the organised legal profession and lawyers - saw legal aid as a central tool in matching this political aspiration with social reality and as a means of ensuring that the courts decided "issues between citizen and citizen and between citizen and State on their merits, regardless of the importance or unimportance of the citizen."[803]

The significance of this review of the ideas behind the national scheme is threefold. First, it has demonstrated that it had an ideological context - beyond the bare bones of the Commonwealth-State agreements. Moreover, this context, whilst having many features in common with the ideology of legal aid in other modern Anglo-American societies, nevertheless had its own national features. It was a product of the Australian experience of modern law and government, reaching back into the early 20th century welfare state. And like its institutional mirrors it exhibits a strong sense of social continuum.

The review has also shown that the content of the Australian ideology of legal aid was disparate, save for a recurring theme of equality before the law. Otherwise, legal aid was explained - and defended - in terms of an obligation of the Crown to the poor, a socio-legal responsibility of the modern state, an adjunct of the administrative of justice, a privilege of poorer litigants and accused, a social justice objective of governments, a civil or political 'right' of modern social citizenship, a measure to achieve legal equality between 'rich' and 'poor', a social obligation of the legal profession and a means of promoting lawyers' market competence and dominance. Despite this apparent disparity, Australian governments, politicians, law-makers and the legal profession generally approved of the desirability of state or professional intervention to provide legal aid, especially for poorer people. Yet they often disagreed about how and why this might be achieved. This picture accords

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802 D Bruce Ross, above n 207 at 57.

803 The Hon R R Downing, Leader of the Opposition, in the resumed second reading speech on the Legal Practitioners (Legal Aid) Bill 1970, 5 August 1970, NSW, PD 1970 Vol 136 at 4918.

with Abel's conclusion that legal aid at "various times and in different environments ... has been justified as advancing values that are not only divergent but often fundamentally inconsistent."[804]

Secondly, the review is significant because by portraying the history of ideas of Australian legal aid it has completed the inquiry driven by the unanswered questions of the NLAAC report. In portraying these ideas - in their context and describing their content - the review has advanced our understanding of the historical origins of the national scheme. In particular, it has explored many of the issues in the NLAAC report's first, second and third categories of unanswered questions.[805] It reveals the national scheme originated in the response of governments to underlying, ongoing dynamics of legal aid in modern Australian society. This response will be de-constructed and explained in Part II.[806]

Yet, the review still leaves the Australian story incomplete, for it does not answer all the questions appertaining to the origins of the national scheme. Furthermore, it produces other, new questions. For instance, why did governments wait until the early 1970s to make a coordinated national response to legal aid, when its ideology - and the social objectives it projected - had been present throughout the experience of modern law and government in the Australian welfare state? Moreover, merely acknowledging the ideological context of the national scheme does not answer the two questions in the fourth category of the NLAAC's legacy.[807] In other words, why did its star, which had been so bright in the early 1970s, fade so quickly in the 1980s? And why did the Keating Government replace legal aid and its ideals in 1993 with the 'access to justice' response. And finally, what did this action signify for popular access to law?

Thirdly, the review of the ideas behind the national scheme is significant because it highlights their essentially 'legal' character. The players in the history of ideas of Australian legal aid were also the principal actors in its system of law and government: the state, governments, political parties, administrators, officials, judges, the legal profession and lawyers. In other words, the review has shown that the ideological context of the national scheme was really part of a much wider scenario, namely that of the legal ideals and praxis of government of modern Australian society. This is something of a mixed blessing. It is valuable as it provides the ideological counterpart to the institutional history of the Australian experience narrated above.[808] It means that we have enhanced our understanding of this modern legal development in the post-war welfare state.

On the other hand, in highlighting the legal character of the ideological context and the institutional history we have revealed the limitations of these frameworks in

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804 R L Abel, above n 2 at 485.

805 Above at pp 6-9.

806 Chapter Six below.

807 Above at p 8.

808 Chapters Two, Three and Four.

explaining the origins of the national scheme. For it is not possible to explain the origins of these legal developments within their own terms, namely the self-referential ideals of the modern Australian legal system. And these limitations cannot simply be overcome by adding the other development factors discussed above, namely the post-war changes and trends in public policy, politics, the legal profession and the lawyers' services industry. The reason is that neither the legal nor the wider social and political contextual frameworks examine the role and functions of modern Australian law and its ideals as such. Nor do they address the institutional and ideological paradoxes of modern legal aid:

> First, there is the analytic mystery of why the state creates and supports an institution that frequently challenges its discretion, reveals its ineptitude, and makes vocal and sometimes irresistible demands on its resources ... Secondly, there is the normative puzzle: is legal aid promise or peril? Is it a non-reformist reform that not only offers material gains to its beneficiaries but also permits them to gain control over their lives and to organize for further action? Or is it a mere sop, a diversion from the important tasks of social, political and economic mobilisation?[809]

Consequently, the history of the legal development of Australian legal aid - even informed by a background 'political' context - is incapable of adequately explaining the origins of the national scheme. Similarly, its explanation is incapable of explaining the significance of the national scheme as a legal development - a requirement which is essential if we are to be able to consider whether fair and effective access to law is feasible in the Australian welfare state. To adequately answer these questions, we must discover an alternative approach to explaining the origins and significance of the post-war Australian legal aid experience. This is the task which we undertake in Part II.

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809 R Abel, "The Paradoxes Of Legal Aid" in J Cooper & R Dhavan (eds), *Public Interest Law* (1986) at 379.

Part II:
The Post-War Experience Revisited

Chapter Six
Reconsidering the Theory*

> [O]ne of the important functions of myth *is that it anchors the present in the past.* This is done by establishing a dramatically significant series of events: and the drama is conveyed by the style, which may well consist of using oppositions and their resolution; and it is also conveyed by dredging deep into unconscious symbolism, so that the message communicated by the myth does have an impact at a number of levels. The advantage that myth has over cosmology is that the latter may merely provide a set of ideas which set limits to conceptual exploration; while myth does provide a time reference, it does presuppose that circumstances can be traced to particular, if only imaginary, events. To locate things in time, even if the exact time is unspecified, creates a far more effective device for legitimation, for example, than simply creating a set of abstract ideas which are timeless.
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> P S Cohen "Theories of Myth" (1969) 4 (New Series) *Man (The Journal of the Royal Anthropological Institute)* 337 at 349-350

Introduction

The two chapters in this part of the thesis revisit the post-war legal aid experience. In doing so, they pursue three objectives. First, they seek to remedy the explanatory 'gap' in the Australian experience, the neglect of its orthodoxy and liberal legalist ideals to engage with the reality of law, which has limited our capacity to explain the origins of the national scheme, and its significance in post-war Australian society. The second objective of Part II is to defend and explain the opening contention of the thesis, which claims that revisiting the origins and significance of the national scheme holds the key to determining whether fair and effective access to the law is a feasible expectation of citizens and governments in the Australian welfare state.[810] Thirdly, these two chapters and the conclusions they defend provide an analytical platform for identifying the lessons of the post-war legal aid experience and for considering their implications, which is the task of Part III below.

As foreshadowed in Chapter One, Part II proceeds, in both scope and subject-matter, from a cross-national perspective.[811] Chapter One also canvassed the general justifications for the injection of this perspective. Australia was one of a number of Western or Westernised societies which reorganised or reformed legal aid after World War II.[812] Many of these societies - like Austria, Canada, Denmark, Finland, France, Norway, Sweden, Ireland, The Netherlands, New Zealand, the United Kingdom and the United States - also had welfare capitalist systems of political

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* An earlier version of this chapter was presented as a draft paper at the Biennial Meeting of the Working Group on Comparative Legal Professions, International Sociological Association Research Committee on the Sociology of Law, Onati, Spain, 13-15 July 1998.

810 Above at pp 11-12.

811 Above at p 12.

812 Above at pp 1-2 & n 2.

economy.[813] Moreover, these welfare states, together with those in which legal aid was not prominent in the post-war years - like Belgium, Germany, Italy, Japan and Switzerland - also displayed modern, national centralist-type systems of legal regulation.[814] These links in comparable experiences, political economy and law mean that cross-national inquiry - the stuff of comparative public policy and its techniques - is seen to potentially offer us fresh insights into the origins and significance of the Australian scheme.[815]

For the purposes of Part II and III, however, there are more particular and specific reasons for pursuing cross-national inquiry. The literature of post-war legal aid, which is outlined and reviewed below, treats the different, post-war national experiences as part of a general social phenomenon - at least in the Western world.[816] Both its explanatory frameworks and significant subsequent professional and scholarly investigations have established cross-national comparison as the forum for explaining developments in legal aid.[817]

The second and third objectives of this Part also encourage comparative perspectives. The links between Australia and comparable countries evident in post-war legal aid - social experience, political economy and law - have continued. The actions of successive Australian governments in downgrading the administrative significance of legal aid - and in gradually constricting public expenditure - were replicated in other welfare capitalist states in the 1980s and 1990s.[818] Furthermore, Australia has not been the only Western society where significant parts of the central justice system have remained inaccessible to poorer citizens, notwithstanding post-war reforms to legal aid. Moreover, in many Western countries the legal problems of poverty have been exacerbated by unemployment on a new post-war scale, by the emergence of alienated and marginalised underclasses, and by conflicts over race and migration. Australia was neither alone in the 1980s in experiencing unprecedented levels of public concern about access to civil and criminal justice, nor were its governments

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813 Above at p 6 and n 35.

814 Below at pp 163-164.

815 Chapter Seven below.

816 Below at pp 142-153.

817 Eg, in 1992, administrators, lawyers and scholars from The Netherlands, Norway and Sweden joined colleagues from the English-speaking world to form the International Legal Aid Group, and in 1995 a World Legal Aid Conference was convened in Malaysia. Indeed, cross-national approaches have been typical of approaches since the 1950s. In 1959, papers on developments in legal aid in Denmark, France, Germany Norway, Sweden, Switzerland and the USSR were presented to the Committee on the Judiciary and the Legal Profession at the New Delhi Congress of the International Commission of Jurists: N S Marsh, "Legal Aid and the Rule of Law: A Comparative Outline of the Problem", (1959-60) *Journal of the International Commission of Jurists* 95 at 95-96.

818 These issues were the theme of the conferences of the International Legal Aid Group in 1994 and 1997: Ministry of Justice, *Legal Aid in the Post-Welfare State Society* (1995); Scottish Legal Aid Board, *Legal Aid - How much justice can we afford?* (1997), Vols 1 & 2.

alone in adopting new, 'access to justice' responses. Britain and Canada had both done so since 1988.[819]

Moreover, the transformation of Australian public administration and infrastructure is typical of the welfare capitalist world, where five new public policy 'megatrends' have emerged since the early 1980s, comprising "attempts to peg back the growth of government; the internationalization of public administration; the privatization of public administration; and the rise of the 'New Public Management'".[820] In adopting the principles and strategies of 'New Public Management' - including its deregulation of the private sector, shrinking of public services and limiting access to public functions through 'cost-recovery' and efficiency - Australia followed developments in Britain and New Zealand in the late 1970s and early 1980s.[821] The principles and practices of 'New Public Management' have since spread to non-English speaking welfare capitalist countries.[822] Its 'contract' paradigms have created new mass markets for legal information, advice and representation, whilst denying its 'consumer-citizens' adequate access to a corresponding range of publicly-funded legal services. The political premises of 'New Public Management' have also prompted many Western countries to retreat from the liberal ideals which gave legal aid its special social post-war significance. In turn, this has often seen some of the more comfortable assumptions of modern citizenship recontested in increasingly corporatised and polarised societies.[823]

These and other economic and political transformations have generated new pressures on the modern Western matrix of the state, its central legal system and its social functions. Since the early 1960s, legal integrity of the nations of Western Europe has been challenged by growing administrative and economic union. This trend was accelerated at Maastricht in 1992 by the adoption of the goal of European political union. The projection of free market dogma through 'globalisation' is also challenging the integrity of the social functions of the modern Western national legal systems. Since 1995, Australia, for instance, has conducted negotiations with the Organisation for Economic Cooperation and Development over entry into the Multilateral Agreement on Investment, an international treaty which seeks to protect foreign investors from unfavourable treatment by host governments.[824] These and other new external pressures all have the potential to modify the social allegiances of the nation state, especially in responding to the needs of its poorer citizens.

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819 Above at pp 2-4: The Right Honourable Lord Woolf, Master of the Rolls, *Access to Justice: Final Report*, (1996); Legal Action Group, *Access to Justice: an initial response to Labour's proposals for reforming the civil justice system*, (1995) & Ministry of the Attorney General, *Access to Justice: Report of the Justice Reform Committee*, (1988).

820 I Thynne, "Basic Concepts and Issues" in I Thynne (ed), *Corporatization, Divestment and the Public-Private Mix*, (1995) at 1.

821 F G Castles, "The dynamics of policy change: What happened to the English-speaking Nations in the 1980s" (1990) 18 *European Journal of Political Research* 491 at 492-498.

822 Eg, Finland and The Netherlands in the 1980s, and signs of this shift began to appear in Germany in the 1990s: I Thynne, above n 820 at 36 & 73.

823 D Fleming, above n 47 at 161-163.

824 D Forman, "MAI way: parliamentary prerogative", *The Australian* 9 June 1998 at 17.

Since the late 1980s, there have been two major changes in world politics which have seen a significant extension of the compass of the law and legal ideology of advanced capitalism. The first was the collapse of the communist systems in Eastern Europe and the Soviet Union (with the attendant breakdown of the economic support these countries had provided for their political allies). In some cases, the gradual democratisation of government and society saw a revitalisation of the values of modern centralist law. Not all of the former communist countries had similar experiences of democratisation and legal reform. However, in all the former communist states, economic reform and restructuring opened up new markets for the investment capital, technology and know-how of advanced capitalism. The establishment of these new, 'market' economies increased the global social significance of modern Western centralist law and its institutions, especially the Anglo-American type, which provides the legal lubricants of international capital, its supply, management and regulation.

The other major change in world politics was the thrust of Western capitalism, investment and legal ideology into the southern Asian countries. Cambodia, China, Indonesia, South Korea, Thailand and Vietnam are now vigorously pursuing strategies to modernise their legal systems, particularly in relation to corporations law and business regulation.[825] These developments have created a huge market for Western legal products and technology, which governments and the private legal profession in Australia, Britain, the United States and elsewhere are competing to service.[826] Once again, the result has been to increase the prominence and penetration of modern Western centralist law and its institutions, especially in the legal regulation of the global economy. Both these changes are other instances of the 'links' between international legal developments since the late 1970s - the pinnacle of post-war legal aid - and the role of the legal system in the contemporary Australian welfare state.

The Role and Scope of This Chapter

The role of this chapter is to address the first of the objectives of this Part. It seeks to remedy the explanatory 'gap' in the Australian experience which limits our ability to explain the origins of the national scheme, and its significance in post-war society.

The chapter begins by identifying and outlining the literature of post-war legal aid. In doing so, it concentrates upon those contributors who have sought to explain the post-war experience in a cross-national, welfare state context. This literature is briefly reviewed, and its significance explained, shortcomings are highlighted and

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825 E g. Xu Xiaosong, "On China's Capital system and its Reform", (1997/98) 4 *Canberra Law Review* 11; Kia Hua Wang, "Celebrations turn into Sorrow; Where is China's Consumer Protection Law?", (1997/98) 4 *Canberra Law Review* 151. The material included in Jian Fu, "Select Bibliography On Chinese Law: Part I - Companies, Joint Venture, Banking, Insurance And Consumer Laws" (1997/98) 4 *Canberra Law Review* 257-290 is predominantly post-1994 and indicates the scale of the involvement of the Western legal enterprise.

826 Eg. in Australia the International Legal Services Advisory Council assists law firms wishing to export legal services, especially to the Asia-Pacific region.

the inherent limitations of its ideological framework discussed. The review identifies these limitations as the failure of the literature to factor in the political dimensions of modern law in Western society in explaining the origins and significance of post-war legal aid. The 'missing' political dimensions are highlighted, before the proceeds to consider the fruits or benefits of having reviewed the explanatory literature.

The next section of the chapter presents a redesigned framework from which to analyse the post-war experience. This framework seeks to build upon the postulates stated earlier in the thesis. It also incorporates the 'strengths' of the explanatory literature, particularly its historical record of post-war developments in national arrangements for legal aid. However, at the same time the redesigned framework also aims to remedy the defects identified in the literature. Consequently, it 'adds' to the existing framework by including a legal pluralist perspective, a dynamic model of legal development using Renner's notion of functional transformation and incorporating the methodology and techniques of Public Policy. The new framework also acknowledges some important limitations of the epistemology of legal development in the modern state.

The first application of the re-designed analytical framework is to explain the modern transformation of the poor persons legal assistance institutions. The chapter proceeds to link this modern transformation with legal aid, by invoking the analytical techniques and insights of Renner's idea of functional transformation. These techniques are then employed to trace the transition of the modern poor persons institutions into the bifidial modern Western 'institution' of legal aid. In the case of the 'concrete' or machinery dimensions of the poor persons institutions, this task proves to be relatively straightforward. There is more comparability than difference in the subsequent developments of the law and institutions of the modern state in Civil Law and Common Law world. On the other hand, in explaining the transition of their 'ideal' or normative dimensions into the ideals of legal aid, the discussion in the chapter is inevitably drawn to the differences in the social construction of 'modern Western law' in the Civil Law and Common Law societies.

The chapter concludes by comparing the origins and social functions of modern legal aid in the mid-century Western world on the cusp of the post-war experience. It reveals that whilst its origins and social functions were in many respects highly comparable, there was one significant difference between the Civil Law and Common Law societies. This difference lay in the character and social function of the 'ideal' or normative dimensions of modern legal aid. The chapter explains the reasons for this essential difference, highlighting in particular the distinctive and different character and social functions of the socio-legal 'institution' of legal aid in the Common Law world, and 'within' its 'modern Anglo-American law'.

The Explanations of the Post-War Experience

The post-war legal aid experience produced a voluminous scholarly literature, especially in the world of liberal legalism in the United States in the 1960s and early 1970s.[827] The public policy of legal aid administration in Australia, Britain, Canada, The Netherlands, Sweden and the United States generated an equally extensive public literature.[828]

Typically, the legal aid literature was nationally or regionally oriented, describing the history of particular schemes or political struggles with the legal profession over administrative arrangements, funding and service delivery. It also generally insisted on "divorcing law from politics".[829] In particular, most scholarly analyses adopted and portrayed "the same ideological approach towards the legal system ... [assuming] law is independent of any conflicts within society and that there is consensual agreement upon the use of the legal system to provide solutions to social problems".[830]

Therefore, generally the literature does not offer us adequate explanatory frameworks to better understand the origins of legal aid in the post-war legal systems. Neither does it typically engage with the social and political dimensions of legal aid. However, within the scholarly literature there are a few exceptions, accounts of varying significance and depth, which have sought to contextualise the post-war experience and other developments in legal aid within the modern society of the welfare state.[831]

In 1950, Marshall explained the origins of the British post-war scheme as indicating the renewed efforts of the modern state to redress the problem of social equality by removing "the barriers between civil rights and their remedies".[832] Two decades later, the renewed interest in Marxist legal scholarship in Britain produced other and

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827 R L Abel, above n 2 at 475.

828 Eg. the Australian national scheme stimulated many reports on legal aid administration. At the national level, these include J Cooper, *Legal Services in Australia*, A Report to the Attorney-General, Senator Gareth Evans, (November 1983), Attorney-General's Department, Legal Aid Task Force, *Final Report, August 1985: Discussion Paper November 1984*, (1985), National Legal Aid Advisory Committee, above nn 7 & 21, Senate Standing Committee on Legal and Constitutional Affairs, Cost of Legal Services and Litigation, "Legal Aid: 'For Richer And For Poorer,'" Discussion Paper No 7, (April 1992), & Senate Legal and Constitutional References Committee, above n 45. Many more investigatory documents have been generated by the experience in the States and Territories.

829 R L Abel, above n 2 at 476.

830 P C Alcock, above n 245 at 158-159.

831 This review does not include the 'charitable', 'Judicare', 'salaried' and 'mixed models' of legal aid delivery. Whilst these models provide useful tactical perspectives, they offer little assistance in contextualising the origins and significance of legal aid in the welfare state. Recent literature on the 'four models' includes A Paterson, above n 299 & F Regan, "Is it Time To Rethink Legal Aid?", paper presented to the Socio-Legal Studies Association Annual Conference, University of Exeter, England. March 30-April 1, 1993.

832 T H Marshall, *Citizenship and Social Class and other essays*, (1950) at 40.

richer accounts of its post-war developments, or their origins and significance.[833] In 1976, Bankowski and Mungham published an Anarcho-Marxist critique of the duty solicitor legal aid schemes and the inner-city neighbourhood law centres which had been established since the late 1960s.[834] They damned legal aid because, like all reform of capitalist law, prc viding lawyers for the poor was ultimately a "waste of time" serving only to help "law much more, by increasing its domination-legitimacy, though making it ... 'accessible'", and strengthening "the hand (and pocket) of lawyers".[835]

Also in 1976, Alcock published his study of the politics of the law society scheme which had operated in England in the 1920s and 1930s.[836] He saw developments in this scheme as:

> ... the product of the interrelation of the economic, political and ideological practices of various groups within the ruling class, reacting to what they perceive to be the demands of the lower classes and producing and changing legal aid as a legitimation for the operation of a class based legal system.[837]

Alcock concluded that, if we are to understand the social basis of post-war legal aid, we needed to recognise its legitimating role, especially in any attempt to contest the functionalism and contradictions of the explanatory orthodoxy.[838]

In the mid-1980s, Paterson and Nelken responded to Bankowski and Mungham and to work by Bankowski in 1981, and Abel in 1982 and 1984, which explained developments in legal aid around 'demand creation' hypotheses.[839] Paterson and Nelken argued the contention that legal aid was a product of oversupply of lawyers, the expansion of legal education and an economic subsidy to solicitors did not withstand critical exposure to the reality of the British experience in the 1960s.[840] Moreover, they claimed the 'demand creation' hypotheses of Abel, Bankowski and Mungham oversimplified the complexity of the legal services industry, the

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833 W M Rees, "British Legal Services and Socialist Theories of Law", (1984) 4 *Windsor Yearbook of Access to Justice* 73 at 83.

834 Z Bankowski & G Mungham, *Images of Law*, (1976) at 49-53 & 74-75.

835 Ibid at 77.

836 P C Alcock, above n 245.

837 Ibid at 173-174.

838 Ibid at 174 & 158-163.

839 A Paterson & D Nelken, "The Evolution of Legal Services in Britain: Pragmatic Welfarism or Demand Creation?", (1984) 4 *Windsor Yearbook of Access to Justice* 98 at 99-101 referring *inter alia* to Z Bankowski, "Commissioning Legal Services" [1981] *Scots Law Times (News)* 37 , R Abel, "The Politics of the Market for Legal Services" in P A Thomas (ed), *Law in the Balance*, (1982) & R Abel, "Lawyers in England and Wales", unpublished paper delivered at the meeting of the Working Group for Comparative Study of Legal Professions of the ISA Research Committee on Sociology of Law at Bellagio, Italy, July 1984.

840 Ibid at 101.

importance of interest group politics and competing definitions of the problem of legal 'need'.[841]

In 1994, Cousins, in an article influenced by Alcock's theoretical premises and by Abel below, examined common factors affecting the development of legal aid in Belgium, France, Ireland, The Netherlands and the United Kingdom.[842] He argued that the emergence of legal aid schemes in these and other advanced Western societies was influenced by the presence of three key social dimensions: (a) distinctive factors of the national historical and cultural environment, (b) functional factors of industrialisation, modernisation and development, marital breakdown and divorce, religion, political conflict and political violence and developments in national legal systems, and (c) political factors, primarily the influence of the 'access to justice' interest groups, public administration and the private legal profession.[843] Cousins concluded that these explanatory perspectives enable us to comprehend the origins of post-war developments in legal aid.[844]

However, among those who have sought to contextualise the post-war experience, two writers remain at centrefield: Cappelletti and Abel. In 1972, Cappelletti published an article in which he portrayed modern legal aid as originating in the ancient quest to solve the problem of providing lawyers for the 'poor'.[845] He saw the post-war experience as the culminant legal aid response of the modern Western society, representing a "first wave" towards achieving equal and universal access to justice.[846] In 1985, Abel published an epic article in which he sought to explain the origins of modern legal aid and its political significance in Western capitalist society.[847] Abel contended that legal aid was a product of a diversity of factors, including industrialisation, urbanisation, regional and international economic migration, philanthropic capital and its influence, socio-political reform, and other capitalist social transformations in the 19th and 20th centuries.[848] While these were the background causes, Abel argued that there were other, contemporary transformative forces affecting the development of post-war legal aid. These forces included changes to family structure, changes to state regulation of the reproduction of labour, the expansion of public administration in the welfare state and changes in the legal profession and legal system.[849] However, ultimately, according to Abel, the presence of transformative social forces alone could not account for the post-war

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841 Ibid at 101 & 116-118.

842 M Cousins "The Politics of Legal Aid - A Solution in Search of a Problem?" (1994) 14 *Civil Justice Quarterly* 111. Cousins also makes limited references to Australia, Denmark , Germany, Italy, Portugal, Spain and the United States.

843 Ibid at 116-125.

844 Cousins adopts a comparable explanatory approach in "Legal Aid Reform in France and the Republic of Ireland in the 1990s" in F Regan, A Paterson, T Goriely & D Fleming (eds), *The Transformation of Legal Aid*, (in press).

845 M Cappelletti, "Legal Aid: Modern Themes and Variations", (1972) 24 *Stanford Law Review* 347.

846 M Cappelletti & B Garth, above n 2 at 21.

847 R L Abel, above n 2.

848 Ibid at 586-591.

849 Ibid at 586-592.

phenomenon. It was necessary to look to contextual factors in the form of "concrete historical circumstances", including the social aftermath of World War II, the social and political changes of the 1960s, and the election of social democratic governments in particular countries.[850]

The contextual scholarly literature also includes two writers who have tackled the question of the origins and significance of post-war legal aid from sociological perspectives: Blankenburg and Regan. In 1982, Blankenburg explained the diversity of the responses in the Western European welfare states by reference to differences in national welfare expenditure, the attitudes of the legal profession and the legal education curriculum.[851] In 1997, Blankenburg again demonstrated the diversity of the Western response, describing the reactions of the legal profession and the welfare state in the English-speaking countries and Western Europe.[852] He attributed this diversity to differences in the relative prosperity of the welfare states and to the success of lawyers in defending their professional privileges.[853]

Regan, on the other hand, has sought to develop an explanatory model of the post-war experience in the context of welfare capitalism. In 1994, dissatisfied with the existing options - particularly the analytical limitations of the "funding/personnel" approach in the models of legal aid - he began to explore whether it was possible to construct an alternative approach to analysing the social policy of legal aid.[854] For this purpose, Regan adopted the three categories of welfare capitalist states ('liberal', 'social democratic' and 'corporatist') first described by Esping-Andersen.[855] He compared the development and significance of legal aid in Sweden - like the other Scandinavian countries, a 'social democratic' welfare state - and Australia - like the United States, United Kingdom and Canada, a 'liberal' welfare state.[856] Whilst the results of his comparative study were mixed, Regan concluded that:

> ... viewing legal aid through the lens of the welfare state is a major advance in the level of detail that it provides, and the way that strengths and weaknesses of legal aid can be identified in different societies.[857]

Regan has since pursued this perspective in a paper which seeks to explain variations in legal aid services in welfare states by reference to different opportunities for citizens' mobilisation of law, as they exist in the Civil Law and Common Law legal

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850 Ibid at 586, 592 & 498-540.

851 E Blankenburg, "European Experience in Innovating Legal Services" in (1982) 2 *Windsor Yearbook of Access to Justice* 247 at 249-250.

852 E Blankenburg, "Lawyers' Lobby and the Welfare State: The Political Economy of Legal Aid" in Scottish Legal Aid Board, Vol 1, above n 818 at 1.

853 Ibid at 9-18.

854 Francis Regan, "Are There 'Mean' & 'Generous' Legal Aid Schemes" in Ministry of Justice, above n 818, 15 at 16.

855 Be[illegible] at p 218-219; G Esping-Andersen, above n 35.

856 Regan, above n 854 at 18.

857 Ibid at 37.

systems.[858] This conjunction of welfare states and legal 'families', he argues, helps to explain "why some societies offer very effective assistance for court while [others] offer more effective help for outside court".[859]

A Review of the Explanations of Legal Aid

This chapter does not present a detailed critical review of the legal aid literature, its descriptive or contextual components. Instead, it briefly reviews the literature from three perspectives. First, the chapter considers the significance of the explanatory literature in portraying developments in post-war legal aid schemes, and in defining and describing "legal aid" and "the post-war experience". Secondly, it considers the shortcomings of the literature and highlights the principal flaws in the explanations of the legal aid post-war experience presented by the various contributors. Thirdly, the chapter identifies the inherent limitation of the ideological frameworks behind the explanatory literature. It proceeds to explain the basis of this limitation, and why it disqualifies the liberal legalist, liberal centralist and Marxist-oriented explanations as explanatory frameworks of the post-war experience. The review concludes by identify the missing part of the explanatory frameworks, namely the political dimensions of modern Western law.

The Significance of the Explanatory Literature

In seeking to explain legal aid, the explanatory literature serves two important functions. First, it portrays and describes experiences of legal aid in post-war society, providing us with a record of developments in the machinery, funding, politics and public policy of legal aid, and associated developments in the areas of poverty, government, the legal services industry, lawyers and the legal profession. Moreover, the explanatory literature does so in a cross-temporal and cross-national context. It shows us important aspects of the development of modern legal aid in the welfare capitalist countries, in other advanced capitalist countries, and in other parts of the modern world, including Africa and South America. Consequently, the explanatory literature is an important and valuable explanatory resource, and is extensively referred to below and in Chapter Seven, in reconsidering the origins of the post-war experience and its significance.

Its second function is definitional. In other words, the explanatory literature serves to define "legal aid", and the "post-war experience". It defines legal aid as the socio-legal organisation through which the modern state and legal profession cooperate for the purposes of providing lawyers' services for poorer people, at minimal or no cost. The explanatory literature, expressly or by implication, applies this conception to explain the 'institutional' basis of the developments in the machinery and administration of legal aid which represented the post-war experience. The literature also defines and constitutes "the post-war experience". It asserts, in the case of both

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858 F Regan, "Why Do Legal Aid Services Vary Between Societies? Re-Examining The Impact Of Welfare States And Legal Families", draft chapter to appear in F Regan, A Paterson, T Goriely & D Fleming, above n 844.

859 Ibid at 2.

its liberal legalist and Marxist-oriented components, that these developments constituted a new and unified phase or 'wave' in the significance of legal aid in the post-war world and its modern Western legal systems. The explanatory literature, in other words, serves to constitute "the post-war experience" as a series of interconnected, unprecedented developments in the significance of legal aid in modern Western society. In performing this function, the explanatory literature is also valuable and important. In retrospect, as we consider below, it can be seen as forming part of "the post-war experience" itself.[860]

The Shortcomings of the Explanatory Literature

However, the explanatory literature does not offer us an adequate and comprehensive basis for explaining the origins and significance of the post-war experience and, in particular, why welfare capitalist states like Australia 'decided' to reform the organisation, administration or scale of legal aid administration in the post-war period. One reason for this is that no part of the literature adequately explains the origins of the post-war experience[861].

The case against the non-contextual component literature - which constitutes the great body of legal aid scholarship, public reports and investigations - is twofold. First, this literature rarely purports to consider the origins of national developments in post-war legal aid in a cross-national context, and never considers their significance in the context of modern Western law and society. Secondly, the 'contributors' to the non-contextual literature almost invariably proceed from analytical premises based on liberal ideological assumptions about the role and functions of law.[862] This is a characteristic which, as Abel reminded us, is "hardly surprising", given the role of liberal legalism as the "prevailing ideology of advanced capitalism".[863]

Liberal legalism served definite, and important, functions in post-war society - and it still does. In the Western world, together with the modern mythology of law to which it is inextricably linked, liberal legalism and other modern centralist conceptions of law enabled "'us' to have a 'unified' law", bringing "together law's contradictory existences into a patterned coherence".[864] However, its acontextual historical, social and political perspectives and centralist perspectives of modern law do little to inform our understanding of the legal dynamics of the modern state. And the developments in post-war legal aid are no exception.[865]

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860 Below at pp 198-202.

861 The other reason is the inherent limitation of its ideological frameworks discussed below at pp 149-151.

862 R L Abel, above n 2 at 476-485.

863 Ibid at 476.

864 P Fitzpatrick, above n 68 at 2.

865 Ibid at 87-91; D Fleming, "The social significance of the phenomenon of 'legal aid' in the Australian welfare state", paper presented at the joint Meeting of the Law and Society Association and the Research Committee on Sociology of Law, Glasgow, Scotland, 10-13 July 1996 at 9-12.

In the case of the 'contextual' explanations, a comparable case exists against Alcock, Bankowski and Mungham, Blankenburg, Cousins, Marshall, Paterson and Nelken and Regan. None of these writers presents a general explanation of the post-war experience, although, as already noted above, each is important because they contribute to explaining particular aspects of its origins and significance. Similarly, all these contributors proceed from centralist legal perspectives, albeit - especially in the case of the Marxist-oriented writers Alcock, Bankowski and Mungham and Cousins - of a different kind to liberal legalism. On the other hand, Blankenburg, Marshall, Paterson and Nelken and Regan have a more ambiguous association with liberal legalism. Whilst none can fairly be said to be 'liberal legalists', liberal social theories permeate their social construction of modern Western law and its institutions. Consequently, like other reformers and non-Marxist social scientists, Blankenburg, Marshall, Paterson and Nelken and Regan neither effectively engage with nor deeply contest the omnipresent liberal images of law, its institutions and the modern legal system in the post-war welfare state.

On the other hand, both Cappelletti and Abel have presented detailed and comprehensive explanations of post-war legal aid, which are in each case easily translatable into a general theory or model. Nevertheless, these two contributors have also failed to adequately explain the origins of the post-war experience. Detailed arguments against both Cappelletti and Abel, demonstrating the shortcomings of their explanations, have been presented elsewhere.[866] It is not necessary for the purposes of this chapter to reproduce these arguments. The key objections to both Cappelletti and Abel - and to the other 'contextual' explanations of legal aid - lie in the limitations of their conceptualisation of the legal developments in modern Western society which are discussed below. Therefore, only the principal objections to the respective explanations of Cappelletti and Abel are briefly summarised below.

Cappelletti's explanation of the origins of post-war legal aid is ultimately an elegant and lucid piece of liberal mythology.[867] Its acontextualism, as in the other liberal legalist accounts above, disqualifies it from representing a complete record of the modern development of legal aid, or the origins and significance of the post-war experience. Abel's explanation, on the other hand, is not so easily dismissed. His 'Marxist-oriented liberal' perspective on modern law and society allowed him to defrock the liberal legalist explanatory orthodoxy, yet compelled Abel to reconstruct legal aid in a 'political' guise.[868] Abel was not, in other words, prepared to extend his

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866 D Fleming, above n 865 at 8-11 & 14-22.

867 Ibid at 8-11.

868 Notwithstanding a Marxist-orientation - which is evident, for instance, in his emphasis on "economic considerations" in the role of the legal profession and in the description of legal aid as "an object of class struggle" closely associated with the reproduction of "labor power, disciplining capital and the welfare bureaucracy and, mitigating state coercion" (above, n 2 at 476-485, 500 & 608) - Abel remains a lawyer. Albeit one with a novel and, at times, deeply critical perspective on their modern role, and the functions of 'modern American law' (below at pp 183-188 & 192-194). Moreover, Abel is perceived as a lawyer by his colleagues and critics alike, highlighting the 'broad church' of the 20th century American legal profession.

defrocking to the 'institution' of legal aid itself. Moreover, Abel adopted a superficial interpretation of the public policy processes of the welfare state.[869] The consequence is that his 'political' explanation - insightful and important as it is - fails like all the other explanations to explain the legal dynamics of the modern capitalist state.

The Inherent Limitation of the Ideological Frameworks

The other reason why the various contributors do not adequately and comprehensively explain the post-war experience is a common flaw in their ideological premises. Neither the liberal legalist, liberal centralist nor the Marxist-oriented interpretations confront the politics of law in post-war society, and its impact on developments in legal aid. This neglect, avoidance or denial of the political dimensions of modern Western law is the central limitation of the explanatory literature.

This claim is relatively uncontroversial in the case of the explanations which have been inspired by liberal legalism, or other liberal centralist conceptions of modern law - the great bulk of the scholarly literature, the literature of legal aid administration and the explanations presented by Blankenburg, Cappelletti, Marshall, Paterson and Nelken and Regan. At their most paradigmatic, liberal constructions of modern law sanctify its inherent apoliticism. They also avoid or deny the political origins of modern law, and the political character of the processes and institutions of the modern Western legal systems. The liberal reformist perspectives - like those of Marshall and Paterson and Nelken - and non-Marxist sociology - like those of Blankenburg and Regan - are less dogmatic. These perspectives are prepared to admit, to varying degrees, the political character of the origins, role and functions of the modern legal system. Indeed, much of their work is concerned with interpreting the political significance of legal phenomena in the welfare state. However, the liberal reformist perspectives and non-Marxist sociology similarly avoid or deny the political dimensions of Western law itself. Generally, they are unwilling to trespass behind the steely mist of the mythology of modern centralist law. And Blankenburg, Cappelletti, Marshall, Paterson and Nelken and Regan are no exceptions.

The claim that the Marxist-oriented interpretations avoid or deny the politics of modern law in post-war society is more controversial. Indeed, at first glance, it may even seem perverse. After all, Marxism and its derivatives have been the principal, most profound and persistent critics of modern Western society, and the role and functions of its institutions.[870] The law and legal institutions of Western capitalism, however, have been an exception. The nature, construction or politics of modern Western centralist law and its legal systems were "not a central focus of concern for Marxists":[871] Modern state law was only relevant when it affected the "decisive

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869 D Fleming, above n 865 at 19-21.

870 H Collins, *Marxism and Law*, (1984) at 1.

871 Ibid at 9; W M Rees, above n 833 at 85-86 & Lord Lloyd of Hampstead, *Introduction to Jurisprudence*, (1979) at 724-738.

factors" of class and capital in social evolution.[872] Consequently, 'capitalist law' was:

> ... not a prominent analytical concept of comparable importance to social class or capitalism for example. Nevertheless legal systems ... [were] of considerable interest to Marxists because of the part they played in different social formations such as feudalism or capitalism. Marxists ... [could not] deny the importance of some of the functions performed by legal institutions, but essentially their interest in law ... [was] tangential to a predominant focus on the general mode of social organisation and the material circumstances in which men are placed.[873]

Even post-war Marxist and Marxist-oriented legal scholarship still only focused on revealing the social reality of the operation of modern Western centralist law, and on portraying the economic, social justice and political implications of its legal systems.[874] Therefore, in effect, from its inception Marxism generally abandoned law, in the sense of recognising the modern, centralist law of the capitalist state as a discrete political phenomenon, with its own developmental history, processes and experience. In other words, Marxist analyses of law, like their liberal counterparts, have generally avoided or denied the politics of law:

> Marxists deny that there is a special and distinctive phenomenon which we can term law. Because Marxism has approached law tangentially, treating it as one aspect of a variety of political and social arrangements concerned with the manipulation of power and the consolidation of modes of production of wealth, there has been no commitment towards an identification of the unique qualities of legal institutions.[875]

The result has been that the "nature of legal institutions themselves remains an unexplored terrain" in Marxist legal perspectives.[876] Indeed, it "has often been remarked that there is no Marxist theory of law", and apart "from extremely recent literature ... only two major works [have been] devotedly exclusively to the formulation of a Marxist theory of law".[877]

Therefore, the Marxist ideas which inform the ideological frameworks of Abel, Alcock, Bankowski and Mungham and Cousins enable them to de-construct the politics of legal change in post-war society. They reveal, in other words, the political factors influencing developments in legal aid, and - in Abel's case - post-war legal aid itself.[878] However, their reliance on Marxist legal ideology means that they do

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872 H Collins. n 870 above at 9.

873 Ibid.

874 W M Rees, n 833 above at 84-85.

875 H Collins, n 870 above at 13.

876 Ibid at 9.

877 Ibid at 9-10: K Renner, *The Institutions of Private Law and their Social Functions*, O Kahn-Freund (ed), (1949) & E P Pashukanis, *Law and Marxism*, C J Arthur (ed), (1978).

878 I.e., they describe the politics behind state decision-making, locate public policy factors, explain the ideological and economic agendas of the legal profession and lawyers, identify other political interest groups, explain 'who' benefited, or missed out, and why, and related factors.

not - and cannot - explain the politics of law itself and, in the instant case, the politics of the institutional development of legal aid in post-war society.

The outline of Marxist legal ideology above shows that there are three justifications for this claim. In the first place, in Marxist orthodoxy, modern Western centralist law and its institutions are inherently apolitical. Indeed, they are 'non-institutions', solely constituted by the sum of their economic parts and functions, and thereby incapable of 'independent' action or development. They are mere receptacles of capitalist ambition. Secondly, in adopting Marxist-oriented frameworks, Abel, Alcock, Bankowski and Mungham and Cousins have not 'abandoned' modern centralist law and its institution, unlike the Marxist orthodoxy. However, in not 'abandoning' law, they have 'retained' or 'saved' the social construction of modern centralist law and its institutions produced by a century or more of legal development. In the 20th century, liberal, centralist, apolitical representations of law have deeply infected the very character of the modern Western legal systems. By failing to directly engage with these omnipresent legal representations, the Marxist-oriented frameworks have accepted by omission - or default - an apolitical, social construction of the law of the modern state in post-war society. Thirdly, neither Marxist legal orthodoxy nor the Marxist-oriented explanations of legal aid contest the governing ideological premise of liberal centralism that modern Western law is mono-typical - that it is a centrally manufactured, exclusive product of the state.

The 'Missing' Political Dimensions of Modern Western Law

Rejecting the explanatory literature on the grounds outlined above begs the question: "What were the political dimensions of modern law in post-war Western society?" The answer is that its dimensions were threefold.

The first political dimension was that in post-war Western society the reality of modern law continued to be legal plurality. The centralist law of the national legal systems dominated legal regulation in both the Civil Law and Common Law countries, everywhere pervading social life to an omnipresent and unprecedented degree. Its dominating presences were not, however, to the exclusion of non-state, non-central types of law or legal ordering. Notwithstanding the overarching role of the regulatory machinery of the modern state, and its legislative, judicial and administrative-types of centralist law, these other types of modern legal ordering continued to exist, as Galanter reminds us:

> Counterparts or analogs to the institutions, processes and intellectual activities that are located in national legal systems are to be found at many other locations in society. Some of these lesser legal orders are relatively independent, institutionally and intellectually, of the national legal system; others are dependent in various ways. That is, societies contain a multitude of partially self-regulating spheres or sectors, organised along spatial, transactional or ethnic-familial lines ranging from primary

> groups in which relations are direct, immediate and diffuse to settings (e.g., business networks) in which relations are indirect, mediated and specialized.[879]

Thus, in post-war society modern law comprised a multitudinous collection or aggregation of coexisting forms of legal ordering. Whilst centralist law was predominant, it nevertheless formed part of a fundamentally pluralistic legal domain or province, as we explain below. The presence of this plural legal domain represents the first dimension of the politics of modern law in post-war Western society.

The second dimension of the politics of modern law is generated by the legal domain. Its modern aggregation or 'collection' of law has a dual political dynamic within Western societies. Its legal multitudinality produces an internal dynamic - the 'internal' politics of the legal domain. These 'internal' politics of law, i.e., the relations amongst the various 'members' of the legal domain, are inherently fluid, with allegiances regularly shifting, or else fracturing, and new alliances developing. However, the legal domain functions within the social context of the modern Western world. Thus, there is also an 'external' aspect to its political dynamics. The 'external' politics of the legal domain are themselves bi-dimensional. On the one hand, the 'external' politics of the legal domain are 'corporate', or collective, as far as the politics of the relationship between modern law - in all its variety - and other organisations, entities and political actors in Western society is concerned. On the other hand, the legal domain also provides the forum for interaction between its 'individual' members and the 'external' social world. This is the forum, for example, for the interaction between modern centralist-types of law and their 'host' societies which we discuss in the next paragraph. Therefore, the existence of the 'internal' and 'external' politics of the modern Western legal domain means , as Sack points out, that "law, even in a certain place at a certain time, is ... never a single phenomenon but a (more or less systematic) conglomerate of (more or less diverse) phenomena".[880]

The third dimension of the politics of law arises from two qualities displayed by centralist law and its institutions - the machinery and law of the modern state - in post-war society. The first is that the different parts of the modern Western legal systems retained the capacity to change or adapt their social functions in the absence of corresponding changes to institutional form, 'legal' design or new public policy directives. Courts, other state legal agencies and the 'legal' organisations of centralist law, like contract, property and legislation, appeared to be capable of changing what they actually 'did' without deliberate or conscious 'external' intervention. This quality of the 'institutions' Western centralist law was first identified by Karl Renner, whose ideas are acknowledged and explained below.[881]

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879 M Galanter, "Justice in Many Rooms: Courts, Private Ordering and Indigenous Law" (1981) 19 *Journal of Legal Pluralism and Unofficial Law* 1 at 17-18.

880 P G Sack, "Legal Pluralism: Introductory Comments" in P Sack & E Minchin (eds), *Legal Pluralism: Proceedings of the Canberra Law Workshop VII*, (1986) at 1-2.

881 Below at pp 156-159.

Renner's positivism and 'organic' theory of legal development are outdated and, in some respects, anachronistic. Nevertheless, modern state centralist law and its institutions have always displayed a remarkable capacity to adapt to social change and the requirements of legal regulation in 20th century capitalism and its welfare states. To a socially significant degree, they appear to possess a 'life of their own'. This apparent capacity of the law and institutions of the legal system to adopt 'independent' or 'autonomous' responses gives it a political quality, irrespective of the fact that it may be an illusion. What is significant, in a political context, is the appearance of an effective locus of 'legal' power, somehow detached from the state.

The other quality of the legal machinery and law of the post-war state was its apparent 'separateness'. Modern centralist law and its institutions were popularly perceived as existing as something 'separate', 'apart' and remote from the social world. This is the characterisation of modern law projected by legal positivism, especially in the first half of this century. Marxism and Marxist-oriented critiques of modern Western law, and other socio-political perspectives - like the great eruption of modern 'political' jurisprudence in the United States - have discredited the intellectual foundations of legal positivism. Nevertheless, its ideals of modern law as something 'separate and 'apart' from the state and society remain powerful and influential. This is particularly so in the Anglo-American world, where legal centralism was so successful in projecting its image of modern law "as a thing apart from society, politics or economics".[882] However, this conception of law is also closely allied with the legalism which was "a very common social ethos" in modern Western society.[883] Furthermore, as we discuss in Chapter Seven, the post-war period had seen a significant projection of Anglo-American legal ideals throughout the Western world.[884]

In this context, it is also important to recognise that the 'separateness' of law was not only a widespread perception in modern social life. It was also a real quality of modern legal regulation in the post-war welfare state. In its legislative, judicial and administrative-types, modern centralist law is manufactured by, or on behalf of, the state, and serves as an instrument of public policy. Thus, in a real and identifiable sense, state law originates 'outside' the social and economic spheres which are the objects or 'targets' of its actions. Furthermore, the institutions of the legal system exist 'apart' - in an administrative and organisational sense - from other 'non-legal' state institutions and social organisations, including the other 'members' of the modern legal domain.

Moreover, the deployment of centralist law as an instrument of public policy tends to reinforce its 'separate' qualities. The 'legal', normative or technical structures of legislation, judicial law and administrative law are unable to adequately mirror or describe 'real life' and its impossibly complex social, political and economic

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882 H W Arthurs, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England*, (1985) at 2.

883 J N Shklar, above n 34 at 1.

884 Below at pp 210-214.

relationships. The very process, therefore, of social ordering through state law, and its paradigms of rules, regulation and adjudication, tends to 'separate' and 'disconnect' modern centralist law from social reality. This is a reality in which, moreover, the massive scale and scope of the legal system and its system of legal regulation in the post-war welfare state highlight these aspects of social disjunction. For these several reasons, the legal system and its law appeared to be something 'apart'. Once again, it appeared to the state and its citizens as being capable of forming and pursuing its own political objectives.

The Fruits of Reviewing the Explanatory Framework

Reviewing the explanations of post-war legal aid above has had three major benefits. First, it has shown that the explanatory literature does not allow us to remedy the explanatory 'gap' in the Australian experience. This literature has a number of shortcomings, foremost amongst which is its failure to present an adequate and comprehensive explanation of the post-war experience of legal aid. It cannot, therefore, provide us with the additional information required to fully explain the origins and significance of the Australian national scheme. Furthermore, the review has shown that the ideological frameworks behind the explanatory literature contain a common, central flaw. None of its contributors confronted the politics of law in modern Western society, and considered its impact on developments in post-war legal aid. Consequently, the explanatory literature is unable to supply an adequate framework with which to revisit the Australian experience, discover any missing segments in its story, and reconsider its social significance in the welfare state.

The second benefit of the review has been that it has demonstrated the significance of the explanatory literature in portraying and describing national developments in post-war legal aid. This literature, moreover, helps us to explain what we mean when we use the terminology of 'legal aid' and to define the parameters of its "post-war experience".[885] Thus, the review has identified the principal 'database' of the post-war developments in legal aid, and the post-war experience itself, which will prove to be useful in revisiting the Australian experience in Chapter Seven below.

Thirdly, the review has also identified and explained the three dimensions of the politics of modern Western law 'missing' from the explanatory literature. These 'missing' political dimensions of modern law inevitably impinged upon the origins and significance of the post-war experience. The review, however, has not merely highlighted that these political factors are absent in the explanations of Abel, Alcock, Bankowski and Mungham, Blankenburg, Cousins, Marshall, Paterson and Nelken and Regan. It has also shown why we need a fresh analytical framework if we are to complete the process of revisiting the origins and significance of post-war legal aid. In so doing, the review has sketched the essential requirements of the new framework. It must incorporate analytical perspectives which recognise the plurality

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[885] Above at pp 146-147.

of modern Western law, the political dynamics of the modern legal domain, the role of the modern legal system and legal regulation in the welfare state.

Redesigning the Analytical Framework

In the first place, designing a new alternative framework for post-war legal aid requires restatement. The framework which is applied in the following parts of the chapter, and, as we will see, throughout Chapter Seven and Part III, incorporates the postulates defined, explained or implicit in earlier parts of the thesis.[886]

Secondly, a philosophy of revision, and not of radical reconstruction, has been adopted in redesigning the analytical framework of legal aid. In reviewing the explanatory literature, we have not rejected its contribution without significant qualifications. Its descriptions of the history of the post-war developments have been acknowledged as an important resource of ongoing significance. More importantly in the present context, neither did the review entirely jettison the liberal legalist, liberal centralist and Marxist-oriented ideological premises which informed the explanatory accounts. Nor are these premises discarded in the redesigned analytical framework. For instance, three of the new perspectives below proceed from Marxist-oriented premises on law, society and the state. Moreover, the ideological premises within the explanatory literature form an indelible part of the Western experience of modern law, and the literature itself an irremovable part of the post-war experience. Thus, any new analytical framework cannot ignore their influence, even if we wished to do so.

In any case, modern law, its origins and social functions are impossibly complex phenomena. And, as Hart once philosophised, the "diverse, strange, and even paradoxical ways" in which "serious thinkers" have answered the question "What is Law?" in modern Western societies "throw a light which makes us see much in law that lay hidden".[887] Thus, a 'kaleidoscope approach' to modern legal development is more likely to be productive, although this is not quite what Hart intended. Furthermore, as much as the explanatory literature may avoid or deny the politics of modern law, the impact of its formative political ideologies - liberalism and Marxism - on the shape, content and development of the modern legal system as we knew it in the post-war Western world is both unavoidable and undeniable. Consequently, the new framework must be one which accommodates the Catholicism of modern law and its embracing social ideologies.

Nevertheless, it is necessary to redesign the investigative framework to redress the defects in the existing - or 'old' - analytical perspectives, and to accommodate the political dimensions of modern law. Accordingly, the redesigned analytical framework also includes the four other perspectives identified and explained below:

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886 Above at pp 12-14. By implication, Part I of the thesis adopted an 'empirical approach', looking to the evidence of history in searching for the story of the context of the origins and significance of the Australian post-war experience of legal aid.

887 H L A Hart, *The Concept of Law*, (1961) at 1 & 2.

first, it adds a legal pluralist perspective; and, secondly, a dynamic model of development in the state legal system; thirdly, it applies the methodology and techniques of Public Policy; and, fourthly, it acknowledges the ultimate brake on explaining legal development in the welfare state.

A Legal Pluralist Perspective

The first addition is to adopt a legal pluralist perspective to analyse the politics of modern law. Legal pluralism is not a "technical term with a precise, conventional meaning".[888] For the present purpose, the legal pluralist perspective embraces two different conceptions. First, it describes a pluralist conception of the legal character of the modern legal domain. Modern law is envisaged as the multitudinous collection of coexisting forms of legal ordering described above.[889]

However, the legal pluralist perspective is "more than the acceptance of a plurality of law."[890] As Sack reminds us, legal pluralism is also an ideological perspective - a different view of modern law - standing in opposition to the centralist conceptions of liberal and Marxist theory. Moreover, it is an ideology of law which considers the multitudinality of the modern Western legal domain:

> ... as a positive force to be utilised - and controlled - rather than eliminated. Legal pluralism thus involves an ideological commitment. However, this commitment takes the form of an opposition to monism, dualism and any other form of dogmatism instead of prescribing a certain, positive choice of action. Moreover, the refusal to treat the plurality of law as a positive force also implies an ideological stance. It means, at its weakest, that the plurality of law must be temporarily tolerated as a necessary evil: it forces us to adopt a series of essentially undesirable compromises, it prevents us from fully implementing other, positive goals which demand that this plurality be overcome. In short, the counterpart of legal pluralism is an ideology which aims at global unification of law and which deserves the ugly label of 'legal unificationism'.[891]

Thus, the legal pluralist perspective is not merely an alternative to modern monist, centralist legal perspectives. It proceeds from - and projects - the belief that legal plurality and diversity are the preferable form of social ordering - and legal analysis - in modern Western society.

A Dynamic Model of Development in the State Legal System

The second addition to the redesigned analytical framework seeks to harness the transformative capacity of the legal institutions and law of the modern Western state. This, as we described above, was a key dimension of the politics of modern law in post-war society. To do so, the framework incorporates the model of legal development of the institutions of Western law propounded by Karl Renner, an early 20th century legal theorist. In *The Institutions of Private Law and their Social*

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888 P G Sack, above n 880 at 1.

889 Above at p 151-154.

890 P G Sack, above n 880 at 1.

891 Ibid.

Functions, Renner sought "to utilise the Marxist system of sociology for the construction of a theory of law" to explain the processes of legal development in modern capitalist society.[892] The basis of this theory was the evolution of the legal institution of private property in the historical context of the Civil Law legal systems. Renner's theory and his methodology, however, apply equally to the Common Law world, where the socio-economic functions of private property are similar, with its institutional content varying "in detail, not in fundamentals".[893]

The purpose of 'adding' Renner, however, is not merely to theorise what we have already identified as an observable and politically significant phenomenon, i.e., the apparently 'separate life' of the law and institutions of the welfare state. Renner's explanation of modern legal development helps us to 'de-construct' this phenomenon, so that we can more clearly understand its role in the politics of modern law in post-war society. To understand this, it is necessary to sketch Renner's theory of legal development, before justifying the claim that it is a worthy and useful addition to the redesigned analytical framework.

As indicated above, it was the apparent historical capacity of private property to retain its original legal integrity, in the face of changes to its social function, which first attracted Renner's attention. How was it. ˙ asked, that pre-modern types of private property survived, even though their social functions were sometimes "diametrically opposed" to those which they had originally performed?[894] However, the scope of Renner's inquiry was not restricted to this phenomenon, but embraced the wider question of how modern Western society had adapted its:

> ... pre-capitalist and early capitalist legal conceptions to the needs of high capitalism without changing those conceptions themselves? How does society use the institutions of the law, what does it make of them, how does it group and re-group them? How does it put them to new services without transforming their normative content?[895]

In Renner's theory, this phenomenon of social transformation, without apparent legal transformation, was made possible by the process of "functional transformation". To understand the idea of functional transformation, it is first necessary to acknowledge the jurisprudential premises of Renner's theory. Whilst he was a Marxist, Renner clung to positivist conceptions of law, juxtaposing them with the economic determinism of Marxist theories of social development.[896] He sought, in other words, to 'save' the institutions of Western centralist law by reconstructing them in a realistic, modern capitalist guise.

Thus, Renner's idea of functional transformation was premised upon positivist conceptions which assumed the existence of a 'legal' realm, exclusively inhabited by

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892 K Renner, above n 877 at 1.

893 Ibid at 16.

894 K Renner, above n 877 at 2.

895 Ibid.

896 Ibid at 1.

law and its institutions, and disassociated from the political and economic machinations and influences of social interaction. The 'legal' realm, however, was not entirely divorced from social life. It provided capitalist society with the normative ordering necessary to regulate its economic transactions, and it was in performing these functions that the social functions of Western centralist law and its institutions emerged. For Renner, the relationship between modern Western society and its law was both interactive and dichotomous.

The existence of different 'legal' and social realms meant that social change could manifest itself either in the institutions of 'law', or in the functions performed by its institutions in social regulation.[897] On the one hand, 'law' and its institutions could change, independently of changes to their social function. On the other hand, the regulatory functions of modern 'law' institutions might change, without changes occurring within the 'legal' realm. In this case, however, changes in social function would eventually necessitate changes to the institutions of 'law' within the 'legal' realm.[898] These possibilities of legal development defined the scope of the phenomenon of the functional transformation of the institutions of 'Law' modern Western society. This is the phenomenon, in other words, whereby the 'Law' may not overtly develop or change its institutional format or structure, but nevertheless begin to perform new and different regulatory functions in the social world.

For Renner, functional transformation could occur in three different circumstances. First, the social functions of a legal institution could be transformed by changes or development within the 'legal' realm. In this case, the internal elements - or constituent norms - of the institution would alter, resulting in a corresponding transformation of its social functions which reflected the degree of the normative shift, change or innovation.[899] Secondly, the social functions of a legal institution might have "either increased or diminished, changed or disappeared".[900] In these circumstances, the role of the institution would be correspondingly transformed, once again according to the degree and direction of the initiating variation in social function. Thirdly, a legal institution might also undergo functional transformation as a consequence of near contemporaneous change within the 'legal' realm, and society itself. In this case, its actual institutional functions would be changed, with transformative pressures emerging from both the 'legal' and social realms.

It is vital to the idea of functional transformation that the integrity, legal form or shape of the legal institution is not overtly changed, or its 'appearance' altered. Overtly - or 'externally' - the original or existing form of the institution or law appears to be 'legally' and institutionally intact, notwithstanding that the functions it actually performed in society have - to varying degrees - been transformed. For Renner, recognising functional transformation was important if we were to fully

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897 Ibid at 2. In this paragraph, 'Law' is used as short-hand term to refer to the centralist-type of law and institutions of the modern Western legal systems.

898 Ibid at 252.

899 Ibid at 75-76.

900 Ibid.

comprehend the process of legal development in the modern capitalist state. Its transformative possibilities meant that it was necessary to study political developments both within the 'law', and in the politics of modern Western society 'itself'.[901]

The redesigned framework incorporates this model of legal development through functional transformation, although not in an unalloyed form. Renner's theory of modern law is dated, and its jurisprudential premises have been "shaken by the course of history".[902] As we indicated earlier, the trend of 20th century Western jurisprudence has not favoured the positivist conception of a clear dichotomy between 'law' and society. Indeed, even as Renner wrote, the intellectual credibility of distinguishing 'legal' and social realms had begun to crumble in the face of developments in sociology and sociological jurisprudence.

Moreover, the functions performed by the legal institutions and law of the modern state have also changed. In particular, the expanded functions of state legal regulation since the 1900s have meant that the Western 'institution' of private property can no longer sensibly be defined solely in economic terms. It was already "part of the order of labour [and] part of the order of power" when Renner wrote the first edition of *The Institutions of Private Law and their Social Functions*.[903] The social functions of private property continued to be transformed by the diversification of modern government accompanying the expansion of the welfare state. This development has also seen the diversification of the functions of the legal institutions and law of the modern Western state.[904]

Nevertheless, the legal system of the welfare state in post-war Western society retains its essential original modern configuration. It remains fundamentally a collection of the legal institutions of the central state, together with its variety of centralist-types of modern law. Therefore, as Kahn-Freund concluded in 1949, whilst Renner's central thesis may be dated, his model of legal development through functional transformation "remains fruitful, and can and should be used for a better understanding of legal developments in our own time."[905]

The Methodology and Techniques of Public Policy

Thirdly, the redesigned analytical framework applies the methodology and techniques of Public Policy to legal development. From the outset, this thesis has proceeded from the assumption that public policy drives legal regulation in the welfare state. In Part I, and in this chapter, we have referred to the modern role of the institutions and centralist-types of law of the legal system as 'instruments' of

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901 Ibid at 76.

902 Ibid at 38.

903 Ibid at 28.

904 A development which Renner acknowledged in 1929, ibid at 37.

905 Ibid at 38.

public policy. However, we have not yet acknowledged important corollaries of linking public policy and state law.

"Public policy" is not only a description of the processes, content and outcomes of state decision-making. It is also a sub-discipline of political science or public administration, which emerged in the 1970s for the study of modern government.[906] The subject-matter of Public Policy is the politics of state decision-making, which, for its purposes, is characterised as either 'positive', in the sense direct or overt decision to undertake particular courses of action, or 'negative', in the sense of an indirect or complicit 'decision' to endorse, or acquiesce in, an existent or evolving social or political trend or development.[907]

By studying decision-making, Public Policy scholars have sought to better understand the political dimensions of "what actually happens within that space called the state".[908] Generally, they have not extended their inquiries to decision-making affecting modern centralist law. However, there appears to be no reason why we cannot extend their techniques to investigate the politics of legal decision-making, given the origins of modern centralist law 'within' the state, and its 'instrumental' functions in modern government. Moreover, its law is amongst the 'resources' of the modern state. Thus, its law 'outcomes' are as much 'policy products' of the state, as those, like decisional 'outcomes' in social welfare, education, health, housing, economic, taxation, income maintenance, occupational welfare, urban planning and environmental policy, conventionally associated with Public Policy. To 'disentangle' the politics of these types of decisional 'outcomes', its scholars have developed a methodology to explain "why issues arise on the agenda, and how they are resolved."[909] As Davis *et al* explain, Public Policy analysis is a method which:

> ... requires us to 'puzzle out' ... the processes and limits of the state and to assess the relative influence on outcomes of politicians, bureaucrats, interest groups, organisational structures and economic forces.[910]

This inquisitive or 'puzzling-out' approach provides us with another platform from which we can explore legal development in modern society, especially in those cases, like legal aid, where governments and the machinery of the state are so closely involved.

The Ultimate Brake on Explaining Legal Development

The last addition to the analytical framework take the form of a qualification. It refers to the fact that there are inherent limitations to understanding the processes of legal development in the welfare state. Ultimately, these processes cannot be fully

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906 G Davis, J Wanna, J Warhurst & P Weller, *Public Policy in Australia*, (1988) at 2-6.

907 A J Heidenheimer, H Heclo & C T Adams, above n 60 at 3 & 5.

908 G Davis, J Wanna, J Warhurst & P Weller, above n 906 at 61.

909 Ibid at 8.

910 Ibid.

comprehended or explained. This redesigned perspective can assist in making the processes of legal development more transparent. However, an aura of mystery will always remain about its 'hows', 'whys' and 'whens'. Renner attributed this problem to the similarities between legal development and "organic development", or growth in the natural world:[911]

> ... the process of growth, cannot be understood from germ to fruit and again to the new germ; so the change of functions can be recognised only at an advanced stage, and then only by way of historical comparison: it can be recognised only when it has matured.[912]

Public Policy scholars have issued comparable - if more prosaic - warnings, alerting us to the fact that the welfare state "is above all a fragmented set of institutions with roles that are often contradictory, responding with varying effectiveness to competing class and sectional interests".[913]

In seeking to analyse the origins and significance of legal development in the welfare state, we run the risk of attributing "the appearance of life and certainty, to find hidden logic in actions, or motivations separate from the intentions of those who make, or are affected by, state policy."[914] Consequently, we must take care in not mistaking 'appearances' for causality in analysing legal aid and the post-war experience. The complexity of the politics and law of the welfare state places an ultimate brake on explaining legal development. The best that we can realistically and sensibly hope for is to give greater transparency to its major and more overt causes.

Applying the New Analytical Framework

We are now in a position to apply the new analytical framework and its option to ascertain whether we can locate any 'missing' parts in the story of the origins of the post-war experience of legal aid. And, if so, we can explain what those 'missing' parts are and also explain their importance in interpreting the significance of the post-war experience.

Modern legal aid, however, as the historical record in the explanatory literature reveals, was not an invention of post-war Western society. Legal aid already formed part of the modern Western systems of law and government, as the study of the Australian experience in Part I has confirmed. Therefore, if we are to place ourselves in a position to explain 'what' happened, and why it did in the post-war experience we must first understand the origins, role and functions of modern legal aid in Western societies.

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911 K Renner, above n 877 at 253.

912 Ibid at 252-253.

913 G Davis, J Wanna, J Warhurst & P Weller, above n 908 at 34.

914 Ibid.

The Modern Origins of Post-War Legal Aid

For Cappelletti, the origins of modern legal aid were unproblematic: it first emerged in a charitable form in medieval Europe.[915] His description of the medieval charitable origins of legal aid has been a powerful and lasting image. As 'image', 'myth' or 'history', the medieval charitable origins are deeply implicit in the mainstream, liberal legalist orthodoxy of modern legal aid. It is a view, moreover, which is accepted - or at least not seriously contested - in both the liberal centralist and Marxist-oriented explanations above.[916]

In fact, Cappelletti and his liberal fellow travellers have not misled us in locating the origins of institutionalised assistance for poor litigants and accused within the medieval legal systems of England and Europe. In the case of the former, Chapter Two of the thesis has already described the medieval origins of the *in formâ pauperis* procedures.[917] In Europe, as Cappelletti tells us, medieval governments in French, German and Italian cities, kingdoms and principalities made comparable institutional provision for poor litigants and accused.[918] These poor persons institutions did survive into modern England and Europe and were incorporated in the new legal systems of the outlying 19th century Western-dominated world, like the Australian colonies.[919]

Despite these historical realities, locating the origins of modern legal aid in the Middle Ages is mistaken. Cappelletti and the liberal orthodox have misinterpreted the history of modern legal aid as we knew it in post-war society. The fact that they have done so does not reveal them as 'bad' or sloppy legal historians. It is, however, another instance of their progressive historiography. The liberal legal aid orthodoxy conducted its 'investigations' from the vantage point of the modern society of the post-war Western world. In doing so, these legal aid historians have adopted from one of two equally flawed methodological premises. Either liberal legal historians have engaged in some kind of historical deduction, extrapolating the modern 'institution' of legal aid backwards into medieval society. Finding institutionalised legal assistance in the post-war world, they have assumed that its 'ancestors' were the poor persons institutions of medieval and early modern Western society. This is misconceived 'history', exhibiting all the flaws of reductionist accounts of the 'historical' origins of modern Western institutions.[920] Conversely, Cappelletti and his fellow travellers have assumed the 'legal continuity' or survival of the original poor persons institutions into modernity. If so, they have overlooked the consequences of legal modernisation. The legal assistance institutions did not enjoy an uninterrupted

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915 M Cappelletti, above n 117 at 12-16.

916 Regan, for instance, in his 1998 draft chapter (above n 858 at 7) refers to the "dominant priority in legal aid reforms" over "the last five hundred years": K W Barralet, "Legal Aid 1495-1995" (1995) 30 *Australian Lawyer* 20.

917 Above at pp 17-23.

918 M Cappelletti, above n 117 at 11-16.

919 Ibid at 27-64; above at pp 23-25.

920 K E Bock, "Theories of Progress and Evolution" in W J Cahnman & A Boskoff (eds), *Sociology and History: Theory and Research.* (1964) at 37-38.

passage from medieval and early modern times into the modern Western world. Its poor persons institutions, like all its legal institutions and law, were a product of the legal modernisation of Western society.

The Legal Modernisation of Western Society

Legal modernisation began in the 18th century and was part of the transformation of Western society, government and political economy, wrought by the demise of feudalism, and the emergence of new legal and political ideals, technological innovation, industrialisation and modern capitalism. In England, early indicators of legal modernisation were evident by the 1750s.[921] In the next 150 years, comparable experiences of legal transformation, change and reform occurred throughout the Western world.[922]

In both England and Western Europe, legal modernisation was accompanied by the subjugation and gradual elimination of non-concentric and social types of law.[923] Anglo-American legal historians have familiarised us with the English experience of the destruction of its pre-modern types of de-centralised and 'non-state' legal ordering.[924] We are less familiar, at least in the Common Law world, with the Western European experience. The pre-modern legal systems in these countries also contained significant non-centralised plural elements, which similarly gradually fell prey to the influences of legal modernisation.[925]

By 1900, modern types of government and centralised legal systems existed in Britain and Western European countries like Belgium, France, Germany and Italy.

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921 A "constant succession of wars" saw the expansion of the legal powers of the central government, and Parliament established its political supremacy and ultimate national legitimacy. However, this did not prevent the judges from establishing their own pre-eminence "in the centre of the [national] legal stage": B Abel-Smith & R Stevens, above n 99 at 8-9, 11 & 18. There were also changes within the judge-made law. The transformation of the Common Law, "by which the law of property gave way in paramountcy to the law of contract" began in the 1770s: P Atiyah, *The Rise and Fall of Freedom of Contract*, (1979) at 102. Modern legislation had also begun to leave an indelible imprint on English society through new national criminal laws: E P Thompson, *Whigs and Hunters: The Origins of the Black Act*, (1975) at 258-269; D Hay, P Linebaugh, J G Rule, E P Thompson & C Winslow C, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, (1975) at 18. The English legal profession assumed a new social significance through the consolidation of the central courts, the establishment of a Law Society, establishing a monopoly over conveyancing and the legal demands of industrialisation: B Abel-Smith & R Stevens above at 19-20, 22-23 & 53: D Neal, above n 55 at 72-75.

922 M Galanter, "The Modernization of Law" in M Weiner (ed), *Modernization: The Dynamics of Growth*, (1966) at 153.

923 Ibid at 153-154. In the colonised countries of the New World, the modern law began with a legacy of pre-modern Western forms. In the Anglo-American world of the United States, Australia, Canada and New Zealand, the modern central legal systems were able to begin with a clean slate; save, that is, for the inglorious treatment of the traditional law of the indigenous peoples.

924 H W Arthurs, above n 882 at 7-8, 13-15 & 17; E P Thompson, above n 921 & B Abel-Smith & R Stevens, above n 99 at 13-14.

925 Eg, H M Sachar, *The Course of Modern Jewish History*, (1958) at 25-35. Weber refers to the impact of the development of the emergence of the modern "bureaucratic princely state" in suppressing aspects of legal autonomy traditionally enjoyed by "municipalities, guilds, village communities, churches, clubs, and other associations of all kinds" in Europe: M Rheinstein (ed), above n 65 at 181. Spain is another instance where legal modernisation saw the abolition of seigneurial and ecclesiastical jurisdictions.

Furthermore, many of these countries had exported their new modes of legal regulation to their overseas colonial dominions. The process of legal modernisation transformed the existing law and institutions of the 'old' Western central system of state legal administration. The result was, as Galanter describes it, the emergence of:

> ... those institutional-intellectual complexes ... connected to the state, guided by and propounding a body of normative learning, purporting to encompass and control all the other institutions in the society and to subject them to a regime of general rules.[926]

These new national systems of legal administration and government were not simply revitalised and reformed versions of the 'old'. They were different types of legal systems which made and projected new and enforceable claims for the exclusivity of their modern, centralist-types of law. These claims were intolerant of - and ultimately rejected - the legitimacy of all competing forms of legal ordering. The emergence of the modern national legal systems, in other words, cannot be understood solely as a supreme illustration of legal and political reform. Legal modernisation introduced a new ideological basis to the legal administration of modern Western society. The modern state - and its central-type of law and institutions and systems of legal regulation - became the sole preserve of legitimacy, and the central fulcrum of the modern Western system of government.

The Impact on the 'Original' Legal Assistance Institutions

Legal modernisation also laid the foundations for modern legal aid. Variations of the legal assistance institutions, whereby lawyers' services, other legal representation, special procedures or concessional rates were 'given' to poorer litigants or accused, appeared in the modern legal systems in Australia, Canada, England, France, Germany, Italy, the United States and other Western countries.[927] The new, institutional forms which resulted were not merely 'hybrid' or modified versions of the 'old', as Cappelletti and liberal 'history' encourage us to believe.[928] The legal assistance institutions in the modern Western legal systems were new and different. They were a definite, clear and sharp departure from their medieval ancestors, and early modern predecessors. The establishment of the modern national legal systems transformed the 'original' legal assistance institutions, and the reasons 'why' and 'how' this occurred can be explained in alternative ways.

The Institutional Novation Explanation

One explanation is that the incorporation or absorption of the 'original' legal assistance institutions into the modern national legal systems constituted an act of novation. In this interpretation, incorporation established a 'screen' through which the 'old' poor persons institutions passed, to emerge anew in the modern Western legal systems. Thus, the 'original' institutions disappeared, were transformed, and reappeared in the totally new context of the exclusive regulatory preserves of modern

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926 M Galanter, above n 879 at 19.

927 M Cappelletti, above n 117 at 18-21: F H Zemans (ed), above n 2 at 77-78 (Austria), 254 (Denmark), 265 (Norway) & 302 (Spain).

928 M Cappelletti, above n 117 at 29.

centralist law. In this role, the 'new' modern poor persons institutions became part of the legal machinery of the modern Western state.

The Functional Transformation Explanation

The other explanation draws upon the functional transformation perspective included in the new analytical framework above. In this interpretation, the significance of the 'new' poor persons institutions was their similarity to the 'original' legal assistance institutions. Incorporation or absorption into the modern legal system was generally accompanied by variation, modification or other reforms intended to improve the reach or accessibility of legal assistance for poor people. However, the institutional constitution, structure or design of the 'original' legal assistance institutions remained intact. To the observer, the 'new' institutions in the modern legal systems were generally indistinguishable in 'shape' or 'construction' from their immediate predecessors. In these circumstances, the preconditions for functional transformation were present, i.e., development without overt change to the integrity, legal form or 'appearance' of a legal institution.

In this context, the establishment of the modern legal systems can be interpreted as changing the social function of the 'original' legal assistance institutions. It was a legal development which satisfied the requirements of Renner's third category of circumstances when functional transformation occurs, namely when there is a near contemporaneous change within the 'legal' realm and society itself.[929] To understand 'how' this occurred, we need to explain the dual impact of establishing the modern legal systems on the legal assistance institutions

In the first place, this development altered the constituent norms of the 'original' legal assistance institutions. The original 'charitable' ideals of assisting the poor were replaced by the new regulatory norms of the "institutional-intellectual [legal] complexes ... guided by and propounding a body of normative learning" which constituted the modern legal systems.[930] This experience was only a small part of a general modern transformation of the 'old' legal institutions of Western centralist law, as we consider below. Nevertheless, normative transformation had a particular effect upon the legal assistance institutions. It displaced - or at least created the potential to displace - their original constituent norms or ideals. For the present purpose, we need not explain their 'new' normative or ideological character or constitution. It is sufficient to have demonstrated that the 'original' legal assistance institutions fulfilled - or had the potential to fulfil - new and different social functions in Western societies now governed by modern legal systems.

Secondly, the establishment of the modern legal systems changed the regulatory functions of these institutions, as it did for all the institutions of Western centralist law. It did so by changing the functions actually performed by the 'original' poor persons institutions in modern Western society. Like other modern legal institutions, they became "connected to the state" in a new - and dramatically different - way than

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929 Above at pp 156-158.

930 M Galanter, above n 879 at 19.

in the past.[931] The state not only controlled the modern legal system, but used its institutions and centralist law to create its unprecedented, modern omnicompetence, progressively arming itself with 'legal instruments' to intervene in every reach of social and economic life. Consequently, the 'original' legal assistance institutions, irrespective of the fact that they ostensibly served the 'poor', were - like their more prominent institutional comrades - enlisted into the service of the state. Thereby, once again, transforming - or potentially - transforming their social function.

Linking These Modern Transformations with Legal Aid

This first application of the redesigned analytical framework has provided several important new insights. It demonstrates that there is an alternative history of the origins of legal aid in modern Western society which locates its origins in modernity itself. The analysis above also revealed the modern poor persons institutions - the progenitors of modern legal aid - as products of the legal modernisation of Western society, and the subsequent establishment of its national legal systems. It also highlighted the links between the origins of modern legal aid and the state, and the role and functions it assigned to its new legal machinery. From a historical perspective, therefore, the new analytical framework has allowed us to remedy the shortcomings of the legal aid orthodoxy, and to resolve some of the 'missing' links in the modern background to the post-war experience.

More importantly, the new framework has enabled us to identify modernity as the investigative base for understanding the post-war experience of legal aid. For the remainder of this chapter, therefore, our focus will be upon modern Western society, its law and central legal systems. However, linking the origins of post-war legal aid to the modern transformation of the poor persons institutions is not without problems, and these must be addressed before we can safely proceed.

Initially, the modern poor persons institutions did provide the basis of legal assistance in the machinery of the new Western legal systems. By the 1940s, however, these institutions had ceased to describe the organisational basis of legal aid in many of the countries shortly to undergo the post-war experience. We know that the poor persons institutions had gradually developed into legal aid in the 1900s, 1910s, 1920s and 1930s, as the Australian experience and the legal aid literature have shown. What we do not know for certain, at this stage, is 'how' and 'why' this legal development occurred. To a considerable degree, as is explained below, we can tell its story with the aid of the historical 'database' in the explanatory literature. However, for the reasons explained above, this literature does not provided us with an adequate analytical framework to trace the transition of the poor persons machinery into modern legal aid.

To some extent, the explanations of the modern transformation of those institutions above remedy this problem. The institutional novation and functional transformative interpretations provide us with alternative explanations of the origins of the modern

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931 Ibid.

poor persons institutions. However, at this stage it is not clear which of these two interpretations provide us with an appropriate platform to explore the subsequent development in late 19th and early 20th century Western society. This question must be answered before we can proceed further.

The Disadvantages of the Institutional Novation Explanation

In this context, the institutional novation explanation has two principal limitations. As an explanatory tool, its value is exhausted in explaining the modern transformation of the 'old' poor persons institutions. In this role, it has been valuable and useful, for the reasons explained above. Thereafter, however, the value of the institutional novation explanation is diminished because it lacks a developmental capacity. It cannot explain the transition of the modern poor persons institutions into legal aid, other than by reference to changes in the legal machinery of the state.

Therein lies the second principal limitation of the institutional novation explanation. Whatever else modern legal aid may be, it is certainly more than the sum of the legal assistance machinery of 20th century Western society. Clearly, this institutional or 'machinery' dimension is part of "legal aid". Since the 1910s and 1920s, the machinery of legal assistance in many Western legal systems has been denominated or described as "legal aid". The history of modern legal aid is replete with instances of "legal aid" being identified with organised, institutionalised provision of legal assistance for poorer people. The Australian experience in the 1960s, its national scheme in the 1970s and in 1980s and 1990s are but some examples.[932] In the post-war Western world generally, modern legal aid 'existed' in this 'concrete' dimension, and has continued to do so.[933]

Clearly, however, it also 'existed' as an 'ideal' or normative dimension in 20th century Western society. In this dimension, modern legal aid is a vibrant, multi-faceted, chameleon-like ideological construction. In the post-war experience, for instance, "legal aid" was widely described as a political, social or quasi-legal 'right', entitling citizens to assistance to enable them to conduct transactions in the legal system. It was conceived of as a civil right, giving rise to concomitant obligations on the part of governments and the state.[934] Its 'existence' as a 'right' was, moreover, asserted, justified and defended in the context of a disparate collection of socio-legal

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932 In the case of the 1960s, see above at pp 56-68; for the national scheme, see generally Chapter Four and Appendix "A". In the 1990s, "legal aid" has been used to describe the provision of legal assistance in Federal Government media releases (eg, "Big Funding Boost for Legal Aid", Minister for Justice and Consumer Affairs, Senator Michael Tate, 10 August 1991), newspaper reports (eg, "Legal Aid can't meet lawyers' bills", Sydney Morning Herald, 14 November 1991 at 3; "Legal aid faces another round of cuts", The Age, 3 February 1992 at 3; "Legal-aid constraints deny justice to many", The Age, 4 February 1992 at 13), public administration and legislation (eg, Senate Legal and Constitutional References Committee, above n 45 & Legal Aid Act 1990 (NT).

933 Eg, The Netherlands Ministry of Justice & Scottish Legal Aid Board, above n 818.

934 M Cappelletti, above n 117 at 30-31: National Legal Aid Advisory Committee, above n 7 at 284-286.

ideals, amongst which the "image of legal aid as equal access to the law (embodied in the courts) [was] the dominant conception".[935]

By the post-war period, this image of "legal aid" had become suffused into reality. This is one reason why Cappelletti was so successful in promoting his claim that legal aid was the 'answer' of the modern world to the ancient "problem of providing lawyers for the poor".[936] This ideological construction of "legal aid" became the basis of an assumption that it was an inherent institutional component of modern Western society. A key part of the normative dimension had become 'reality' - a central assumption of modern Western law. This 'institutional' dimension of "legal aid" was not restricted to Cappelletti and liberal legalism. Neither was its ideological construction restricted to the 'provision of lawyers for the poor'. It embraced the idea that organised provision of legal assistance for poorer people was a deeply implicit part of modern Western society.

The complexity of the ideological construction of modern legal aid was increased by its link with lawyers. Throughout the 20th century, the modern legal profession, most markedly in the modern Anglo-American countries, has seen "legal aid" as its premier social obligation. On the other hand, for its Marxist-oriented critics, like Bankowski and Mungham, this professional 'obligation' was construed as a device to promote lawyers' market competence and dominance. This is yet another illustration of the 'ideal' or normative dimension of modern legal aid, albeit of a negative or critical kind. The institutional novation explanation does not easily accommodate this other dimension of modern legal aid. Thus, it does cannot provide us with an appropriate platform to explore the subsequent development of the modern poor persons institutions.

The Advantages of the Functional Transformation Explanation

In the functional transformation explanation, the modern poor persons institutions were differentiated from their predecessors by the new social functions which they

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935 R L Abel, above n 2 at 487. In reviewing the Australian ideological context, for instance, we saw that since the 1900s the provision of "legal aid" was variously justified as an obligation of the Crown to the poor, as a socio-legal responsibility of the modern state, as an adjunct of the administrative of justice, as a privilege of poorer litigants and accused, as a social justice objective of governments, as a civil or political 'right' of modern social citizenship and as a measure to achieve legal equality between 'rich' and 'poor'. Another instance from the Australian experience is in the NLAAC report (above n 7 at 285-286) which advised the Federal Government "that the foundation of efficient and effective legal aid programs and strategies to meet the needs of the Australian community for legal aid [included]: (a) the legal and social responsibilities of Federal, State and Territory parliaments as the principal law-makers; (b) the legal, administrative and social responsibilities of Federal, State and Territory governments as custodians and managers of the Australian legal systems; (c) the public interest in the just and effective application of those laws and administration of the legal system to promote good government and individual, social and economic well-being; (d) the rights to justice of those to whom Australian law applies as expressed in the fair application of the law and appropriate and effective access to the Federal, State and Territory legal systems; and (e) the acknowledgment that accessible legal services and information about access to the law and legal system are amongst the measures of social well-being of those to whom Australian law applies in their interpersonal relations and individual and community relations with the legal system and Federal, State, Territory and local governments and their agencies".

936 M Cappelletti, above n 117 at 6.

performed. Incorporation was said, first of all, to have altered the constituent norms of the 'original' institutions, replacing them with the new regulatory norms of the modern legal systems. It also placed the poor persons institutions into their new, legal servitude to the modern state. As an explanatory tool, the functional transformation explanation has two important advantages. First, it proceeds from the dynamic premises of Renner's theory of modern legal development, as sketched in the redesigned framework above. Inherently, therefore, the functional transformation explanation provides us with an analytical platform to explore the transition of the poor persons institutions into modern legal aid.

Secondly, it also gives us a bifidial 'picture' of the social construction of the modern poor persons institutions. On the one hand, the functional transformation explanation shows their normative, ideological or 'ideal' social construction. In Renner's terms, their institutional constitution within the 'legal' realm. On the other hand, the functional transformation explanation demonstrates the regulatory, functional or 'concrete' modern social construction of the 'new' poor persons institutions. This was their modern role as part of the legal machinery or 'equipment' of the state. The advantage of this 'picture' is that it closely corresponds to the bifidial social construction of modern legal aid which we described above, i.e., its dual 'concrete' and 'ideal' dimensions. It provides us with the link between the modern transformation of the poor persons institutions and legal aid as we knew it in post-war society - and thereby with a further reason why the functional transformation explanation provides an appropriate explanatory tool with which to continue the work of the chapter.

It also allows us to define the two questions from which this work can proceed. The first question is: "What explains the transition of the machinery or 'concrete' dimensions of the modern poor persons institutions into the legal machinery of legal aid in 20th century Western society?" 'How' and 'why', in other words, did state poor persons assistance develop into the legal aid schemes which preceded the post-war experience? The second question is: "What explains the transition of the poor persons institutions into the normative or 'ideal' dimensions of modern legal aid?" 'How' and 'why' did their initial modern normative social construction develop into the legal aid ideals of post-war modern Western law?

The Transition of the Machinery or 'Concrete' Dimensions

The story of the transition of the machinery or 'concrete' dimensions of the poor persons institutions is relatively unproblematic. It is recorded in many parts of the scholarly and legal aid literature.[937] Essentially, these institutions remained part of the legal machinery of the modern Western legal systems until well into the 20th century.[938] Indeed, in some countries, like Australia, they remain in remnant forms.[939]

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937 Above at pp 142-146.

938 Eg, Australia, Austria, Britain, Canada, Denmark, France, Germany, Ireland, Italy, Norway, Spain, Sweden and the United States.

The general pattern, however, was one of gradual adaptation, reform and legislative or administrative reconstruction. New types of legal assistance schemes emerged, although often retaining elements of their modern predecessors in legislative structure or administration.

The objectives of this chapter do not dictate describing the history of 'how' these developments occurred in any detail. We can, however, point to the Australian experience described above as one instance. In Chapters Two and Three, we described the modern transformation of the *in formâ pauperis* procedures in colonial law and government, and their subsequent development in the legal aid legislation of the Commonwealth and the States.[940] Other modern Western countries - including Canada, England, France, Germany, Ireland, Norway, The Netherlands, Sweden and the United States - made comparable legislative or administrative changes to the poor persons legal assistance machinery.[941] Neither do the objectives require us to explain in detail 'why' these developments occurred. Nevertheless, it is useful to briefly outline the major causal factors in the transition to the modern national legal aid schemes.

In the mid and late 19th century - the early decades of the new, national legal systems - the modern-type of poor persons institutions was semi-dormant, their new social functions remaining more immanent than real. Most Western countries did little to either enervate their legal procedures or to encourage citizens' access to law. Many factors contributed to this initial neglect. No doubt, in part it reflected the degree of satisfaction with the achievements of the new legal systems - amongst the "governors", if not the "governed".[942] In the words of Cappelletti, "the equality sought was formal rather than actual; it was enough that all citizens had a legal path open to them by which they could receive a lawyer".[943] However, not all contemporary Western states had governments which actively applied these liberal democratic principles in legal regulation. Indeed, even the modern liberal democracies, like England, its British colonies and the United States, neglected legal assistance for their poorer citizens.

Moreover, initial popular expectations of the new legal systems were not as great as centralist accounts of modern legal development would have us believe. Universally, the historical experience of pre-modern Western legal ordering and regulation had been pluralist, and "pluralism itself persisted and indeed flourished" in the modern legal domain - not only in the Common Law world.[944] The adage of 'a law for the rich, and one for the poor' often very accurately described both the actual social experience of the poor and less powerful, and their collective memory. In the

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939 In 1993, the Rules of the High Court of Australia still made provision for civil proceedings conducted in *in formâ pauperis*.

940 Above at pp 23-33 & 56-57.

941 Above n 2.

942 W A Robson, *The Governors and the Governed*, (1964) at 13.

943 M Cappelletti, above n 117 at 26.

944 Above at pp 163-164: H W Arthurs, above n 882 at 50.

Common Law world this was demonstrably so. Since the 1770s and 1780s, a new emphasis on private property had further diminished the relevance of its modern central courts and their judicial law for poor litigants, and the legal problems of poorer people.[945] The reorganisation of civil justice in England, and the colonial reforms which this spawned, had done little to alleviate their plight. Indeed, as Weber has remarked, the fact that "capitalism could nevertheless make its way so well in England was largely because the court system and trial procedure amounted until well into the modern age to a denial of justice to the economically weaker groups".[946] Quite apart from the unpopular character of the modern legal systems, its agents in the lawyers of 19th century capitalist society were uninterested in the newly defined legal problems of the poor. They inevitably tended to "concentrate [their] time, effort, and skill on the remunerative business" provided by business and the middle classes.[947]

The early 20th century was the turning point in the development of the modern machinery of legal aid. As, indeed, it was for the modern Western state and its entire legal system. In stops and starts, and with no apparent or predetermined pattern, this period saw Western governments slowly invigorate, reform, adapt and reconstruct the poor persons institutions. To explain why these legislative and administrative changes occurred, we first need to recognise that they were results of state decision-making. Consequently, like all other developments in the state legal system, they were a product of changed public policy towards - in this instance - the provision of legal assistance and the organisation of legal aid. Public policy was therefore the primary cause of the conversion of the poor persons institutions into the machinery of legal aid.

In this context, we can make some general observations about the causes of these changes in legal assistance policy. There was, in the first place, no single cause. Abel has amply demonstrated how modern capitalist countries had different - and sometimes inconsistent - reactions to the background social forces, including urbanisation, migration, capitalisation and political movements, which shaped modern national responses to legal assistance.[948] These social forces were, moreover, often subject to significant national variations.[949] This is a fact to which both Blankenburg and Cousins have attested in the context of the post-war welfare states.[950]

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945 B Abel-Smith & R Stevens, above n 99 at 12-13: P Atiyah, above n 921 at 102.

946 M Rheinstein (ed), above n 65 at 353.

947 M Cappelletti, above n 117 at 25.

948 R L Abel, above n 2 at 586.

949 Late colonial Australian society, for instance, had a distinctive experience of these four social factors. The principal sources of development capital were metropolitan investors and local governments. There was no pattern of large-scale internal migration to the cities. The cause of growing urbanisation was immigration, and the residents of the expanding cities displayed a high degree of cohesion and prosperity, relying on parliamentary measures to achieve social and political reforms: N G Butlin A Barnard & JJ Pincus, above n 134 at 9-12; S Glynn, *Urbanisation in Australian History 1788-1900*, (1976) at 13-60; G Bolton, above n 140.

950 Above at pp 144-145.

Beyond this, the causes of state action to change legal assistance were manifold. Certainly, they were not restricted to the personal plight of individual poorer litigants and accused. The Australian experience demonstrates, for instance, that reform or expansion was sometimes associated with public administration, and the operations of the legal system.[951] There were, however, three major and inextricably interrelated causes of changes to state legal assistance policy. The first and most significant was the ever-increasing potency of the legal capacity of the state, and the ever-expanding scope and social penetration of its centralist-types of law and administration. The social transformations of capitalism, referred to above, had increased both the "size and complexity" of early 20th century Western society and thereby the demands and opportunities for state legal intervention.[952] Modern state law and its legal system mattered more than it ever had before - to both the state and its citizens.

The second major cause was the growth of modern conceptions of social citizenship, defining the relationship between the state and its citizens as a reciprocal matrix of civil and political rights and obligations. These were, in part, as Cappelletti records, a product of developments in political ideology:

> ... the moral and ideological basis of the laissez-faire world was steadily eroding ... modern nations turned to various combinations of the old vision with new and often inchoate ideas of social and economic welfare [which] ... varied from that of post-Depression America, which often seems like an attempt to bring an older individualism within the reach of all, to those of modern Scandinavia, which often seems like a kind of state paternalism.[953]

These new 'social visions' saw communitarian conceptions of human rights begin to replace the individualism which had hitherto dominated modern Western government, politics and legal administration.[954] In England, for instance, modern social citizenship had its origins in the "growing interest in equality as a principle of social justice and ... appreciation ... that ... formal recognition of an equal capacity for rights was not enough".[955] It "grew out of a conception of equality [as] equal social worth, not merely of equal natural rights" which advocated "the complete removal of all the barriers that separated civil rights from their remedies".[956]

However, modern social citizenship was only in part an ideological phenomenon. It was also a product of modern social transformations and of the development of the advanced capitalist economy. In England, for instance, the spread of its ideals was encouraged by economic and industrial factors, including changes in the labour market, reduced income differentials through the introduction of graduated tax scales

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951 Above at p 87.

952 M Cappelletti & B Garth. above n 2 at 7.

953 M Cappelletti. above n 117 at 27-28.

954 These new social rights included "the rights to work, to health, to material security, and to education": M Cappelletti & B Garth. above n 2 at 7-9.

955 XXXIbid at 40.

956 XXXIbid.

and mass production of consumer goods for popular consumption.[957] The cumulative effect of these economic, fiscal and social changes reduced obvious social differences between 'rich' and 'poor', and helped "guide progress into the path which led directly to the egalitarian [social] policies of the twentieth century".[958] Or, less romantically, it increased the pressures on the state for material reforms and improvements to popular social welfare and:

> ... profoundly altered the setting in which the progress of citizenship took place. Social integration spread from the sphere of sentiment and patriotism into that of material enjoyment. The components of a civilised and cultured life, formerly the monopoly of the few, were brought progressively within the reach of many, who were encouraged thereby to stretch out their hands towards those that still eluded their grasp. The diminution of inequality strengthened the demand for its abolition, at least with regard to the essentials of social welfare".[959]

The third major cause of changes to state legal assistance policy was the growing influence of 'modern Western law', in other words, of the social constructions of 'law' in the modern societies of the Common Law and Civil Law worlds which are discussed below. The growing popular demand for 'access to law' was another significant source of political pressure on the state to change legal assistance policies. Moreover, the growing social significance of 'modern law' also influenced the change in nomenclature of the poor persons machinery. Gradually, the terminology of "legal aid" replaced the concept of "poor persons" in the 20th century legal aid machinery.

Ultimately, however, the story of the transition of the modern-type of poor persons institutions into the machinery of modern legal aid is one of national experiences. In pre-war Western society, the role of the state, the scale and scope of its legal system, the impact of social citizenship and the role of 'modern law' were subject to significant national variations; and this not only in different trends in the Common Law and Civil Law world, but also between countries like Australia, Britain, Canada and the United States, which had comparable legal and political traditions. Moreover, 20th century developments in the machinery of legal assistance were influenced by differences in the political economy of the emerging welfare states. Even in the pre-war world, different political philosophies shaped the size and functions of the 'corporate' welfare states in Western Europe, the 'socially defensive' systems in Australia and Britain, and the typically minimalist welfare state in the United States.[960]

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957 Marshall, above n 832 at 47.

958 Ibid.

959 Ibid at 46-47.

960 F G Castles, above n 57 at 492-495.

The Transition of the Normative or 'Ideal' Dimensions

The second question posed above asked: "What explains the transition of the poor persons institutions into the normative or 'ideal' dimensions of modern legal aid?" Answering this question is not as straightforward as the story of the development of the machinery of modern legal aid above. To explain the development of its normative or 'ideal' dimensions, which is hereafter referred to as 'legal aid', we must first return to the functional transformation explanation and to its interpretation of the impact of Western legal modernisation upon the 'original' poor persons institutions. This explanation showed how legal modernisation changed their normative content, replacing them with the regulatory norms of the modern Western legal systems. At the time, we did not pursue the significance of this ideological dimension of the modern transformation of the poor persons institutions. There was no need to do so: the primary object was to establish that these institutions, as they appeared in modern Western society, were creations of modernity.

However, our present purpose is different. If we are to explain the transition of the normative or 'ideal' dimensions of the poor persons institutions into 'legal aid', we must now pursue the significance of the ideological dimensions of their modern transformation. So far, we have described this as a 'replacement effect', i.e., their 'original' institutional norms were replaced by the regulatory norms of the modern legal systems. In retrospect, this description is adequate, for it defines - as we explain in detail below - the historical basis of the transition of the 'new' norms of the poor persons institutions into 'legal aid'. However, the contemporary reality was more complex and must be explained, if we are to make the explanation of this transition convincing and historically credible.

The 'original' constituent norms of the poor persons institutions were not 'replaced' overnight – and neither were the modern legal systems, as we knew them in the 20th century Western world. Nor did the 'productive capacity' of their "institutional-intellectual complexes" emerge in a blinding flash of light, immediately transforming the legal regulation of modern Western society.[961] The norms of the new legal systems were a product of ongoing development, particularly, during the decades of the late 19th and early 20th century, as the story of the 'concrete' dimensions of modern legal aid revealed. Thus, the 'moment' or 'instant' of the modern transformation of the poor persons institutions did not see their constituent norms 'replaced'. Their normative content, however, was instantly subject to the immanent possibility of reconstruction or change, at the orchestration of the state through the new 'normative engines' of its modern legal system.

When 'replacement' actually occurred, it did so in the context of the modern legal systems, and within the new legal norms they engineered. The focus of the 'normative engines' of the new Western legal systems, however, was not upon the poor persons institutions. These 'engines' focused upon engineering the construction of the ideological dimensions of 'law' in the modern societies regulated by the new

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961 M Galanter, above n 879 at 19.

legal systems. The 'product' of this great enterprise was the social construction which we knew as 'modern law' in the post-war Western world. This 'modern Western law' was constituted by the legal centralist normative constructions which fixed the identity of law in the societies of the 20th century Civil Law and Common Law worlds.

If we need to defend the proposition that 'modern law' in Western society, i.e., how 'it' 'sees', identifies and celebrates law, is an ideological construction we can do so from four different bases within this chapter . In the first place, the review of the explanatory literature above demonstrated how centralist ideals of 'law' dominated its explanations of the post-war experience, in the face of the legal plurality of the post-war world.[962] Secondly, in identifying the 'missing' political dimensions of modern law in the explanatory literature, we highlighted the plurality of the modern Western legal domain.[963] Thus, in ascribing monotypicality to its multitudinous dimensions, the centralist monotypes of 'modern Western law' are signalling their origins in ideology or 'belief', and not as social descriptions of law itself. The third basis is that the 'missing' political dimensions of law also showed that the law and institutions of the modern legal system were popularly perceived as having a 'separate' existence. This perception, moreover, was shown to have solid foundations in the modern reality of central regulation, and the role of its centralist law in the public policy of the welfare state.[964] The 'content' of this 'separate law' closely corresponds to the legal centralist constructions of 'modern Western law'. Nowhere is this more evident than in the modern Common Law world, where the association of 'law' with lawyers, courts and legislation "has become part of the general culture" - notwithstanding the plurality of the modern Anglo-American legal domain and the social significance of administrative centralism, its law and institutions in the Common Law countries.[965] Fourthly, as we have several times shown Galanter to describe, the modern Western legal systems are "institutional-intellectual complexes ... guided by and propounding a body of normative learning".[966] In the context of modern legal plurality, the "regime of general rules" to which this bifidial matrix subjects "the other institutions in society" - and Western social life itself - are inherently ideological constructions.[967]

On whichever grounds one demonstrates the construction of 'modern law', its 'production' in the new national legal systems was the seminal legal development of the modern Western world. Its 'manufacture', moreover, was inextricably linked with the 'replacement' of the constituent norms of the poor persons institutions. Therefore, before we can explain the significance of this 'replacement', and thereby

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962 Above at pp 146-151.

963 Above at pp 151-154.

964 Ibid.

965 H W Arthurs, above n 882 at 4.

966 M Galanter, above n 879 at 19.

967 [illegible]

the origins of the normative or 'ideal' dimensions of modern legal aid, we must first explore the basis of the social construction of 'modern Western law'.

The Basis of the Social Construction of 'Modern Western Law'

Like its modern legal systems, the origins of its 'modern law' are to be found in the legal modernisation of Western society described above.[968] In both the Common Law and Civil Law world, legal modernisation saw the institutions of the 'old' central type of legal systems refurbished, redesigned and reconfigured, and its centralist-types of law consolidated, codified or reformed. Across Western society, the outcome was highly comparable, notwithstanding the tendency of modern centralist scholarship to differentiate development in the Common Law and Civil Law types of legal system, and their distinctive categories of legal thought.[969] Older forms of plural legal ordering were suppressed, and eventually eliminated, and modern legal domains, in which centralist-types of law were pre-eminent and predominant, emerged.[970] There was, however, one key difference in the experience of legal modernisation in the Common Law and Civil Law worlds. It had the effect that the basis of their respective social construction of the legal centralist norms which constituted 'modern Western law' was significantly different.

In the Western Civil Law world, legal modernisation did not alter the basic composition of the central component of its legal domain. Administrative centralist or bureaucratic types of law and their institutions remained as the exclusive centrepiece of the national central legal systems. These institutions and their administrative-types of centralist law were 'modernised' to match the new regulatory requirements of modern capitalist society. But the essential character and constitution of the central component of the legal domain in the Civil Law world was unaltered by legal modernisation. Neither were its 'internal' politics changed, save that, as in the Common Law world, its centralist-types of law rapidly achieved their modern hegemony.

The 'stability' of centralist law and its domain in the Civil Law world had significant implications for the construction of 'law' within the ideological 'engines' of its modern legal systems. Its 'old' legal institutions and administrative centralist-type of law faced no new competition. The new legal norms of the Civil Law societies were 'engineered' by the 'architects' of its modern legal system on the basis of the existent legal institutions of the state. Their version of 'modern Western law', therefore, was 'constructed' in the image of the state and its legal machinery. In the Common Law world, however, the experience of legal modernisation of the central legal domain was different. And so, accordingly, was the basis of its social construction of its versions 'modern Western law'.

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968 Above at pp 163-164.

969 M Rheinstein (ed), above n 65 at xxxix & 198-206.

970 Above at pp 163-164.

The Experience in the Common Law World

The experience of legal modernisation in the Common Law world is generally portrayed as similar to its Civil Law counterpart, i.e., as a period of reform of the 'old' centralist-type of legal systems. Historians acknowledge that the Common Law countries had distinctive social experiences. In Britain, for instance, legal modernisation was evolutionary and adaptive, whereas in the United States, it was revolutionary and - by reason of social necessity - innovative and creative. For legal historians, however, the outcomes in the Anglo-American world were similar: legislatures were created or reformed, government democratised, the courts and their procedures streamlined, and its legislative and judicial-types of centralist law revised.[971]

In Britain, legal modernisation is usually seen to have culminated in the 1870s when "the shiny new components of an integrated national legal system" were "bolted into place".[972] Complete 'kits' or 'packages' of its developing modern type of legal regulation had already been 'exported' to the self-governing colonies of the British Empire, a process which continued into the 20th century. In the United States, in contrast, the final events in the shaping of its modern legal system cannot be dated so precisely.[973] Nevertheless, by the 1850s the modern transformation of its courts and their judicial law was substantially complete. Whilst the next 50 years saw "rapid, unprecedented change", even the "the most important of these changes continued trends set earlier in the century".[974] Moreover, by the 1860s the superior court judges had come "to play a central role" in American society, increasingly employing "the common law as a creative instrument for directing men's energies towards social change".[975]

For most purposes, the picture presented by centralist legal history is adequate, useful and informative. It reveals much of what we need to know about the origins of the modern legal systems, and its courts, legislation and judicial law, in Australia, Britain, Canada, New Zealand, the United States and other Common Law countries. However, centralist legal history overlooks one vital feature of the experience of legal modernisation in these countries. It was also a time of significant new developments in the technology and politics of modern centralist law. It is within these changes that we find the distinctive character of the experience of legal modernisation in the Common Law world.

The Appearance of a Modern Administrative-Type of Centralist Law

The first new development was the appearance of a modern administrative-type of centralist law. By 1850, administrative or bureaucratic modes of legal regulation were evident in government and the administrative organs of emerging modern

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971 Eg, L M Friedman, *A History of American Law*, (1973) at 93-264.

972 H W Arthurs, above n 882 at 47 & 50-88.

973 See previous paragraph.

974 L M Friedman, above n 971 at 295.

975 M J Horwitz, *The Transformation of American Law 1780-1860* (1992) at 1.

Anglo-American societies. This new administrative law was not a refurbished or redesigned modern version of the decentralised, 'unsystematic', partial and patriarchal forms of administration of late medieval and early modern British society. It originated within the new administrative ideologies of centralised public administration in the modern state which generated new types of legal institutions and technologies. The result was a new, modern administrative-type of law, quite different in conception and design to the judicial-types of law of the courts and the legal profession.[976]

The focus of modern Anglo-American legal history on this latter type of law, the disciplinary divide between 'law' and 'administration' and the influence of the courts and legal profession have conspired to obscure the origins of administrative law, its content and functions. The legal historians have generally relegated administrative law to the 'non-legal' world of 'administration'. The scholars of public administration, on the other hand, have similarly generally acquiesced in the 'non-lawness' of administrative law, and developed their own typologies of its institutions and systems of legal ordering. Both of these approaches have suited the interests of the judges and the lawyers, who have thereby been justified in subjecting administrative law, its actors and actions to the processes of judicial review of administrative action. In the few cases where the lawyers have acknowledged administrative law, notably Dicey and Lord Hewart, its significance has either been deliberately downplayed, or demonised as an illegitimate - often dangerous - ward of the courts, judges and lawyers.[977] Consequently, we have no comprehensive account of its origins the Common Law world. The major historical account is Arthurs' investigation of the emergence of administrative law in England in the 1830s and 1840s. This serves to demonstrate its origins in legal modernisation, and the distinctive character of this new form of modern Anglo-American centralist-type of law.

Arthurs begins by recording that, by 1830, industrialisation had "significantly altered all aspects of ... life" in England, and its "social consequences ... was attracting considerable concern".[978] One response of the central government to this social problem was to assert a new role in articulating national social policy.[979] However, it faced the threshold difficulty that it lacked the administrative machinery to implement these new types of policies.[980] The solution was not to be found in the

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976 It was a system in which, as Arthurs describes (above n 886 at 164), "its architects created ways and means of making and applying law that relied heavily on conciliation, expanded the role of discretion, diminished that of formal adjudication, and unleashed a proliferation of rules, which, by virtue of their source and purpose, were specific to a given activity or industry."

977 A V Dicey, *Introduction to the Study of the Law of the Constitution*, 9th ed (1939) at 328-329: The Rt Hon Lord Hewart of Bury, G H. *The New Despotism*, (1929).

978 H W Arthurs, above n 882 at 92.

979 Ibid at 91-93.

980 Patrick Atiyah's description (above n 921 at 18) of England in 1770 as marked by the "absence ... of so much of what is taken for granted today as part of the machinery of Government" applied in 1830. The central administrative system was still "an uncoordinated melange of departments, offices, boards, and commissions, staffed often - but not always - by incompetents and sinecure-holders, some functioning

institutions of judicial law. The central courts were still recovering from the "disastrous period" of the previous 40 years, and the civil jurisdictions and judges were preoccupied with property and commercial law, displaying little interest in social administration or governance.[981]

In the 1830s, therefore, the British Parliament and the national government were compelled to find an alternative solution to these emerging, new legal regulatory demands. The answer took the form of the establishment of new and modern administrative-types of legal regimes. Sometimes, these new legal regimes were merely temporary adaptations of existing legal institutions and law.[982] In other instances, the legislators were innovative, establishing new types of administrative institutions, like the statutory regulatory commissions and factories and mines inspectorates.[983] The statutory legal powers and functions invested in these administrative agencies permitted them to produce their own schemes of legal regulation. Officials in the factories and mines inspectorates, for instance, were authorised to make delegated legislation, and independently enforce, through fines and a criminal jurisdiction, both their regulations and the legislation constituting the inspectorates, free from judicial supervision and review through appellate or prerogative writ proceedings.[984] Moreover, these officials, along with their counterparts in the new regulatory commissions:

> ... drafted statutes which parliament enacted ... interpreted legislation ... adumbrated it in advice, rulings, and bulletins; above all, they secured, through [their] formal and informal activities ... adherence to law's purposes and policies.[985]

These new administrative agencies generated an alternative modern centralised legal system, with its own type of law, unique legislative and adjudicative techniques, and its own legal values.[986] Importantly, these developments in administrative were not merely a flash in the pan. In the 1850s and 1860s, the factories and mines inspectorates, for instance, laid "the practical foundations of modern administration and social policy", a "new administrative technology" which was subsequently

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virtually without ministerial direction, some with ministerial participation extending to the most trivial and routine tasks": H W Arthurs, above n 882 at 93-94.

981 P Atiyah, above n 921 at 361; H W Arthurs, above n 882 at 94; below n 83.

982 Eg, the establishment of domestic tribunals to self-regulate commercial activity, and including arbitration clauses in regulatory legislation: H W Arthurs, above n 882 at 96-103.

983 Ibid at 103-129.

984 Ibid at 105.

985 Ibid at 115. Arthurs describes (ibid at 117) this new 'legal technology' as characterised by its capacities to identify "a complex socio-economic issue; a determination to resolve it by procedures in addition to formal adjudication on the adversary model, including investigation and report, negotiation, and rule-making; a willingness to entrust adjudicative tasks to persons other than judges; a reliance upon standards of decision-making other than vindication of common-law rights, including such vague concepts as 'expedient'; and an ultimate ambivalence concerning the residual functions of parliament and the courts vis-à-vis the special new machinery."

986 Ibid at 162.

through modern forms of self-government under the 'rule of law' to British colonies in Canada, Australia, New Zealand and elsewhere.[987]

Arthurs' account is invaluable in telling the story of the English experience. However, it also serves as a case study illustrating the conditions in which new and modern administrative-types of centralist law appeared in the Common Law world. Moreover, by clearly linking its development with new and expanding functions of modern government, the evidence elsewhere suggests that it is likely to be a representative study. In the United States, for instance, we know that administrative centralist-types of law had their "birth in necessity" in early 19th century government, assuming their modern significance with the expansion of the powers of the Interstate Commerce Commission in the 1900s, "and the establishment of similar state agencies [which] made increasingly manifest the place of administrative agencies in enforcing legislative policies".[988] In Australia, the expansion of modern administrative law occurred in the context of the growing functions of the state capitalism colonial governments in the 1880s and 1890s. Indeed, throughout the late 19th century and early 20th century Anglo-American world "the increased functions of government [and] the ... tremendous growth in administrative agencies" and their "extensive investigative, rulemaking, and adjudicating powers represented a [new and] provocative fusion of different powers of government."[989]

The Changed Politics of the Emerging, Central Legal Domain

In both the Common Law and Civil Law societies, as we indicated above, legal modernisation saw Western centralist-types of law and their institutions achieve their modern pre-eminence and pre-dominance.[990] It was, moreover, inextricably linked with social transformation.[991] The developing political economy of modern capitalism, and its social reforms, industrialisation and new business cultures, organisations and transactions, demanded new legal technologies, solutions and options. These developments generated a new degree of flux and fluidity throughout the diverse components of the emerging modern Western legal domain. In England, for instance, new legal types of commercial regulation and dispute resolution developed and "flourished" in the 1840s, 1850s and 1860s.[992] In the Common Law

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987 H W Arthurs, above n 882 at 115 & 90.

988 1 Am Jur 2d Administrative Law § 186 n 6 at 814; J W Hurst, *The Growth of American Law: the Law Makers*, (1950) at 16-17.

989 1 Am Jur 2d Administrative Law § 186 n 6 at 816.

990 Above at pp 163-164. As Arthurs notes in the case of England (above n 882 at 182), both "lawyers and administrators ... functioned as carriers of techniques and of attitudes and values, disseminating them among the many groups with which they were involved. At the same time they were responsible for cross-pollenization, and apparently carried back to their familiar legal tasks and administrative settings the techniques, attitudes, and values of other social fields, including national political networks, business organisations, technical experts, local élites, and communal groups. In so doing, lawyers and administrators were able to transform state law in some respects and to use it in an effort to deflect or dominate the internal law generated by each other and by other social fields ... "

991 Above at pp 163-164.

992 H W Arthurs, above n 882 at 50 & 50-77.

world, however, there were two distinctive new developments, both in the politics of modern centralist law.

The first was within the central component of its emerging modern legal domain. Administrative law introduced a competitive dimension to the 'internal' politics of centralist law in the Common Law societies. By the 1850s, it had established the basis of an alternative central legal system with the capacity to provide new modes of national legal regulation. This legal system and its administrative-type of law had the potential to replace or change the role and status of the existing types of Anglo-American centralist law - its legislative and judicial-types of law. In the case of the former, these 'threats' were only nominal. By the 1850s, the power and authority of legislatures and legislators to dominate or control administrative law and its agencies was already constitutionally inviolable. In the United States, this was profoundly so.

In the case of judicial-types of law, however, the situation was different. Throughout legal modernisation, the courts, judges and the lawyer-administered parts of the Common Law legal systems were deeply entrenched - and irrevocably implicated - social institutions. We cannot credibly claim - and it would fly in the face of history to do so - that the existence of these institutions and their law was seriously imperilled by administrative law. The courts, the judges and the lawyers were destined to - and in the United States had already - become the major public face of the modern Anglo-American legal systems. However, their transition to this ultimate modern role was not automatic, or without the need for precautionary responses to maintain social relevance and hegemony. In both England and the United States, the early decades of the 19th century were a period of vigorous adaptation of the institutions, ideology, processes and content of judicial law to accommodate the changing needs of developing capitalist societies.[993] Although, as we have indicated above, the different modern legal origins of the United States meant that these adaptations were far less institutional in character than in England.[994]

Administrative law did, however, pose a potential threat to the status of judicial-types of law and legal ideology. In particular, it threatened the power and function of the courts, judges and lawyers in the legal regulation of modern Anglo-American society. The contemporary English experience is one illustration. Whilst by the

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993 M J Horwitz, above n 975; L M Friedman, above n 971 at 295-298. In England, by 1830 the mechanics of modernisation of the central legal regime were already well-advanced. The modern social and political ideals of the 'rule of law' floated gossamer-like over the entire jumble of the Parliament, the central courts and the judge-made and administered law: E P Thompson above n 921 at 258-269; D Neal, above n 55 at 72-75. Over the next 40 years the administration of the central superior courts was reformed, including provision for payment of judges' salaries, changes to civil procedure, an appellate jurisdiction introduced and the House of Lords professionalised: B Abel-Smith & R Stevens, above n 99 at 37-41 & 43-45. The judge-made and administered legal system reached its "high-water mark with the merger of the superior courts and the abolition of their peculiar procedures in 1873": H W Arthurs, above n 882 at 47. The criminal justice system was also modernised, including criminal law reform, the transformation of policing and reforms to the poor law: ibid at 29-32; J J Tobias, *Crime and Industrial Society in the 19th century*, (1967) at 223-242; W R Cornish, "Criminal Justice and Punishment" in W R Cornish et al (eds), *Crime and Law in Nineteenth-Century Britain*, (1978) at 7-65.

994 Above at p 177.

1850s, administrative law, its legal system and agents has suffered some setbacks - with, for instance, the lawyers "[shunting] railway regulation into Common Pleas in 1854, [demolishing] the privative clause of the Railway and Canal Commission in 1873, and ultimately [harassing] that body into a state of virtual paralysis":[995]

> ... [g]radually, and for the most part unnoticed, [the central administration was] gaining judicial powers as well as legislative powers, thus laying the basis of the modern administrative state, with its characteristic and wholly necessary extension of wide discretionary powers'.[996]

It was, furthermore, perceived by the judges and lawyers - at least in England - to be a real threat, with Dicey's warnings in the 1880s followed by the call to the judicial arms issued by Lord Hewart in the 1920s - the spectre of the "new despotism".[997] Moreover, as we record below, this perception proved to have a real foundation, as the subsequent experience of Anglo-American government in the 20th century was to demonstrate, particularly in England and the British Commonwealth welfare states.

The appearance of administrative law also changed the 'external' politics of the central legal domain. Its alternative legal systems and modes of administration introduced a new 'choice' factor. The modernising, mid-19th century societies of the Common Law countries were presented with new options for legal regulation. Of course, it is once again inconceivable that its governments and legislators would have - or could have - 'chosen' to replace judicial-types of law, its courts and legal system. Nevertheless, the presence of administrative law provided them with an alternative, especially in the field of managing the growing social functions of the modern Anglo-American state. It was an alternative, moreover, which the law-makers 'chose' to exercise. As foreshadowed above, by the 1920s in England and in its modern Western dominions in Australia, Canada, New Zealand and South Africa, administrative law, its institutions and modes of regulation had become:

> ... the means of providing services for the greater part of its subjects - not only services like the armed forces or the police ... but social services such as education, public health, housing, medical attendance, [various types of social insurance] ... gas, water and electricity ... and regulatory services which control the development of land and the road transport industry.[998]

Even in the United States, where early 20th federal governments concentrated "on protective measures (such as anti-trust legislation designed to restore a system of competitive enterprise)":

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995 H W Arthurs, above n 882 at 176.

996 Ibid at 139 citing D Roberts, *Origins of the British Welfare State*, (1969) at 114. Arthurs' book contains many other illustrations. It is beyond the constraints and scope of this part of the chapter to recite them in detail. Generally, however, he portrays a picture of active competition between the social fields of administrators and lawyers "at a number of crucially important locations" in mid-19th century English society (ibid at 181-182).

997 A V Dicey, above n 977; The Rt Hon Lord Hewart of Bury, above n 977 at 17.

998 E C S Wade, in the preface to A V Dicey, above n 977 at xiii.

> ... numerous economic enterprises [were] publicly owned and controlled, either directly by the federal or State governments or by independent public authorities such as the Tennessee Valley Authority."[999]

Furthermore, modern governments in the Common Law world persisted in these 'choices'. The size of its administrative legal systems continued to grow, especially in the post-war period, when it formed a vital part of the legal fabric of the welfare state. Moreover, the administration of its modern legal systems provided a fertile breeding ground for administrative centralism, the ideology behind administrative law and its regulatory modes. Administrative centralism prospered, initially through the embrace of the new discipline of 'public administration', and later as the "growth of administrative tasks" spawned "a vast new complex of relations between public authority and the citizen".[1000] The "steady extension of state control and planning activities" in the welfare state increased the influence of administrative law and its ideologies in the politics of the central legal domain in the 20th century Common Law world.

The Grand Alliance of 'Modern Anglo-American Law'

The third distinguishing feature of legal modernisation in the Common Law world was also evident in the politics of its centralist law. Legal modernisation saw the negotiation of a new political alliance between the state, the judges and the courts, the organised legal profession and lawyers. This was the liberal legal centralist alliance, which was to prove to be the grand alliance of 'law' in the modern Anglo-American world. The alliance was a political compact or 'bargain' struck between the parties, in which the social construction of law and the administration of civil and criminal justice were its governing concerns. It resulted, on the one part, in governments and legislatures in the modernising Anglo-American societies acquiescing in the social projection of legalism and its ideals through the ideological 'engines' of their new modern legal systems. Legalism had emerged during legal modernisation as a powerful ideology of law originally serving to give coherence to the disparate social fields occupied by the legal profession and its lawyers.[1001] As Arthurs describes, by reference to the English experience:

> ... legalism - the notion of law as ideology - performed this function. Victorian lawyers seem generally to have had a relatively fixed notion of law as a formal system, a conception that such a system ought to work in its familiar mode (albeit with greater efficiency), and the conviction that the functioning of the formal system was indispensable to national purposes. The ideology of legalism had adjectival rather than substantive content. Its impact therefore was greatest in defining lawyers' attitudes toward the legal system as such, toward the relationship of laymen and other actors to the system, and toward state action affecting the system. When this powerful social field, energised by its ideology, projected it indigenous law, it was able to

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999 W Friedmann. *Principles of Australian Administrative Law*, 1950) at 26. During World War II. the great expansion of Federal government budgets. and its expanded national economic role. also saw new developments in the administrative apparatus of the American welfare state: L M Friedman. above n 971 at 569.

1000 W Friedmann. above n 999 at 27.

1001 H W Arthurs. above n 882 at 180.

> influence the law of other social fields, and even the law of the state, especially in adjectival matters.[1002]

Legalism, and its description of an ideal, modern judicially-administered system of civil and criminal justice, in which the superior courts and their judges played the central role in superintending state legal regulation, was adopted by the state. ..For their part of the 'bargain', the judges, the legal profession and the lawyers aligned their worldview of law-legalism - with the political interests of governments and legislatures in the emerging modern state. The quid pro quo was that the latter 'delegated' the function of administering civil and criminal justice to the courts and the judges, and regulation and provision of lawyer services to the organised legal profession and the lawyers.

For the immediate purpose, the existence and content of the liberal legal centralist alliance needs no defence or further explanation. The subsequent history of the administration of the modern legal systems in the Common Law world provides ample evidence of the existence of the special relationship it created between the state and the legal profession - and its judges and lawyers - in the administration of justice, legal services and the market for lawyer services. Moreover, it is abundantly clear that the "paradigm of law ... identified as 'legal centralism'" emerged from within the machinations of the alliance.[1003] This paradigm was the basis of the social construction of 'law' in modern Anglo-American society, as Arthurs' description reveals:

> ... the central assumption, the crucial structure that dominates the way most lawyers, judges, law professors - even most people - think about law is this: law is formal; it exists as a thing apart from society, politics or economics; law has the capacity to achieve, and does achieve, results by encouraging and discouraging behaviour, by attaching specified consequences to behaviour that facilitate it, deter it or undo its harmful effects; law is made and administered by the state; and access to law is provided in courts by legal professionals - lawyers and judges - who invoke a body of authoritative learning in order to argue and decide cases.[1004]

For other purposes, however, it is necessary and important to momentarily dwell on the 'proof' of the origins of the alliance and its essentially political character. It was, after all, the grand alliance of 'Anglo-American law' in the 20th century Western world. Consequently, its origins and character form an important part of the background to the post-war experience of legal aid, which we revisit in Chapter Seven. Moreover, the Australian version of the alliance plays a central part in unravelling the implications of the post-war experience in the context of the response of its welfare state to the social 'problems' in 'access to justice' in the mid-1980s and early 1990s. This task is the subject-matter of both Chapter Eight and of the conclusion to the thesis.

1002 Ibid at 180-181.

1003 Ibid at 2.

1004 Ibid.

The grand alliance of 'modern Anglo-American law' was not an accident of history. As Arthurs reminds us, "[l]egal institutions and ideas do not simply emerge, evolve, reshape themselves, deteriorate, or disappear of their own accord."[1005] However, there is little, if any, primary or 'direct' evidence of 'how' or 'when' the alliance first emerged. Nevertheless, the appearance of administrative law and the changed politics of the central legal domain discussed above provides some powerful 'circumstantial' evidence. This contemporary evidence goes to both the origins of the liberal legal centralist alliance, and its essential character.

In the first place, during the legal modernisation the legal profession did not only actively participate in the shaping of the modern processes and doctrines of the courts. Its members were also active participants in the administration of the modernising Common Law societies. In England, the legal profession occupied "key positions" in mid-19th century social administration, where its judges, as Arthurs describes:[1006]

> ... pronounced authoritatively upon the meaning of statutes, instructed local justices and administrative officials in the proper performance of their duties, and influenced the direction of legal change by speaking writing, and serving on committees or as members of the House of Lords.[1007]

Similarly, English lawyers were active "everywhere [helping] to shape basic public policies, to translate these into legislative form and ultimately practical reality, and to resist both enactment and implementation of policies".[1008] In the United States, a comparable situation - in a different social context - obtained before the 1860s, as Howe observes:

> The legislative responsibility of lawyers and judges for establishing a rule of law was far more apparent than it was in later years. It was a clear to laymen as it was to lawyers that the nature of American institutions, whether economic, social, or political, was largely to be determined by the judges.[1009]

In helping to configure modern Anglo-American society, the judges and the lawyers were not only concerned with short-term advantages for the courts and legal profession, or personal self-interest. They were also proselytisers of legalism and its modern ideology of centralist law. The legal profession deployed legalism and its social ideals when they confronted the ideological modes, institutions and actors of administrative law in the modern competitive politics of the central legal domain. By the 1870s, the English legal profession had succeed in both propounding its version of modern centralist law, and effectively policing its social paradigms:

1005 Ibid at 1.

1006 Ibid at 180.

1007 Ibid.

1008 Ibid.

1009 M Howe, "The Creative Period in the Law of Massachusetts" (1947-50) 69 *Proceedings of the Massachusetts Historical Society* 237 quoted in M J Horwitz, above 975 at 2.

> ... for example, by disparaging overt attempts to depart from the formal model as 'unconstitutional,' by treating departures as a ground for judicial review that delegitimated the offending social technique, any by seeking to ensure that those who participated in law as a social technique were either themselves lawyers or under the close control of legal advisers. Familiar episodes epitomize each tactic: arbitrators were denounced for their tendency to decide cases in derogation of 'law'; the factory inspectors and the Railway Commission were harassed in judicial review proceedings; and the courts of requests were manoeuvred first into the control of legal assessors and then out of the hands of lay judges altogether."[1010]

By the time legal modernisation was complete in the 1880s, English administrative law and its regulatory modes had been 'de-legitimated'. Its law of administration converted by the judges and lawyers - with the sanction of the state - into 'public administration', thereafter subjugated to the supervision and control of the courts through the 'administrative law' of judicial review. A comparable outcome - although in a less dramatic or contested context - resulted in the United States, where its judges and lawyers similarly relegated the role of administrative agencies and their law to "a mere transmission belt for implementing legislative directives in particular cases."[1011] This was an activity in which, as in the modern British Common Law world, they were at least notionally to be supervised through "a coherent set of principles" developed and policed by the courts.[1012]

The second source of contemporary 'circumstantial' evidence lies in the reaction of the state to 'delegitimation'. In failing to intervene to 'protect' the social standing of administrative law, governments and legislators made a 'choice' - a negative type of public policy decision. They acquiesced in both the relegation of administrative law to 'public administration' and in the superintendence of the courts and the legal profession in managing administration. The 'choice' made by the state is consistent with it having reached a *modus operandi* with the latter with respect to the future social pre-eminence of judicial-types of law and regulation and to the functions of judges and lawyers in the legal regulation of modern Anglo-American society. This new operational accord is significant 'inferential' evidence of the existence of the liberal legal centralist alliance.

On the other hand, state acquiescence in the 'delegitimation' of administrative law seems contradictory. Modern governments and legislators continued to endorse its institutions and regulatory modes as administrative instruments in the many important arenas of public administration outside the civil and criminal justice systems. Administrative law remained an essential part of the modern Anglo-American legal systems, as we have described above. However, state acquiescence in 'delegitimating' administrative law, whilst persisting in using it for administrative purposes, is only contradictory from the liberal centralist perspective. It is only liberal legalism - and 'modern Anglo-American law' itself - which pretends that the

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1010 H W Arthurs, above n 882 at 172.

1011 R B Stewart, "The Reformation of American Administrative Law" (1975) 88 *Harvard Law Review* 1669 at 1675.

1012 Ibid at 1672.

state is obliged to remain loyal to the one type of modern law. In reality, the 'appetite' of the modern state for law, and, for that matter, whether it 'chooses' to act with any type of law, is fundamentally pragmatic and catholic, and driven by political expediency. Moreover, the acquiescence of the state in 'delegitimating' administrative law is only contradictory if we overlook its dual interests in legal regulation. One of these interests is the administration of society and its economy. Modern governments and legislators in Anglo-American society have pursued this state interest via its three types of centralist law - administrative, judicial and legislative - and their different modes of social regulation. The other administrative interest of the state is the use of legal regulation for the purposes of governing modern society. If we consider its 'decision' to acquiesce in the 'delegitimation' of administrative law in this context we can identify other aspects of the contemporary 'circumstantial' evidence which go to support the presence of the liberal legal centralist alliance.

For several reasons, the medium of governance offered by the courts, judges and lawyers was inherently more attractive to modernising states in the Common Law world. As elsewhere, the final phases of legal modernisation coincided with embryonic demands for greater state intervention in modern social governance, from a variety of sources. The mid-19th century Anglo-American states, however, were unwilling to shoulder responsibility for the expansion of public functions required. Moreover, even if their liberal capitalist governments had been fiscally equipped and competent, the contemporary political climate was against intervention on the social scale required. As Cappelletti pointed out, in a related context, "it required affirmative state action that contemporary political thought regarded with hostility".[1013] Thus, the delegations of responsibility and functions which the liberal legal centralist alliance entailed were consistent with the governmental philosophies of the modernising states in the Common Law world. It was cheaper to vest responsibility for the administration of civil and criminal justice in the modern legal system in the courts and judges, and to maintain a privatised market for lawyers' services in modern Anglo-American society. It was also consistent with its modern constitutional spirit of the separation of powers in capitalist societies where institutions and people operated under the mantle of the 'rule of law'.

At least equally significant, however, were the attractions of legalism - the professional ideology of the judges and lawyers - to the state. Administrative law and its new modes of regulation had brought "specificity, predicability, uniformity and rationality" to modern Anglo-American law.[1014] As the state and its agencies recognised, these virtues were ideally suited for social administration. However, they were far less appropriate for their new role in the government of modern Anglo-American society. Legalism, in contrast, as Arthurs has described above, was an "adjectival" social ideology. Its comprehensive, descriptive normative framework of an idealised system of justice offered the modernising Anglo-American states a desirable legal medium for modern social governance. This framework was ideal for

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1013 M Cappelletti, above n 117 at 24.

1014 H W Arthurs, above n 882 at 151.

their perceived, self-restricted governmental 'needs', yet retained a sufficient approximation of the everyday reality of civil and criminal justice to impress the populace. Its normative content, moreover, emphasised the importance of personal rights, enforceable in the courts by the judges with the aid of lawyers on an individual basis. Whilst these paradigms were derived from the modern law of property in its many and various forms and from the criminal law, they projected images of law and dispute resolution which were readily adaptable to the individualist ethos of modern liberal political ideals and citizenship. Furthermore, legalism was aspirational and national in conception. It had the additional attraction for the state that it carried with it the zeal of its designers, and their modern conviction that "things ought to be done according to 'law' in the formal sense, as it was understood by lawyers ... (albeit with greater efficiency), and ... that the functioning of the formal system was indispensable to national purposes".[1015] Legalism was, therefore, an irresistible enticement to the state to establish its grand modern alliance with the legal profession, and its judges and lawyers.

The Transition of the Norms of the Poor Persons Institutions

In several important respects, the links between the social construction of 'modern law' and the 'replacement' of the norms of the poor persons institutions in their transition into 'legal aid' were similar across the Western world. Everywhere, the 'ideological engines' of its modern legal systems transformed the social function of the normative dimensions of the 'legal' institutions from which they 'engineered' the social construction of 'modern Western law'. In the case of the Civil Law world, as we have seen above, its constituent 'modern legal institutions' were modelled upon those of its existing administrative-type of centralist law and regulatory machinery. In the case of the Common Law world, it was the courts and judicial-type law which provided the basis of the modern social construction of 'law'. In both legal worlds, however, the outcome of this modern functional transformation was the same. The normative dimensions of the constituent 'modern legal institutions' now functioned as national paradigms of idealised systems of law and legal regulation in the modern societies of the Western world.

Within these idealised systems of law and legal regulation, the normative dimension of the poor persons institutions now served a new and different social function. The new Western social constructions of 'law', based as they were upon extant or real legal systems and institutions, incorporated institutionalised provision of legal assistance for the 'poor'. These were modelled - in the case of the Civil Law world - upon its poor persons legal assistance institutions and - in the Common Law world - upon its *in formâ pauperis* procedures. The normative dimension of the poor persons institutions functioned to define, constitute and describe the institutional paradigms of legal assistance within the 'law' being newly 'engineered' by the modern legal systems. Thus, 'legal assistance institutions' for the 'poor' became part of the social construction of 'modern law' in both the Civil Law and Common Law worlds.

1015 Ibid at 182 referring generally to J N Shklar, above n 34.

The result also changed the normative content or 'constitution' of the modern poor persons institutions. Their 'original' charitable ideals were 'replaced' by the norms of the new 'legal assistance institutions', i.e., the norms which constituted the idealised poor persons institutions with 'modern Western law'. The re-constitution of the norms of the modern poor persons institutions was not discernible superficially. Initially, the norms of the new 'legal assistance institutions' remained configured around charitable ideals and functions similar in design to those of the poor persons institutions. However, their actual content had changed, being 'replaced' by the ideals of the 'legal assistance institutions' of 'modern Western law', which - for the moment - were themselves defined by reference to charitable ideals and functions. In this respect also, the experience in the Civil Law and Common Law world was similar.

It was also similar in the case of the transition of the 'legal assistance institutions' and their normative content into modern 'legal aid'. In both the Civil Law and Common Law world, the development of 'modern law' and its 'institutions' did not end with the first products of the 'ideological' engines of the modern legal systems. In the late 19th and early 20th century, the social constructions of 'modern Western law' - like their 'concrete' or machinery counterparts - continued to undergo further development. The 'legal assistance institutions' were not immune from these processes. Gradually, their ideological links with the poor persons institutions were broken down. The 'legal assistance institutions' of 'modern law' ceased to be constituted or defined solely by reference to the 'poor' and gradually assumed new 'functions' towards the poorer citizens of Western society. Charity was displaced as their central norm and replaced by the disparate collection of socio-legal ideals we associate with modern 'legal aid'. These particular legal developments occurred because the original institutional paradigms of legal assistance in 'modern law' were no longer adequate for the changing social circumstances of state legal regulation in modern Western society. The original charitable design of the norms of its 'legal assistance institutions' had also become inadequate.

The events behind this 'redevelopment' of the 'legal assistance institutions' were similar to those influencing the transition of the 'concrete' or machinery dimensions of the poor persons institutions. Earlier, we attributed this transition into the machinery of legal aid in the 20th century Western legal system to three major causal factors: one, the transformative social forces chronicled by Abel; two, the growth in modern conceptions of citizenship; and, three, the growing influence of 'modern Western law'. [1016] In the current context, the pressures on the state generated by the first two factors prompted the 'operators' of its 'ideological engines' to modify the construction of 'law' to meet changing social and economic expectations. The influence of the third factor, i.e., the growing influence of 'modern law' itself, was expressed through its role shaping popular expectations of the state, its legal system and its governmental 'responsibilities'. These expectations were 'felt' by the state through the politics of social and economic change, and acted as a further prompt to its 'legal engineers'. To an extent, however, the politics of Western society itself

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[1016] Above at pp 169-174.

was also now beginning to shape, modify and adapt the first 'designs' of the modern social construction which was 'law', and the role and content of its 'institutions'. It was these developments which accounted for the transition of the normative or 'ideal' dimensions of its modern poor persons institutions into 'legal aid'.

Comparing the Origins and Social Functions of Legal Aid

As we have explained at some length, modern legal aid in Western society originated in the functional transformation of the poor persons legal assistance institutions when they were incorporated into its modern legal systems. By the early 20th century, it had assumed its familiar bifidial form as we knew it in the post-war period. One branch of legal aid was its 'concrete' or machinery dimensions in the legal systems of the modern Western or Westernised societies. The other branch was its normative or 'ideal' dimensions in the ideological construction which was 'law' in the modern Western world. This bifidial social institution was highly comparable in the Civil Law and Common Law worlds, as were the origins, role and functions of its modern progenitors in the legal systems and 'law' of Western society itself. This comparability did not disappear in the 1920s, 1930s and 1940s in the lead-up to the post-war experience. Indeed, the comparability of modern legal aid was reinforced through the growing similarity in state legal regulation in the increasingly congruent welfare capitalist economies of the Western world. Thus, when the post-war period began, its role and function in the Civil Law and Common Law societies had a great deal in common. This fact accounts for the coherence of the explanatory literature, the claims of some of its contributors to present 'universal' explanations and its significance as an historical resource. There was, however, one important difference in the modern institution of legal aid in the Civil Law and Common Law societies, which must be explained before revisiting the origins and significance of the post-war experience.

The Difference between the Civil Law and Common Law Societies

The important difference was in the character and social function of 'legal aid', i.e., its normative or 'ideal' dimensions in 'modern law', in the mid-century Civil Law and Common Law world. This difference originated in the different bases of the social construction of their 'modern Western law', which was described above.

The Character and Social Functions of 'Legal Aid' in the Civil Law World

In the Civil Law world, its 'modern law' had been 'engineered' by the state, using the law and institutions of its modern legal system as the 'template'. In this respect, its social construction of 'law' differed from the Common Law world, where the 'template' was supplied through the liberal legal centralist alliance. The Civil Law states, moreover, were not constrained by an alliance with the judges and lawyers in either designing 'modern law', or in deploying their administrative-types of modern legal system, and in defining its functions. These differences resulted in two distinctive features of the social construction of 'modern law' in the Civil Law world. First, the form or type of its 'institutions' were highly correspondent with the administrative reality of the legal machinery of its modern states. Secondly, the 'production' or 'projection' of 'modern law' in the legal systems of the Civil Law

world was primarily an incident of the expanded administrative and governmental functions of the modern state. The Civil Law states remained more closely and directly identified with the control of social administration than in the Common Law world, where the liberal legal centralist alliance and its 'law' provided a convenient 'blind'.

The distinctive basis of the construction of 'modern law' in the Civil Law world had implications for the social character of 'legal aid', i.e., for how it was 'built' or 'constructed' in the 'law'. As a 'legal institution', 'legal aid' was designed by reference to the legal machinery of its modern states. Consequently, in the idealised 'legal systems' of the Civil Law versions of 'modern Western law' 'legal aid' bore the hallmarks of the machinery of state legal assistance. It was 'built' or 'constructed' as if it were an institution of the 'state', albeit in an idealised form. Thus, 'legal aid' in the 'law' of the Civil Law societies had an essentially state character, which performed the 'function' of providing assistance for the legal problems of their poorer citizens.

The different construction of 'law' in the modern Civil Law world also had implications for the mid-century social role of 'legal aid'. The high degree of correspondence between its 'institutional' types and forms, and the structures of the modern Civil Law legal systems, combined to give 'law' a relatively low social profile. Its 'institutions' had a greater degree of social synonymy with the legal institutions of the modern state than was the case in the Common Law societies. In the Civil Law world, therefore, it was more difficult to distinguish between an expression of the legal ideology of the state and the social politics of its actions or interventions through its legal system. Neither was it socially significant for the state to promote this distinction, as it was unabashedly both 'engineer' and manager of the system of legal regulation. Thus, 'modern Western law' and its 'institutions' did not play the same role as mediums or intermediaries of government. In the Civil Law societies, 'legal aid', like other 'legal institutions', did not perform the function of a social 'institution' standing between the populace and the state. It was nowhere near as prominent as a socio-legal institution of 'modern law' as it was in the Common Law societies.

Instead, citizens turned to an alternative medium to define their relationship with the modern state and its legal system. In the modern Civil Law societies, this relationship was expressed by reference to the social rights of citizens. These rights were defined in the 'face' of or against the state, and expressed the political expectations of its citizenry that it would provide the legal rights or material benefits necessary for social justice. In the Civil Law world, as elsewhere, as Cappelletti and Garth point out, by mid-century these 'expectations' had begun to include the assertion of a social 'right' of citizens' access to law.[1017] In the Civil Law societies, the 'institution' of 'legal aid' became identified with these expectations. Its idealised image of 'state legal assistance machinery' became the vehicle or social medium

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[1017] M Cappelletti & B Garth, above n 2 at 7-9.

whereby citizens expected the state to take the "affirmative action ... necessary to ensure the enjoyment by all of" its modern legal system.[1018]

The Character and Social Function of 'Legal Aid' in the Common Law World

In comparison, the character and social function of the normative or 'ideal' dimensions of legal aid in the Common Law world were quite different. In its societies, the state - through its modern legal system - was also the 'engineer' of 'law', but it was not its 'architect' or 'designer'. In the Common Law world, as we have seen, the basis of the social construction of its 'modern Anglo-American law' was the liberal legal centralist alliance. The 'product' of this alliance was the legal centralism described by Arthurs above, with its idealised judicially-administered system of civil and criminal justice where the superior courts and their judges play a central role in superintending state legal regulation. However, as we have shown, this 'legal system', did not represent the regulatory reality of the modern Anglo-American legal systems, in which administrative law and its institutions played a significant role. Thus, in contrast to the Civil Law world, the 'law' 'engineered' by the state did not enjoy the same degree of correspondence with its modern legal institutions. There was a significant degree of disjunction. In this context, and against the background of its alliance with the judges, legal profession and lawyers, when the modern state in the Common Law societies was 'producing' and 'projecting' 'law', it was purposefully promoting ideology, as a conscious and deliberate adjunct to the performance of its administrative and governmental functions. Moreover, the content of 'modern Anglo-American law' - with its focus on the courts, judges and lawyers - permitted the state to 'disguise' the locus of control over social administration in a way which was unavailable to its counterparts in the modern Civil Law societies.

As in those societies, the social construction of 'modern law' in the Common Law world had implications for how 'legal aid' was 'built' or 'constructed', i.e., for its social character. In the Anglo-American societies, 'legal aid' bore the hallmark, not of the legal machinery of the state, but of the liberal legal centralist alliance, and its idealised 'legal system'. Within that 'legal system', it was the legal assistance 'institution', which was shaped in the mould of the *in formâ pauperis* procedures, which was the traditional vehicle of legal assistance in civil and criminal proceedings in the superior courts. The principal 'operators' of those procedures - the poor persons institutions of the Common Law world - were the judges and practising lawyers. Thus, the 'institution' of legal aid in 'modern Anglo-American law' was not 'built' or 'constructed' as though it were an 'institution' of an idealised form of the 'state'. 'Legal aid' in the Common Law societies had the character of an institution of the 'courts', to be administered by the judges and lawyers. Moreover, its 'function' was not to provide assistance in association with the legal problems of poorer citizens, which was its emphasis in the Civil Law societies. In the Common Law world, the core 'function' of 'legal aid' was to provide legal representation for

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[1018] Ibid at 8.

poorer litigants and accused in connection with judicial proceedings, especially in its superior civil and criminal courts.

The different social construction of 'modern law' gave 'legal aid' a very different profile in the Common Law societies. The liberal legal centralist alliance, and the 'engineering' of its legal ideals as a central medium of government - particularly in the United States - had given 'law' itself a high social profile in the Common Law world. 'Modern law' and its 'institutions' were far more socially prominent and socially significant in the Anglo-American societies than in the Civil Law world. In the 1940s, the commitment of its governments, courts, judges, organised legal profession and lawyers to their modern 'bargain' in the liberal legal centralist alliance was substantially intact. Moreover, its idealised court, judge and lawyer-centred vision of 'legal system' had become entrenched and omnipresent throughout Anglo-American society in the decades since the Common Law states first began to 'engineer' 'law' through their modern legal systems. The paradigms of legal centralism which Arthurs described above had:[1019]

> ... become part of the general culture. Law and lawyers, law and courts, law and legislation - these associations spring immediately to mind and are reflected in school texts, novels, newspaper editorials, and popular speech.[1020]

Thus, the 'existence' of 'modern law', its 'legal system' and 'institutions' had become domain assumptions of the modern Common Law societies.[1021] Their images of 'law' were so deeply and indelibly imbedded that its assumptions are rarely fully articulated, never appearing in "a pure or complete form" amongst its millions of disciples.[1022] In this context, it was 'law' - and not social rights - which was the core medium of the modern interface between the citizens and the state. In societies where - in reality - courts, judges and lawyers played a central role in the administration of justice and where - in ideality - courts and judicial-types of law were the dominant paradigms of the 'legal system', it was inevitable that the 'institution' of legal aid would enjoy a high profile. For in both the *realpolitik* of the machinery of its legal systems and ideological realms of 'law' in modern Anglo-American society, courts, judges and lawyers performed a special and distinctive role. Thus, its 'institution' of 'legal aid' was not only more prominent than in the modern Civil Law world, it was also notably more socially significant. Moreover, its character as an 'institution' of the 'courts', administered by the judges and lawyers for the 'purpose' of providing lawyer representation in the courts, meant that 'legal

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1019 Above at pp 184.

1020 H W Arthurs, above n 882 at 4.

1021 "Domain assumptions" is a sociological concept which describes implicit styles of 'thinking' which underpin the worldview of those who share a certain social perspective. They are the ideas which constitute the basic assumptions or "metaphysics" of a social domain: "the things attributed to all members of a domain; in part they are shaped by the thinker's world hypotheses and, in turn, they shape his deliberately wrought theories. They are an aspect of the larger culture that is most intimately related to the postulations of theory [and] also one of the important links between the theorist's work and the larger society": A W Gouldner, *The Coming Crisis of Western Sociology*, (1971: 1973 Rep) at 31.

1022 A Hunt, *The Sociological Movement in Law*, (1978) at 141.

aid' was identified by the populace within the Common Law societies as an instrument to assert their 'rights' of modern citizenship, and express their demands against the state. To assert those rights, however, through the medium of the courts, and to express their demands through 'law', or their hopes of what it might become, in a way which was quite different to the experience of 'legal aid' in the modern Civil Law societies.

The Other Functions of 'Legal Aid' within the Common Law World

The different basis of its social construction of 'modern Western law' had other implication for the functions of 'legal aid' in the Common Law world . 'Legal aid', like the other 'institutions' of 'modern Anglo-American law', was a product of the liberal legal centralist alliance. As we have shown, this alliance constituted the seminal relationship between the state, the courts, judges, the organised legal profession and the lawyers in the modern Anglo-American world. However, the 'bargain' reached by its parties did not establish a permanent, modern status quo. From its inception, the alliance was essentially a coalition of convenience, matching what was practicable in legal modernisation, the reform of social administration and competing political demand for effective governance in modern capitalist society. Above all, it was a coalition of political interests, and the relationships amongst its members - and their 'collective' or 'corporate' relationship with the society 'outside' - required the constant "determination of rights and the accommodation of interests" we find elsewhere in modern politics.[1023] Thus, both the 'internal' relationship between the state and the courts, judges, the legal profession and lawyers, and the 'external' relationship between the 'law' and the 'state' 'engineered' through its legal system and modern Anglo-American society itself, had a considerable degree of fluidity. In these contexts, the 'institution' of legal aid and its court, judge and lawyer focused ideals also played the role of a domain ideal - or essential, uncontested 'condition' - of the liberal legal centralist alliance. In this role, 'legal aid' served two related and complementary functions.

In the first place, it functioned as a mediative ideal or norm. The liberal legal centralist alliance defined and regulated the 'boundaries' of the modern relationship between governments, courts, judges, the organised legal profession and lawyers in the administration of justice, legal services and the market for lawyers' services. However, neither the 'internalities' of this relationship, nor the politico-economic interests of the parties to the alliance or the 'external' social demands upon governments or the legal profession were unchanging. Nor were the political interests of the modern Anglo-American state and its governments always necessarily aligned with the economic and ideological interests of the legal profession, and *vice versa*. Nevertheless, the parties to the alliance shared an overarching interest in maintaining the mutuality of their 'bargain', ensuring the integrity and survival of the alliance and the social efficacy of 'modern Anglo-American law'. 'Inside' the alliance, therefore, 'legal aid' - and its 'institutional' apportionment of the functions of legal assistance to the courts and lawyers -

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1023 H J Morgenthau. *Politics Among Nations*, 4th ed, (1967) at 411.

provided the mechanism to renegotiate responsibility for 'performing' those functions, as new 'external' social pressures on the parties emerged. In this 'internal' mediative role, 'legal aid' also served as a forum to negotiate the ongoing terms and conditions of the 'delegation' of the administration of civil and criminal justice to the courts and the legal profession, and any changes to the role of lawyers in legal services delivery and in the market for lawyers' services.

Secondly, 'legal aid' also performed the function of 'external' legitimation. As we have described, one objective of the liberal legal centralist alliance was the social construction of 'law' and its continued efficacy as the hegemonic type of legitimate ordering in modern Anglo-American society. The social functions reposed in 'legal aid' made it an ideal candidate as a legitimating ideal, in circumstances when either the basis of the social construction of 'law', i.e., the 'corporate' or 'collective' interests of the parties to the alliance, or its regulatory hegemony were threatened. As Abel tells us, "social scientists frequently attribute the existence of institutions to the need for legitimation" when "they fail to fulfil their declared purposes".[1024] In the case of legal aid schemes, he convincingly demonstrates that the arguments adduced to verify legal aid as social legitimation ultimately rest "on the patronizing assumption that the poor are somehow fooled by legal aid."[1025] However, the 'external' legitimating function performed by 'legal aid' for the purposes of the alliance was not the legitimation of the legal system. In 'projecting' or 'promoting' its ideals into the society, governments and the legal profession were not primarily seeking to legitimate the "state", its "welfare apparatus", "the legal profession, social inequality [or] capitalism."[1026] Although, inevitably, to some extent this was a side-effect. They were instead deploying 'legal aid' as a political 'weapon' or 'tool' in defending, protecting or reinforcing the alliance against 'external' threats, namely changes in modern Anglo-American society - or 'within' its modern legal domain - which threatened or impinged upon the 'corporate' or 'collective' interests of the parties to the alliance, and its 'modern Anglo-American law'. Nor is it contended that this 'legitimation' was necessarily effective or convinced the populace of the virtues of the alliance or its 'law'. Nevertheless, 'external' legitimation was the other function of 'legal aid' within the liberal legal centralist alliance.

Conclusion

In reconsidering the theory of legal aid, this chapter has demonstrated an alternative explanation of the origins of modern legal aid. Its institutions in post-war society, like the other legal institutions of the modern state, originated in the establishment of the modern Western legal systems. These 'concrete' or machinery dimensions of modern legal aid 'evolved' in response to the demands made of the modern state in the 20th century to increase its participation in social governance, providing material forms of social justice and acknowledgment of the 'rights' of social citizenship. The

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1024 R L Abel, above n 2 at 601.

1025 Ibid at 604, 601-606.

1026 Ibid at 601.

legal development of the 'ideal' or normative dimensions of modern legal aid displayed a similar evolutionary pattern across the 20th century Western world. However, as we have demonstrated above, the different basis of the social construction of 'modern Western law' in the modern Civil Law and Common Law legal systems had implications for the character and social functions of 'legal aid'. In the former, the 'institution' of 'legal aid' developed, and was perceived with the Civil Law societies, as a social 'right' to expect affirmative state intervention to facilitate the resolution of citizens' legal problems. Whereas in the modern Common Law societies, 'legal aid' developed as the socio-legal 'institution' which charged governments and the legal profession with the responsibility for ensuring citizens' access to the courts for the purposes of defending or protecting their legal rights, and pursuing their expectations of 'modern Anglo-American law' and its 'legal system'.

In explaining the modern origins of legal aid, its bifidial identity and different character and functions in modern Western society we have only partially answered the question which defined the objectives of this chapter. The explanatory 'gap' in the Australian experience which limits our ability to explain the origins of the national scheme, and its significance in post-war society is yet to be fully remedied. We have, however, made considerable progress. The chapter has not only presented alternative explanations of the political dimensions of modern legal aid. Its redesigned analytical framework also provides us with an alternative model to investigate legal phenomena or developments in modern Western law and society. Thus, armed with both these new and - potentially - insightful explanatory 'tools' we are now in a position to commence the process of revisiting the origins and significance of the post-war experience of legal aid.

Chapter Seven
Revisiting the Experience·

> The argument we have just quoted from adds a further dimension to the discussion, namely by recognizing that any gesture towards helping the poor ends by helping law much more, by increasing its domination-legitimacy, though making it - law - 'accessible'. Any extension of the legal franchise, via the device of the duty solicitor or the law centre, ultimately strengthens the hand (and pocket) of lawyers".
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> Z Bankowski & G Mungham, *Images of Law*, (London, Routledge & Kegan Paul, 1976) at 77

Introduction

This chapter pursues the three objectives of Part II by revisiting the origins and significance of post-war legal aid in the light of the explanatory insights and 'tools' developed in Chapter Six. It begins by clarifying the meaning of the "post-war experience of legal aid" as a preliminary step in reconsidering its origins and significance. The opening contention of this chapter is that this "experience of legal aid" had dual aspects. On the one hand, it was constituted by the appearance of new legal aid schemes in a number of welfare capitalist countries. On the other hand, "the post-war experience" was an ideological phenomenon, which saw the 'legal aid' ideals of 'modern Anglo-American law' assume a new social prominence in the Western world.

From these premises, the chapter proceeds to revisit the post-war experience. Its investigation is organised around the two questions implicit in its dual character: one, what were the origins and significance of the post-war schemes; and, two, what were the origins and significance of the social prominence of Anglo-American 'legal aid' in the Western world? To facilitate the investigation, these questions are divided into two component parts. Thus, the chapter proceeds, first of all, to revisit the origins of the post-war schemes, together with the origins of the new prominence of Anglo-American 'legal aid', both in the Anglo-American welfare states and in other parts of post-war Western society. The chapter then investigates the significance of these two different parts of "the post-war experience of legal aid", once again in the case of the Anglo-American 'legal aid' ideals, both 'inside' and 'outside' the post-war Anglo-American world.

· An earlier version of this chapter was included in a draft paper "The Post-War Experience of Legal Aid Revisited" presented at the Biennial Meeting of the Working Group on Comparative Legal Professions. International Sociological Association Research Committee on the Sociology of Law, Onati, Spain, 13-15 July 1998.

The chapter concludes by considering the major implications of the analysis it contains, and what these implications mean for the objectives set at the beginning of Chapter Six.

The "Post-War Experience of Legal Aid"

The nature or character of "the post-war experience of legal aid" must be clarified before we can usefully address its origins and significance. Obviously, 'the post-war experience' was partly constituted by the series of national developments we identified in Chapter One. Beginning with Britain in 1949, and continuing in the 1950s, 1960s and 1970s with Australia, Canada, Denmark, Finland, France, Norway, Sweden, The Netherlands and the United States, a number of welfare capitalist societies reconstructed the administration of legal aid.[1027] In Australia, as we saw in Chapters Four and Five, 'the post-war experience' was constituted by 1976 national scheme, and by the changes in Federal policy and Commonwealth administration since 1973.[1028] The formative events in other countries have been described in the explanatory literature, especially in Abel's 1985 article and Zemans' edited collection.[1029]

However, the 'post-war experience' was not only another development in the machinery or 'concrete' dimensions of legal aid in the countries of the welfare capitalist world.[1030] It was also a social phenomenon of the Western world and of other countries within its politico-economic thrall. Scholars and lawyers who remain interested in the administration, politics or theory of popular access to 'law' in contemporary Western society look back to the 1960s and 1970s as an especially significant period.[1031] These decades - the highpoint in the 'post-war experience of legal aid' - were a time when in the United States and in many other societies in the Western world modern legal aid was perceived to be "guided by a [new] sense of mission of purpose".[1032]

We can illustrate the 'special' character of developments in legal aid in this period by again referring to the explanatory literature. Chapter Six showed that one of the functions of the literature was to define and constitute the 'post-war experience of legal aid' as a series of interconnected and unprecedented developments in its signifi-

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1027 Above at 1-2 & n 2.

1028 Above at pp 77-104.

1029 R L Abel, above n 2 at 540-550: F H Zemans, above n 2.

1030 It was not, for example, simply the 1970s versions of the developments in legal aid in Australia in the early part of the 20th century (above at pp 25-36), or in the immediate background to the national scheme in the 1950s and 1960s outlined in Chapter Five.

1031 For instance, the question of what has 'happened' to legal aid in the welfare states since the post-war experience is the theme of the edited collection by F Regan, A Paterson, T Goriely & D Fleming, above n 844, currently in press.

1032 G Singsen, "Can Equal Justice Be Pursued By Legal Services In The United States In The 1990's?" in Ministry of Justice, above n 818 at 47.

cance in modern Western society.[1033] In this respect, there was unanimity amongst all the contributors. In the case of both Abel and Cappelletti, the novelty and significance of the post-war developments in legal aid were an overt assumption, central to their investigations and hypotheses. In Cappelletti's case, their phenomenal dimensions underpin his metaphor of the post-war schemes signalling a "first wave" of fresh Western responses to the problem of social inequality in access to law.[1034] For other contributors, like Blankenburg, Cousins, Paterson and Nelken, Regan, and even Alcock, the special character of the 'post-war experience' was implicit, but equally significant in the attention they paid to the new developments in legal aid in the 1950s, 1960s and 1970s.[1035]

The significance of the literature in demonstrating the presence of a phenomenal dimension to the 'post-war experience' goes beyond its content. The very existence of an identifiable, discrete and voluminous literature of legal aid written in - or else referring to - the 1960s and 1970s shows that governments, administrators, legal scholars, lawyers and others perceived something new and different to be happening, or to have occurred. Thus, the literature both recorded, and was itself part of the 'post-war experience of legal aid'. Furthermore, its "extensive case studies of particular legal aid offices, histories and surveys of national legal aid programs, and comparative and theoretical reflections" were unprecedented.[1036] The literature could, moreover, "fill an entire library section" and was quite disproportionate in scale to the significance of the 'concrete' dimensions of post-war legal aid, namely the actual changes to it organisation, funding and administration in the participant Western countries.[1037] These changes were, in any event, relatively insignificant in the global context of post-war society.[1038] Nevertheless, legal aid achieved a new and unprecedented prominence throughout the Western world, even though the "actual events" which constitute our standard conception of its 'post-war experience' were "limited to a few countries in northern Europe, North America and the Commonwealth countries."[1039]

The phenomenon of the 'post-war experience' also displayed a particular ideological character. The fact that the post-war developments in legal aid in the participant

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1033 Above at pp 146-147.

1034 M Cappelletti and B Garth, above n 2 at 21.

1035 Eg, for Erhard Blankenburg the post-war developments were one of the "two movements for legal aid which we experienced this century [which] swept over times of relative economic and social growth and ... took place in countries which could afford them (rather than those which would have needed them most)" (above n 852 at 2).

1036 R L Abel, above n 2 at 475.

1037 E Blankenburg & J Cooper, above n 2 at 263. According to Abel, the post-war schemes "nowhere represents more than a tenth of the total national expenditure on legal services and rarely more than one percent" (above n 2 at 475). The Australian experience bears this out: the NLAAC report (National Legal Aid Advisory Committee, above n 7 at 78) found that in 1986/87 national spending on legal aid amounted to 3% of expenditure on public order and safety, and 0.2% of Commonwealth outlays on social programs.

1038 E Blankenburg & J Cooper, above n 2 at 263.

1039 Ibid.

Western countries possessed ideological dimensions comes as no surprise. The 'ideal' or normative dimensions of modern legal aid continued to form part of post-war Western society. Thus, we could anticipate that the changes to its machinery or 'concrete' dimensions would be reflected in the ideological realm. Moreover, governments in the participant countries continued to operate through their modern Western legal systems in the increasingly congruent social climate of the post-war welfare capitalist world. Therefore, we might expect the presence of these comparable features to be mirrored in the ideological dimensions of post-war developments. And this is, indeed, what Denti found in 1979 in his overview of international developments in legal aid:

> The picture emerging from a study of the evolution of legal assistance in the contemporary world is highly differentiated and reflects the political positions of diverse societies. The reforms carried out in capitalist societies show basically homogeneous trends, since they all move from the assumption, derived from liberal ideology, that *de facto* inequality of access to justice is principally due to the lack of adequate legal assistance. Reforms thus aimed at improving the existence assistance systems and extending their benefits not only to the poor, but to the lower middle class, for whom the cost of legal assistance remains too high.[1040]

Furthermore, we would expect to find a similar comparability in the origins of the post-war changes in 'legal aid' in the participant countries, after taking into account its different character and social functions in the Civil Law and Common Law societies.[1041] If this were our concern, we could explain these changes by reference to similar modern explanatory matrices as evident in the transition of the poor persons institutions above, and the origins of the post-war legal aid schemes below, i.e., social transformation, developments in social citizenship, the significance of 'modern law' and public policy in the welfare state.[1042] However, the national developments in post-war legal aid were not synonymous with 'the post-war experience', as we have indicated above in referring to the literature of the 1960s and 1970s and its content.

As a social phenomenon, "the post-war experience of legal aid" was a cross-national experience of post-war Western society. Or, more precisely, it was an experience of the social fields of the Western world 'inhabited' or 'defined' by legal scholars, liberal social reformers and the legal profession and its lawyers, especially in the Anglo-American countries.[1043] Within those social fields, the post-war national developments were interpreted from the vantage point of 'legal aid', in its different forms in the 'modern Western law' of the Civil Law and Common Law societies. However, one interpretive perspective was at the forefront amongst the parties

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1040 V Denti, "An International Overview on Legal Aid" in F H Zemans (ed), above n 2 at 357.

1041 Above at pp 190-193.

1042 Above at p 169-190; below at pp 202-205.

1043 "Social fields" is used in a sense akin to Arthurs (above n 882 at 177-178), referring to Weber (M Rheinstein (ed), above n 65) Galanter (above n 879), Lon C Fuller, "Human Interaction and Law" (1969) 14 *American Journal of Jurisprudence* 1 & S F Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study" (1973) 7 *Law and Society Review* 719.

actively involved in this new experience of the Western central legal domain. It referred to the social paradigms which constituted 'legal aid' in the modern Common Law world, and particularly in the Anglo-American welfare states. These - the ideals of 'legal aid' as an 'institution' of the 'courts', administered by the judges and lawyers, for the 'purpose' of providing lawyer representation in the courts - became pre-eminent as the social fields of the Western central legal domain worked to 'constellate' the national developments in legal aid within post-war Western society.

Those ideals permeated the social fields of Western centralist law and its actors which attributed significance to the national developments in legal aid in the social climate of the post-war Western world. As Abel surmised in his review of the cross-national literature, "[the] image of legal aid as equal access to law (embodied in the courts) probably is the dominant conception today".[1044] The contention that the ideological character of "the post-war experience" was fixed by the 'legal aid' ideals of the common law societies is defensible on several fronts. In the first place, it was Anglo-American lawyers and English-speakers who were most active in 'defining' the interpretive paradigms of the post-war developments. This is not to claim that there was no significant literature in languages other than English, for this was clearly not the case. However, English was the 'defining' discourse of "the post-war experience". In part, this was a result of deliberate 'projects' by scholars. Zemans' collection of national reports of lawyers and scholars from Austria, France, Germany, Italy, Japan, Korea, Mexico, the socialist countries of Eastern Europe, and Spain who attended the first International Conference on the Law of Civil Procedure in 1977 is one instance.[1045] *International Perspectives on Legal Aid* compiled and structured these experiences around the domain assumptions of law in the Anglo-American societies. As Zemans and Weiss reveal in their introduction:

> True access to justice is achieved only when no person is deterred by financial, psychological, or physical barriers from seeking a legal solution for the assertion of a right, for making a claim, or for defending a civil claim or a criminal charge. While the ultimate realization of this goal may indeed be Utopian, it can be partially achieved by making the path to the court, the normal dispenser of justice, easier for the underprivileged, by ensuring equality before that court, or by creating new methods of dispute resolution that do not embody the inequalities inherent in the adversarial court structure.[1046]

In any event, the very use of English as the conduit for constructing a "post-war experience of legal aid" transmitted the linguistic structures and social associations of 'modern Anglo-American law'. The transmissions of these images of law and society were exacerbated by the spread of Anglo-American cultural ideals in the 1950s and 1960s discussed later in the chapter.[1047] Moreover, the idea that legal aid

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1044 R L Abel, above n 2 at 487.

1045 F H Zemans (ed), above n 2 at 2-3. This was not the first international forum to consider modern legal aid in its post-war context in the national Western legal systems: above n 821.

1046 Ibid at 10.

1047 Below at pp 201-214.

was about lawyers and courts as vehicles for social and political reform permeated the literature of "the post-war experience", as Abel describes:

> In summary, legal aid is a social reform that begins with the solution - lawyers - and then looks for problems that it might solve rather than beginning with the problem - poverty, oppression, discrimination, or alienation - and exploring solutions ... the demand is always for more of the same: more laws, more lawyers, more courts, and now more alternatives to courts.[1048]

Revisiting the Origins of the Post-War Experience

Recognising the nature or character of the post-war experience has implications for the organisation of this chapter. Its dual aspects mean that we must address two different questions, if we are to revisit its origins and significance in post-war society. The first question is: "What were the origins and significance of the new legal aid schemes in the countries which reconstructed or reorganised legal aid in the 30 or 35 years following the end of World War II? " The second question is: "What were the origins and significance of the social prominence of the Anglo-American 'institution' of 'legal aid' in the post-war Western world?"

For the purposes of the chapter, we will divide these questions into their two component parts, i.e., one, the origins of the post-war legal aid schemes and the social prominence of Anglo-American 'legal aid'; and, two, the respective significance of these developments in the post-war Western world. The next section of the chapter begins these investigations by asking, first of all, what the origins of the post-war schemes were, and, secondly, what the origin of the social prominence of Anglo-American 'legal aid' in the post-war Western world was.

The Origins of the Post-War Legal Aid Schemes

The answer to the former question regarding the origins of the post-war legal aid schemes is simple and straightforward. The new schemes were a product of changes in public policy in the welfare state, like other post-war developments in legislation, administration and social policy in the participant countries. By comparison with the liberal legalist accounts, this is an unspectacular conclusion, having nothing of the glamour a 'movement towards equal access to justice'. It is, moreover, far less dramatic than explanations which - like the Australian orthodoxy - locate the origins of the post-war schemes within particular national matrices of the state, the legal profession, lawyers and social reformers.[1049] The national politics of legal aid, the legal profession and 'law' all played their part, but in the context of the politics of legal regulation in the post-war welfare state.

Locating the origins of the post-war legal aid schemes within public policy has several important implications. In the first place, it restricts our capacity to generalise the origins of the 'machinery' aspects of the post-war experience. The

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1048 R L Abel, above n 2 at 598-599.

1049 Above at pp 110-111.

formative influences on the decision-making processes of the welfare state from which public policy emerges are national or local politics. Thus, participant countries - like Australia, Britain, Canada, Denmark, Finland, France, The Netherlands, Norway, Sweden and the United States - each have their own and unique explanatory cocktail of the politics of post-war national developments in legal aid. There are, therefore, ultimately no single, universal explanations which provide answers to 'why' governments in particular welfare states acted, or when they did.

This does not mean, however, that the post-war experience did not witness comparable factors at work in the shaping of the public policy of legal aid. In the post-war period, the participant countries retained the same systems of government and legal regulation they had in the 1940s. Consequently, the same collage of social factors which saw the transition of the poor persons institutions continued to influence developments in modern legal aid in the Civil Law and Common Law world. Moreover, the social significance of those transformative forces, the expectations of modern social citizenship, the penetration of 'law' and state legal regulation grew in the post-war years. The size of the welfare state increased, its regulatory and social welfare functions increased dramatically, the system of legal regulation increased correspondingly and new levels of economic prosperity spread throughout many parts of society, creating new and heightened expectations of material government intervention in popular well-being and social justice. Across the Western world, this were clearly all factors influencing state decision-making towards legal aid.

Moreover, the politics of social reciprocity in legal regulation were not the only comparable, cross-national factors. In different ways, Abel, Alcock, Bankowski and Mungam, Blankenburg, Cousins and Paterson and Nelken alerted us to the impact of other comparable factors influencing the development of the post-war legal aid schemes.[1050] One set of comparable factors was the influence of lawyers and the political economy of the legal profession. Within the participant countries, the national culture and social attitudes of the legal professions and the availability and content of legal education were significant. As were factors like the demand for lawyers' services and the success of lawyers in defending their professional privileges. Other relevant comparable factors were national variations in overall social welfare expenditure and the relative level of economic prosperity. Another set of comparable factors were the particular national social dimensions identified by Cousins. These included the historical and cultural environment; industrialisation, modernisation and development; marital breakdown and divorce; religion; political conflict and political violence; developments in national legal systems; the influence of the 'access to justice' interest groups and public administration. In developing this taxonomy, Cousins was clearly inspired by Abel, whose classification of the transformative and contextual dimensions of the origins of the post-war schemes is summarised in Table 2.

1050 Above at pp 142-146.

However, the public policy 'solution' does imply that before we can usefully explain the origins of the post-war schemes we must first investigate their decisional history in each participant country. As we have seen in various contexts, the post-war Western experience of the welfare state, legal regulation, legal services and legal aid was in many respects highly comparable, notwithstanding inherent and significant national differences. Thus, we can still safely and reliably have resort to the 'data base' function of the cross-national explanatory literature to provide a general, international 'story' of the origins of the post-war schemes. In this respect, Abel's classification of the political dimensions of the 'machinery' developments in post-war legal aid remains the single most valuable explanation. The transformative and contextual dimensions portrayed in Table 2 draw together many of the background and immediate cross-national comparable factors. Together, they provide us with a useful and informative explanation of the origins of the post-war schemes, subject to the qualifications mentioned below.

Table 2: Abel and the political dimensions of the post-war schemes

Transformative dimensions			**Contextual dimensions**
Social transformations	Post WW II welfare capitalist state	Legal profession and legal system	Concrete historical circumstances
Industrialization and urbanization Economic migration The role of capital Social movements	Changes to family structure Reproduction of labour Expansion of state legal and administrative machinery	Legitimation of criminal justice system Legal profession	World War II Contemporary social movements The election of social democratic governments

Source: R L Abel "Law Without Politics: Legal Aid Under Advanced Capitalism", (1985) 32 *UCLA Law Review* 474 at 586-592

The qualifications to Abel's classificatory model as the basis for explaining the origins of the post-war schemes are threefold. The first is more by way of a quibble than a qualification and relates to his interpretation of the role of changes to family structure and reproduction of labour in the post-war welfare state. This qualification is pursued below, in considering the social significance of the post-war schemes.[1051] The second qualification is substantial, and proceeds from a general criticism of Abel's explanation first presented in Chapter Six. The criticism is that his international 'overview' seriously downplays the role of developments in social welfare policy and programs in the post-war welfare states. To sustain the credibility of Abel's classificatory model, we need to inject the explanatory focus of

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[1051] Below at pp 222-223.

Blankenburg, Cousins and Regan, and significantly increase the weighting given to this key comparable, cross-national originating background factor in the origins of the post-war schemes. As Regan explained in his 1993 paper:

> ... the historical data suggests ... that the periods of expansion of legal aid coincided closely with expansion of the welfare state. This occurred in many societies in the immediate post-war period ... For example, the USA legal aid scheme emerged in the early 1960s during a period of massive expansion of welfare programs directed at the poor, under the OEO's War on Poverty. In the UK the legal aid scheme was established in 1949 in a period of major expansion of welfare programs in the immediate post-war period ... The Swedish legal aid reforms of the early 1970s were undertaken in a period of major expansion of the welfare services in that country that both extended the range of services and the proportion of the society covered by them. In Australia the national publicly funded scheme emerged during a period of expansion of welfare state programs in the period 1972-75, under a newly elected social democratic government. During this period major reforms included the following: a universal 'free' health system in 1975; free university education was introduced in 1973; etc. [1052]

The third qualification to the credibility of Abel's model takes us back to the public policy 'solution'. As useful and informative as it may be, in the end the reasons why the participant countries expanded legal aid in the post-war welfare state are national and local. In a real sense, therefore, neither Abel nor any other contributor to the explanatory literature actually offers us an adequate comprehensive explanation of the post-war schemes. For none deliberately engage with the analytical techniques of Public Policy, taking state decision-making as their investigatory focus. Thus, in an ideal world - untroubled by time, teaching or research funding - we could visit the origins of the post-war schemes totally afresh. However, as this is unlikely to eventuate, the practicable solution is more detailed national studies, like Alcock's case-study of the English interwar experience and Mumford's study of South Australia in the 1920s.[1053] These types of investigations should be blended with welfare state and social policy perspectives of the kind offered by Blankenburg, Cousins and Regan. This will enable us to develop better and increasingly realistic and useful explanations. Like the Australian case study in Part I above, these blended approaches are likely to confirm the origins of the post-war schemes in the formative influences of the political matrix of poverty, 'law', social welfare, economic policy, the legal profession and lawyers in the legal systems of welfare capitalist society.

The Origins of the Prominence of Anglo-American 'Legal Aid'

The second subsidiary question above asked what the origins of the social prominence of Anglo-American 'legal aid' in the post-war Western world were. In turn, this question resolves into two further sub-sets. The first sub-set is the experience of the Anglo-American welfare states, including Australia, Britain, Canada, the United States and, to a lesser extent, other parts of the Common Law

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1052 F Regan, above n 831 at 15.

1053 P C Alcock, above n 245; L Mumford above n 169.

world. The second sub-set is the experience 'outside' the Anglo-American world, in the non-English speaking European welfare states like Denmark, Finland, France, The Netherlands, Norway and Sweden, and in the developing countries in the global domain of the post-war West.

The Origins 'Within' the Anglo-American Welfare States

Generally, scholars and other commentators have tended to assume a high degree of comparability - if not similarity - in the post-war experience amongst the Anglo-American welfare states. To a considerable extent this was inevitable, given the common origins of their 'modern law', comparable systems of government and welfare states, and common social and political traditions. It was a tendency, moreover, which was fostered - as elsewhere in the post-war Western world - by the sheer size, scale and vigour of the American legal academy shaped by the intellectual paradigms of the 'problems' of access to law in the 1960s and 1970s.[1054] Thus, scholars and commentators in Australia, Britain and Canada were encouraged to 'measure' national developments in post-war legal aid by reference to the mid-1960s United States experience. This approach to the assessment of social developments in the post-war Anglo-American world formed part of a growing pattern fixed by the global explosion of 'American' culture in the 1950s and 1960s discussed below. In Australia, for instance, the 'presence' of the 'American' experience of post-war 'legal aid' has sometimes been quite marked, especially in the community legal centre 'movement'. At least to an observer, it appears that a similar situation obtained in the community legal services 'movement' in Canada.

It is indisputable, moreover, that the social prominence of the ideals of 'legal aid' did increase <u>across</u> the Anglo-American world during the post-war experience. However, we have been mistaken in too readily assuming that its new social prominence had similar - or even highly comparable - causes. There was a significant difference in its origins amongst the Anglo-American welfare states. Specifically, as between the post-war prominence of 'legal aid' in the United States and its origins in countries like Australia, Britain and Canada.

The key to explaining why this is so lies in the dual functions of 'legal aid' within the post-war national versions of the grand alliance of 'modern Anglo-American law'. 'Inside' the liberal legal centralist alliance, as we explained in Chapter Six, 'legal aid' served as a mediative ideal or norm. It provided a mechanism for renegotiation between governments and the organised legal profession and lawyers of responsibility for the provision of legal assistance.[1055] The other function performed by 'legal aid' was 'external' legitimation of the 'corporate' or 'collective' interests of the alliance, which was also explained in Chapter Six. In this role, 'legal aid' acted as a political 'weapon' or 'tool', defending, protecting or reinforcing the alliance against 'external' changes, threatening either the integrity of the alliance, or impinging upon the hegemony of its 'modern Anglo-American law'.

1054 M Cappelletti & B Garth, "Access to Justice and the Welfare State: An Introduction" in M Cappelletti (ed), *Access to Justice and the Welfare State*, (1981) at 4.

1055 Above at pp 194-195.

In the United States, the ideals of 'legal aid' first achieved their post-war prominence in the 1960s, when the country was sharply reminded "that there are underclasses in America".[1056] The social prominence of 'legal aid' was clearly inextricably associated with the creation of the Legal Services Corporation in 1965, which reflected new social policies adopted by the Federal government in its 'War on Poverty'.[1057] However, the establishment of the American post-war scheme was itself a symptom of a wider cause. The real significance of the prominence of 'legal aid' was that it reflected a crisis in the role and functions of the national legal system in post-war society in the United States.

In modern America, as Hurst explains, "[t]he central job of law" had been "to bring power into balance sufficiently so that particular blocs could not ride roughshod over other interests in society".[1058] In the 20th century, however, the ability of the modern legal system and 'law' to perform this function had progressively been diminished. Its progressive disfunctionality had many causes, but "no factors bore so powerfully upon the legal order, or so much shaped its problems, as the main currents in the growth of the economy".[1059] Foremost amongst these economic factors was the impact of the decisive "change from a subsistence to a market economy" in the 1870s.[1060] Thereafter, production - and "the getting of income and the power that symbolized" - became the dominant imperative in American society, and it was, according to Hurst:[1061]

> ... an emphasis which divided men; the aim was to win as big a share of the consumer's dollar as one could, as against not only other sellers in the same industry, but also as against other industries, and also to do whatever was necessary to protect and strengthen the particular bastion from which one sallied forth into the market.[1062]

In this respect, the United States were not unlike other modern capitalist societies. However, Hurst contends in the American context the 'newness', "richness and rawness" of its society, and the huge scale of national building which it faced. The market economy meant that "men" became preoccupied "with the economy above all other aspects of the society they were forming":[1063]

> When one added to this the unexampled riches, not only natural resources but also potential markets, it was perhaps inevitable that men's plans and their values, their

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1056 L M Friedman, above n 1005 at 575-576.

1057 C Menkel-Meadow, "Legal Aid in the United States: The Professionalization and Politicization of Legal Services in the 1980's", (1984) 22 *Osgoode Hall Law Journal* 29 at 37-42.

1058 J W Hurst, *The Growth of American Law: the Law Makers*, (1950) at 440.

1059 Ibid at 441.

1060 Ibid.

1061 Ibid.

1062 Ibid.

1063 Ibid.

> conscious purposes and their deep-felt emotions should center on economic affairs. "Getting ahead" meant just one thing in this society.[1064]

The effect was to distract people from social responsibility for government - to "drain off the best part of our talent" - and thereby further weaken the administrative effectiveness of the legal system.[1065] Furthermore, progressively urbanisation and the development of mass transport, mass production and cheap mass communication combined to create a sense of popular disconnection with the 'community', and local and regionally based state legal regulation.[1066] By 1950, according to Hurst:

> ... it was apparent that these currents had moved far enough to call into question the capacity of our main legal institutions to mediate ... The rise of great organised pressure groups, given thrust and continuity by their own bureaucracies, created something like a concurrent majority ... Organized spokesmen for industry, commerce, labor, and agriculture wielded a practical veto on measures adverse to their separate concerns, or at least had enough force to modify pending public measures to their own liking. They used their veto frankly and bluntly in their own interests, and not as trustees for a broader public ... The forces in the society which drove in directions away from the central core of common concerns seemed steadily to gain strength relative to the forces that drove towards the center. As blocs pushed their particular programs in legislative chambers, they made a picture of a society which seemed less like a structure of interlocking, mutually supporting parts, than like billiard balls on a table, knocking against each other and rolling from the impact, to hit and rebound from others.[1067]

In the 1950s and 1960s, therefore, the modern legal system in the United States confronted a crisis in its social functions. Alternatively, we could describe its plight as evidencing a significant shift in the politics of the modern American legal domain. In either event, the outcome was the same. The modern hegemony of the American version of the liberal legal centralist alliance was threatened, and its 'corporate' or 'collective' interests in need of defence. Thus, the new social prominence of 'legal aid' in American society was an expression of its 'external' legitimation function. The role of 'modern American law' was being seriously challenged, if not worse, its mediative role in social governance was in decline and modern legal centralist-types of legal ordering under challenge. One response of American governments, judges, the organised legal profession and lawyers was to deploy 'legal aid' in an attempt to reinforce the social legitimacy of the legal system, its 'modern law' and the 'corporate' or 'collective' interests of their modern alliance.

In contrast, the post-war prominence of the ideals of 'legal aid' in the other Anglo-American welfare states had a different explanation. There, its ideals were not as socially prominent as in the United States. In Australia, Britain and Canada, neither 'modern Anglo-American law' nor its 'institutions' had been required to perform the core mediative role demanded of their counterparts in modern America. These

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1064 Ibid.

1065 Ibid at 442.

1066 Ibid.

1067 Ibid at 443.

societies had developed 'socially protective' types of welfare state, with effective and extensive systems of state administration managed through modern paradigms of 'public service'.[1068] In combination, these and related factors gave their governments a higher social profile in legally regulating improvements to the material well-being of their citizens. Whilst this profile did not disqualify 'law' from its mediative role, it significantly diminished it, by comparison with the United States. Thus, in the other Anglo-American welfare states the post-war experience of 'legal aid' and its court-centred, lawyer-focused ideals were inherently less socially prominent.

Secondly, in these welfare states 'legal aid' was not called in aid of the 'corporate' or 'collective' interests of national versions of the liberal legal centralist alliance. In Australia, Britain and Canada, the originating relationships created by the alliance between governments, the courts, judges, the organised legal profession and lawyers remained substantially intact in the 1950s, 1960s and 1970s. In these societies, the 20th century had been a far less tumultuous period for the alliance, the legal system and 'law' than in the United States, which had seen the consistent and constant reinvention of the social basis of its 'law' and systems of central legal regulation.[1069] Moreover, neither these comparable legal systems, their 'law' nor the social hegemony of the liberal legal centralist alliance appeared to be under threat during the post-war period in the other Anglo-American welfare states. The ideals of 'legal system' in 'modern Anglo-American law', liberal legalism and its detached positivist conceptions retained their stranglehold over the social fields of law. This was the case not only amongst the parties to the alliance, but throughout the legal domain where those legal ideals and associated configurations of government remained socially omnipresent and efficacious.

In these contexts, 'legal aid' had little need to perform its 'external' legitimating role. Instead, the post-war social prominence of 'legal aid' in the other Anglo-American welfare states was an expression of its 'internal', mediative functions within the liberal legal centralist alliance. In these societies, the public policy pressures which prompted state action to establish the post-war schemes - and the schemes themselves - had the potential to change the horizon of the relationship between governments and the legal profession and its lawyers. State action - and uncertainty about what form that action would take - 'shook' the 'bargain' between the parties to the alliance. The new interest of the post-war welfare state in Australia, Britain and Canada in legal services raised the spectre - whether well-founded or not - of renegotiation or significant readjustment of the terms and conditions of the alliance. In particular, its 'delegation' of the administration of civil and criminal justice to the

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1068 Cf the United States, which, as Hurst describes it, were "[p]reoccupied with the economy as a field for private adventure ... [and] uninterested in the creation of efficient public institutions" (above n 1058 at 444). However, this was not invariably the case. The New Deal of the early 1930s and World War II had seen developments in the administrative apparatus of the welfare state as a result of the great expansion of Federal government budgets and its expanded national economic role: L M Friedman, above n 999 at 569.

1069 A Hunt, above n 1022 at 38-44: M J Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy*, (1992): G Edward White, *Patterns of American Legal Thought*, (1978) at 99-163.

courts and the legal profession, the role it assigned to lawyers in the legal services delivery and the organisation of the market for lawyers' services. Thus, the social prominence of 'legal aid' in the other Anglo-American welfare states reflected these 'internal' political shifts, possible changing expectations and uncertainties. It was not the legal system or its 'modern law' which was threatened, but the modern distribution of power and functions between the state and the legal profession within the alliance.

The Origins 'Outside' the Anglo-American World

The other sub-set of the social prominence of 'legal aid' was the experience 'outside' the Anglo-American world, in the European Civil Law societies and in the developing countries in the post-war Western oriented world. In these countries, as we argued above, governments scholars and commentators displayed a willingness to express and define post-war developments in legal assistance and legal aid in terms of the paradigm of Anglo-American law. The ideals of Anglo-American law spread in the post-war period and people were increasingly willing to describe national developments in legal assistance in terms of the Anglo-American ideals of legal aid. Why did this occur? What were the reasons for the new prominence of the Anglo-American ideals of legal aid? Why were there five key post-war legal developments which together account for the new prominence of the 'legal aid' outside the Anglo-American world?

The first relevant post-war development was the expanded global significance of modern centralist-types of Western law. In the welfare capitalist countries, the new significance of centralist law was a product of the expansion of the role and functions of the state. The 1950s, 1960s and 1970s saw their modern legal systems develop into truly "giant machine[s] for making and applying law ... a giant machine of social control ... exercised through law".[1070] Across Western society, therefore, the state legal system and its law became more socially significant than ever before.

The new significance of modern Western centralist law was not restricted to the advanced capitalist and developed countries. The 1950s, 1960s and 1970s were also decades of decolonisation, when subject non-Western societies were released from European political rule. One consequence was a devolution of legal and governmental power, which frequently saw modern democratic forms of constitutional law and administration established in new nation states on the Indian sub-continent, and in Africa and South Asia.[1071] Many of these new states were former British colonies, and adopted modern Anglo-American configurations of legal system and 'law'. Those states which had other colonial overlords were nevertheless incorporated into the fabric of modern Western central law, through new, Civil Law type systems.

The second key post-war legal development was the global projection of 'modern Anglo-American law', its 'institutions' and ideals. Generally, for understandable

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1070 L M Friedman, above n 999 at 2.

1071 F Reyntjens, "Africa-South of the Sahara" in F Zemans (ed), above n 2 at 15-16.

reasons, the legal aid literature takes the decades of the 1960s and 1970s as its explanatory focus. However, the growth in the global hegemony of 'modern Anglo-American law' began in the immediate post-war period of the late 1940s and the 1950s. Indeed, one could reasonably claim that the conduct of the war crimes trials in 1945 and 1946 against Nazi defendants and against Japanese defendants in 1945 stamped the post-war world with modern Anglo-American legal ideals. The reasons, however, for their new, post-war prominence outside the Common Law world are more complex, and the process was far more prolonged than these particular events.

The growing hegemony of 'modern Anglo-American law' was also a product of post-war global politics. At the end of World War II, the military and political alliance between Britain and the United States dominated the Western world. This military and political hegemony certainly promoted the global influence of British and American culture and social ideals, including its 'modern law'. This was, however, not the only factor contributing to the global projection of 'modern Anglo-American law'. The rest of the story is complicated - a variety of influences were at work.

Victory in World War II had left Britain in economic servitude to the United States, and facing the prospect of the destruction of its colonial empire as well as changed relationships with its dominions in Australia, Canada, New Zealand and South Africa. Nevertheless, in the late 1940s and in the 1950s and 1960s, Britain remained a major political and cultural force throughout the world. It continued to project its version of 'modern law' into the newly liberated societies of its former non-Western colonies through education of governing elites, and through its role in the British Commonwealth and later the Commonwealth of Nations. Moreover, even in Australia, Canada and New Zealand, significant remnants of the imperial legal dominion existed until at least the mid-1980s.[1072]

In 1945, Britain had been replaced as the Western imperial power. The United States had emerged from World War II as the source of its principal military power, and it assumed primary responsibility for the husbandry of Western interests in the global politics of the Cold War. In discharging these new responsibilities in the 1950s and 1960s, the United States played a major role in projecting its modern legal ideals throughout the world, including the English-speaking Western countries. Sometimes, this was a deliberate and conscious process.[1073] More often, it was

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1072 Eg, in Australia, rights of appeal to the Privy Council still existed until the mid-1970s, and the ultimate legal powers of the United Kingdom were not finally removed until 1986.

1073 The Central Intelligence Agency covertly funded a number of cultural organisations throughout the world in the 1960s. These included partial funding of the Asia Foundation, which supported Lawasia, a "non-communist group" of Asian -Pacific lawyers, including a number of prominent conservative Australians, formed in the mid-1960s to promote the Anglo-American ideals of the 'rule of law': J Kerr, *Matters for Judgment*, (1978) at 182 & 176-189. There was also the participation of some lawyers in the American legal academy in the government sponsored "'development decade'" of the 1960s to "'modernize' Third World nations": D M Trubek & M Galanter, "Scholars In Self-Estrangement: Some Reflections On The Crisis In Law And Development Studies In The United States" (1974) 4 *Wisconsin Law Review* 1062 at 1065.

subtle, indirect, disorganised and consequential, with the projection of modern American 'law' and its ideals following as an incident of cultural expansion.

A major instance was the pursuit of foreign policy. In the late 1940s, 1950s and 1960s the global projection of military power was the primary instrument of United States foreign policy. This necessitated the stationing and movement of hundreds of thousands of its armed services personnel around the world. These personnel, and their families, carried their culture with them. The expansion of global American cultural influence also had its roots in post-war economic developments. The United States, from the time of the Breton Woods agreement in 1944 and its massive financial commitment to the economic reconstruction of Western Europe through the Marshall Plan in the late 1940s, dominated the global capitalist economy. This continued into the 1950s with the emergence of American-owned multinational businesses, and further with the establishment of GATT in the 1960s.[1074] In the post-war period, therefore, these various forms of social projection saw an unprecedented expansion of American ideals of 'modern law' and modern civil society, with its attendant liberal centralist assumptions about the social significance of human rights, civil liberties, due process and the role of lawyers throughout the Western world.[1075] Moreover, the powerful proselytising aspects of modern American society and its culture meant that the post-war projection of its version of 'modern Anglo-American law' was remarkably effective and penetrating.[1076]

Thirdly, the post-war period saw the increasing use of English as the *lingua franca* of Western society in cross-national governmental and commercial transactions, and as a second language of the elites in non-English speaking Western countries. In the developing world, the latter was closely associated with Westernisation of law and government through decolonisation. Generally, however, throughout the 1950s, 1960s and 1970s the increasing use of English as the global common language facilitated and encouraged access to the ideas of the domain of its native speakers, namely modern Anglo-American society and its ideals and culture, including its 'modern law'.

Fourthly, the post-war period saw a transformation of Western human rights ideals into a new regime of public international law. In 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights, which provided the foundation for recognition of a core of existing individual political rights,

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1074 In Australia, in 1964 the Chicago-based transnational law firm Baker & McKenzie opened an office in Sydney to service the legal needs of multinational corporations: *Business Review Weekly*, 20 February 1987 at 65. The 1960s also saw the enactment of the first Australian trade practices legislation which, like the Freedom of Information Act 1982 (Cth), was influenced by the United States experience. In Australia, the 1960s were also a new and significant period of cultural colonisation, fostered by shared experiences in World War II, post-war military alliances, film and television and the community of international opposition to United States and Australian involvement in the war in Vietnam.

1075 T B Strong, "Taking the Rank With What is Ours: American Political Thought, Foreign Policy, and Questions of Rights" in P R Newberg (ed), *The Politics of Human Rights*, (1980) at 50-51.

1076 Ibid.

together with new types of social and economic human rights.[1077] This marked the beginning of "labors extending over a period of 30 years" towards a global system of international protection of human rights, culminating in 1976 when 46 countries ratified the Covenants on Economic, Social and Cultural Rights and Civil and Political Rights.[1078] The development of this new international legal regime not only paralleled the formative years of the origins of the ideological dimensions of post-war legal aid. Its law also relied heavily upon modern American legal ideals "based on the first ten amendments of the U.S. Constitution and the voluminous body of legislation and jurisprudence derived from them".[1079]

Comparable new developments in the legal regulation of human rights also occurred in Western Europe in 1950, and in the Americas in the 1950s and 1960s. In the former case, the procedures, ideas and enforcement mechanisms of human rights law promoted Anglo-American conceptions of fair process and of the independent role and functions of courts and lawyers in conflicts with the state. Complainants and parties invoking the jurisdiction of the European Commission on Human Rights, for instance, were granted standing as individuals.[1080] Western international NGOs - like Amnesty International, the International Commission of Jurists and the International League for Human Rights - also promoted modern Anglo-American legal ideals in the 1950s and 1960s in fostering the protection and promotion of human rights.[1081]

Finally, all these developments occurred in a highly favourable social context. The 1950s and 1960s saw the beginnings of globalisation. They were the decades in which "the revolution of modernization entered its most intense worldwide phase".[1082] Throughout the Western world and its economic realm:

> ... [an] unprecedented lowering of tariff barriers ... made possible a far more intensive worldwide division of labour. Multinational corporations, escaping heavy taxes and high labor costs in the older industrial countries, spread their manufacturing to new locations such as Brazil, Hong Kong, South Korea, and Taiwan ... [Cheap] and rapid air travel brought the upper classes of all countries into closer contact than ever ... [Cinema] and television made audiences around the world vividly aware of each other's consumption habits.[1083]

The social impact of these economic transformations was of a scale comparable to the first phase of Western modernisation discussed in Chapter Six.[1084] Above all else,

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1077 A H Robertson, "Human Rights: A Global Assessment" in D P Kommers & G D Loescher (eds), *Human Rights and American Foreign Policy*, (1979) at 2.

1078 Ibid at 8.

1079 D A Rustow, "Man or Citizen? Global Modernization and Human Rights" in P R Newberg (ed), above n 1075 at 19.

1080 J T Wright, "Human Rights in the West: Political Liberties and the Rule of Law" in A Pollis & P Schwab (eds), *Human Rights: Cultural and Ideological Perspectives*, (1980) at 24.

1081 P R Newberg (ed), above n 1075 at 3.

1082 D A Rustow, above n 1079 at 30.

1083 Ibid.

1084 Ibid: above at pp 163-164.

the outcome was "more mutual contact, interdependence, uniformity ... a spreading awareness, however hesitant and painful, of the commonness of human problems."[1085] This increasingly internationalised environment provided a fertile context for a powerful, coherent body of social ideology like 'modern Anglo-American law' to prosper, as it demonstrably did.

It was these and similar kinds of developments which provided a favourable climate for the growth of the already coherent and powerful ideals of Anglo-American law, By the 1960s and 1970s, the outcome of these and related developments was that the ideals of modern Anglo-American law had colonised significant parts of the modern legal domain in the non-English-speaking world. It was this colonisation and the spread of the paradigms of legal centralism throughout Western society which was the cause of the new prominence of 'legal aid' outside the Anglo-American world.

Revisiting the Significance of the Post-War Experience

The other sub-component of the two questions posed above queried the significance of the post-war schemes and of the new social prominence of Anglo-American 'legal aid' ideal in the Western world. What, in other words, was the real importance or noteworthiness of the post-war experience of legal aid in the Western world? Thus, this second part of our investigation asks, first of all, what the significance of the post-war schemes in the participant welfare states was. What did the legal aid schemes achieve, and 'who' did they assist? Secondly, this section of the chapter investigates the importance of the social prominence of the legal aid ideals of 'modern Anglo-American law'. What did this signify, both 'within' the Anglo-American welfare states and 'outside' in other parts of the post-war Western world and its legal domain?

The Significance of the Post-War Legal Aid Schemes

For liberal legalism and its adherents, the significance of the post-war schemes is unproblematic. The expansion of legal assistance was significant because it benefited the 'poor', who achieved greater access to the legal systems of the welfare states. In part, this liberal interpretation is correct. The post-war legal aid schemes were designed to help poor accused and litigants, and poorer and ordinary people with other types of legal problems. Moreover, as we discuss below, in varying degrees they generally achieved these objectives.

However, the post-war schemes also served other objectives. As we saw above, the post-war schemes were emanations of public policy. In Australia, for instance, the new legal aid policies of 1973-75 also served the administrative demands of new social welfare and regulatory functions in the welfare state.[1086] The schemes were, in other words, instruments of state legal regulation in the societies of the participant welfare states. Therefore, in asking 'what' the post-war schemes achieved, and

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1085 D A Rustow, above n 1079 at 30.

1086 Above at pp 83-89.

'who' they assisted, we must proceed from the perspective of the major parties to the expansion of legal aid. We must consider these questions from the different vantage points and interests of poorer people, the welfare state and its organs, and lawyers and the legal profession.

The Significance of the Post-War Schemes for Poorer People

The conventional interpretations of the social significance of the post-war schemes emphasise the importance of the benefits thereby bestowed upon the poor. There can be no doubt that the reorganisation of legal assistance did benefit the poorer citizens of the post-war welfare states. Indeed, all the explanatory perspectives agree that it 'helped the poor'. The operations of the post-war schemes demonstrated, as Abel contends, a persistent "association between poverty and legal aid", attributable primarily to the adoption of "eligibility criteria phrased largely in terms of income and wealth", but also to other factors, including the preference of the "better off" for services provided by private lawyers.[1087] Low-income people - including women, the young, the old and ethnic minorities - were demonstrably major beneficiaries of the expanded availability of legal aid.

However, as we have indicated above, this fact alone does not adequately explain the social significance of the post-war schemes. In the first place, low-income and poorer people were not the only groups to benefit from the increased availability of legal assistance. Actual eligibility for legal assistance varied according to prescribed income and assets criteria, and according to types of legal problems or proceedings. In the more generous versions of the post-war schemes, like those operating in England in the 1950s and in Sweden in the 1970s, this meant that many ordinary, waged citizens also became eligible for legal aid.[1088] Moreover, the application of these differential criteria also meant that a significant minority of ordinary and middle-class people often qualified for legal assistance on payment of a financial contribution.[1089] In other words, the post-war expansion was important to citizens other than the poor.

Secondly, acknowledging poorer citizens as the principal recipients of legal assistance only serves to identify them as major beneficiaries of the post-war schemes. It does not explain why access to legal aid was important to the poor. The conventional answer, as we have indicated above, is that the post-war expansion benefited the poor because it improved their access to the legal system. We cannot quibble with this answer, provided we treat it as a generalised description of the outcome for the poor. The establishment of the post-war schemes in Australia, Britain, Canada, Finland, France, The Netherlands, Sweden, the United States and comparable countries did see a dramatic increase in public expenditure on legal

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1087 R L Abel, above n 2 at 552 & 551.

1088 Ibid at 544-545: F Regan, "Universal and Selective Services: A Comparative Study of Access to Legal Services", unpublished Master of Policy and Administration thesis, The Flinders University of South Australia, August 1989 at 43-52.

1089 R L Abel, above n 2, at 1551-1552.

aid.[1090] This led to corresponding increases in the availability of legal assistance, which consequently improved the access of poorer citizens to their national legal systems.[1091] However, general descriptions of this kind are inadequate as the basis for assessing the importance of the post-war schemes for the poor.

There are a number of reasons why this is so, none of which we will explore in any detail in this chapter. One is that the post-war expansion of legal aid did not change the essential functions of the legal systems in the welfare capitalist countries. These modern legal systems retained their primary functions as servants and instruments of the modern state. Consequently, poorer people remained in a relatively marginal relationship to the legal system, continuing to "experience law only as constraint, not power".[1092] For instance, as we have seen, whilst spending on legal assistance increased, it remained an insignificant percentage of national GDP and a small proportion of public expenditure on the national legal services system.[1093]

A related reason is that generalising the post-war expansion of legal aid in this way misinterprets its importance for poorer people. Poverty alone did not generate social cohesion amongst low-income and disadvantaged people.[1094] Therefore, it is not terribly useful to describe the outcomes of the post-war expansion in general, undifferentiated terms. Furthermore, to the extent that poverty does generate cohesive social interests, to say that post-war legal aid was important to the poor because it improved their access to law proceeds from a mistaken assumption. It assumes that the poor are interested in better access to the legal system. In some instances, like legal representation in criminal and family law proceedings, improved levels of access were clearly important to low-income defendants and parties. However, the reality of the post-war developments was that poorer people were "rarely ... actively ... involved in creating legal aid programs", and have since been generally been indifferent to preserving the benefits bestowed on them.[1095] Moreover, their marginal social status meant that improvements in access to law generally had "low salience" for poorer people because they "correctly [concluded] it

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1090 Ibid at 544-545.

1091 Abel claims that in Britain in 1968 alone the national scheme "handled almost as many civil legal aid cases ... as the Poor Persons Procedure had done in its entire twenty-five years". In The Netherlands, from 1958 to 1972 the number of civil legal aid cases tripled, amounting to 50% of the civil caseload. In Norway, approximately 300 people received free legal advice in 1964, a figure which had increased to over 17,000 by 1984 (ibid at 545). In Australia, in 1990/91 - 15 years after the establishment of the national scheme - legal aid commissions provided legal representation, advice or duty lawyer services to over 560,000 people, a major increase by comparison with legal aid provision in the 1950s and 1960s: D Fleming, above n 715 at 176. Comparable increases in the availability of legal aid followed the establishment of post-war schemes in France, the United States and Canada (R L Abel, above n 2 at 545-546).

1092 R L Abel, above n 2 at 521.

1093 Above at pp 199 & n 1037.

1094 R L Abel, above n 2 at 520-522; P Hanks, above n 6 at 50-51.

1095 R L Abel, above n 2 at 520-521.

[was] unlikely they [would] get what they want[ed] from legal institutions" in welfare capitalism".[1096]

Another reason why we cannot usefully generalise the importance of the post-war expansion is that its social significance for the poor depended upon several different variables. The scale of increased public funding of legal aid was not uniform. Therefore, the post-war expansion had a differential impact on poorer people in the welfare capitalist states. For instance, in Britain, Canada and The Netherlands, higher levels of national per capita expenditure suggest that their poorer citizens may have fared relatively better than their counterparts in Australia, Ireland and Scandinavia.[1097] Furthermore, the actual social penetration of increased spending on legal aid depended on national variables influencing the cost of legal services, including court and tribunal procedures, substantive criminal and civil law, the role of lawyers and the types and unit costs of legal transactions.[1098] The importance of the post-war expansion was also dependent upon differences in the types of services provided to the poor. In the English-speaking countries, the new legal aid schemes generally aimed to provide a wide range of services, including legal advice, community legal education and promoting law reform, even though legal representation in family and criminal law court proceedings was the predominant type of service delivery.[1099] In contrast, the post-war schemes in the Civil Law countries of Western Europe "usually assist[ed] their citizens primarily in relation to court cases".[1100]

Furthermore, the post-war expansion generally channelled the greater part of new public spending on legal aid into fields of legal work in which lawyers were already both familiar and professionally competent. This clearly benefited poorer accused and parties seeking legal representation or advice in criminal and family law and other types of civil proceedings. However, it generally worked to the detriment of those facing housing, debt, welfare and other legal problems associated with poverty. Practising lawyers were unfamiliar with these new fields of legal work, and sought to "structure the content of legal aid simply by offering poor people the same services they provided paying clients".[1101] Moreover, typically private lawyers were

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1096 Ibid at 521.

1097 In the early 1990s, for instance, national per capita expenditure on legal aid in England and Wales was (SUS equivalents) $39.8, $40.4 in Scotland, $13.1 in The Netherlands and $5.9 in Canada, compared to less than $11 in Australia, Ireland, Norway, Sweden and Finland: E Blankenburg & A Klijn, "The Comparative Legal Aid Survey" in Scottish Legal Aid Board, above n 818, Vol 2, Table 2 at 3.

1098 A Paterson, "Expenditure on Criminal Legal Aid: Report of a Comparative Pilot Study of Scotland, England and Wales and The Netherlands", in Scottish Legal Aid Board, above n 818, Vol 1. This question is also discussed in N S Marsh, above n 817 at 97-110.

1099 F Regan, above n 868 at 1.

1100 Ibid.

1101 R L Abel, above n 2 at 568.

incompetent at understanding the social context in which the poor confronted the legal system.[1102]

Concentrating on the improvements in legal access for the poor also overlooks a notable deficiency in the expansion of legal aid. In important respect, the legal needs of the poor were not unlike those of waged, ordinary citizens. The operations of the legal systems in post-war society generated an enormous demand for access to lawyer functions and information about law. By the post-war period, everyone was:

> ... involved with law ... people advise[d] themselves and others of their legal rights and remedies in consumer disputes ... interpret[ed] legislation and other legal documents in order to ascertain their taxes or payroll deductions, or their entitlement to benefits ... appear[ed] on their own behalf or on behalf of others in small claims courts, welfare offices, traffic courts, grievance proceedings, labour arbitration boards, zoning and assessment bodies, and domestic tribunals such as university disciplinary committees.[1103]

The post-war expansion did little to redress the ordinary, everyday needs of poorer citizens for legal access. Therefore, it is for these reasons that to describe the outcomes of the post-wear expansion in terms of improving the access of the poor to the law is inadequate. Whilst the post-war expansion of legal aid clearly helped poorer people, its actual social significance for the poor remains somewhat problematic. Indeed, it is very clear that the improvements to legal access it produced were less spectacular and far reaching than the conventional interpretation suggests.

Neither was greater public expenditure on legal aid necessarily translated into correlative levels of significance measured by reference to 'social benefits' conferred upon the citizens of the participant welfare states. As Esping-Andersen and other social policy analysts have shown, higher "levels of expenditure [do not] necessarily reflect a greater [state] commitment to social well-being."[1104] Therefore, we need to consider other criteria if we are to assess the impact of the post-war legal aid schemes on social citizenship. In his 1994 paper, Regan pioneered the use of the application of the alternative measures of 'welfare effort' developed by Esping-Andersen to portray legal aid schemes in a social policy context.[1105] These measures are:

1102 Australian Government Commission of Inquiry into Poverty, *Legal Needs of the Poor*, Research Report, Law and Poverty Series, (1975); Commission of Inquiry into Poverty, *Poverty and the Legal Profession in Victoria*, Research Report, Law and Poverty Series, (1977).

1103 D A A Stager in collaboration with Harry W Arthurs, above n 51 at 61.

1104 D Mitchell, "Comparing income transfer systems: is Australia the poor relation?" in F G Castles (ed). above n 57 at 168 referring to G Esping-Andersen, above n 35 at 19: D Mitchell, "Comparative Measures of Welfare Effort", Australian National University Public Policy Program, Discussion Paper No 16. January 1990; F Regan, above n 831 at 8.

1105 Above at pp 145-146.

> ... less immediately concerned with re-distribution than with rights-conferring aspects of welfare provision - his organising problematic is a notion of welfare 'de-commodification', defined in terms of welfare 'rendered' as a matter of right.[1106]

Esping-Andersen also developed three other "measures which supposedly tap salient dimensions of welfare-state stratification", a term which he used to "denote ways in which the welfare state serves to structure the quality of social citizenship".[1107] Combining these 'de-commodification' and stratification indices, Esping-Andersen constructed, as Table 3 below illustrates, a matrix of three different types - or worlds - of welfare states: the Liberal, Conservative and Social Democratic types of welfare capitalism.

Table 3: Esping-Andersen's matrix of the three worlds of welfare capitalism

Type	Political principles	Degree of 'de-commodification'	Principles of stratification
Liberal	Liberal	Low	Means tested/allied with significant private expenditure on health etc
Conservative	Corporatist/associated with high degree of state authority over citizens	Medium	Contributory/earnings related
Social Democratic	Socialist	High	Universal benefits/high degree of benefit equality

Source: F G Castles & D Mitchell, "Three Worlds of Welfare Capitalism or Four?", Australian National University Public Policy Program, Discussion Paper No. 21, Oct 1990 (as amended June 1991) at 10-11

Regan used the typologies described in Table 3 to construct alternative 'models} of legal aid in welfare capitalist states.[1108] However, Esping-Andersen's matrix also provides us with an alternative means of portraying the social significance of the post-war schemes. For instance, in the paradigmatic Social Democratic welfare capitalist societies - those where high levels of 'de-commodification' and benefit universality correspond, like Sweden, The Netherlands and Norway - the provision of legal aid as a right of citizenship in conjunction with high popular eligibility meant that the reforms to legal aid saw a significant increment in the quality of social citizenship. In comparison, in the Liberal welfare states - like Australia, Britain, Canada, New Zealand and the United States - the focus of legal aid provision on poorer people, combined with means-tested eligibility, meant that the enhancement of the quality of social citizenship was correspondingly less.

1106 F G Castles & D Mitchell, above n 35 at 7.

1107 Ibid at 10.

1108 Above at pp 145-146.

Table 4 ***National variables affecting the social significance of the post-war schemes***

Country	Variables affecting the social significance of the post-war schemes						
	Type of welfare state	Legal aid provision			National legal system		
		Eligibility (proportion of the pop.)	Scope (Type of legal services)		Legal family	Legal services system	Opportunities for citizens to 'mobilise law'
			'in-litigation' 1	'outside litigation' 2			
Sweden	Social Democratic	high	extensive range of cases	Nil	civil	state-dominated	low
The Nether-lands	Social Democratic	high	extensive range of cases	limited	civil		low
Britain	Liberal	low	restricted	limited	Common Law	market-dominated	high
Australia	Liberal	low	narrow	substantial	Common Law	market-dominated	high
United States	Liberal	low	narrow	extensive	Common Law	market-dominated	high

Notes: 1. Legal advice and representation to assist citizens in court cases.
2. including legal advice and information by way of interview and over the telephone, legal education and training, and law reform.

Source: F Regan, "Are There 'Mean' & 'Generous' Legal Aid Schemes' in *Legal Aid in the Post-Welfare State Society*, *Legal Aid in the Post-Welfare State Society*, (The Netherlands Ministry of Justice, 1995) at 17-20; F Regan, "Why Do Legal Aid Services Vary Between Societies? Re-Examining The Impact Of Welfare States And Legal Families", draft paper to be published in F Regan, A Paterson, T Goriely & D Fleming (eds), *The Transformation of Legal Aid*, (in press), 12-19 and Tables 1 & 2

However, measuring 'welfare benefit' is notoriously difficult,[1109] and Esping-Andersen is not without his critics.[1110] Regan's work in 1994 and 1998, however, provides some useful indicators for considering the impact of the post-war schemes on social citizenship. In 1994, he sought to test the validity of his initial hypothesis by comparing the post-war experience of legal aid in Sweden - one of Esping-Andersen's Social Democratic welfare states - and Australia - one of its Liberal counterparts. Regan concluded that, whilst legal aid in those two countries could broadly be characterised:

> ... in line with the welfare state models proposed by Esping-Andersen ... it is clear that there can be no simple statement made about which country's legal aid scheme is

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1109 Eg. D Mitchell, "Comparing income transfer systems: is Australia the poor relation?" & "Comparative Measures of Welfare Effort", above n 1104: F Regan, 1993 at 18.

1110 F G Castles & D Mitchell, above n 35 at 12-16.

> better. It depends at least partly upon how the legal system works, what matters are processed as legal and what are labelled as something else.[1111]

Regan has pursued this line of inquiry in his most recent paper, investigating "the impact of welfare states and legal families on legal aid services."[1112] In this case, he concluded inter alia that legal aid schemes in welfare capitalism produced significant differences "for the citizens opportunities to mobilise the law", i.e., significant differences in the qualitative outcomes for social citizenship.[1113] His analysis tends to confirm our conclusions about the origins of the post-war schemes, namely that there are distinctive national stories, which produced distinctive national outcomes, including those affecting social citizenship.[1114] However, Regan's work in these two papers does indicate that we can extend the insights offered by Esping-Andersen in descend into the operational details of legal aid provision, and factoring in the impact of the national legal systems of the welfare states. The matrix in Table 4 demonstrates, that like all public policy initiatives, the social significance of the post-war expansion was complex, relative and, above all, dependent upon the role and functions of law in the welfare states.

The Significance of the Post-War Schemes for the Welfare State

There is a third reason why the conventional explanation is inadequate. Its focus on the poor distracts us from the fact that others also benefited. The poor and other legally-assisted citizens who were the clients of the post-war schemes were not the sole beneficiaries. They were only one element of the political matrix which surrounds the provision of legal aid in modern Western society.[1115] In the post-war expansion, the other most visible and active members of this matrix were the state and the legal profession. As we have seen above, and Abel reminds us, the "'state' is a reified label, concealing [a] great diversity of interests amongst various government officials".[1116] Nevertheless, we can safely generalise some of the benefits received by its various organs and actors.

The post-war expansion saw the legal machinery of the welfare states grow, and hence increase its social significance. Therefore, if nothing else, the reconstruction of the machinery of legal aid reinforced the legal systems of the state. However, the post-war schemes, like other parts of these legal systems, were also instruments of state policy, enabling its various organs to project their public policy objectives. In some instances, those objectives were clear and readily identifiable. For example, Abel has suggested that legal aid was "an essential means of rationalising the chaotic

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1111 Francis Regan, above n 854 at 34 & 35.

1112 F Regan, above n 858 at 1.

1113 Ibid at 19.

1114 Above at pp 145-146.

1115 The other elements, according to Abel (above n 2 at 498-538), being clients, legal profession, legal aid lawyers, the state, capital, labor and philanthropy

1116 Ibid at 524.

and often arbitrary welfare bureaucracy".[1117] Less contestable examples are evident in the Australian experience. The operations of its interim national scheme in 1973-75 were clearly meant to facilitate new policies aimed at improving the social well-being of both poorer people and all citizens seeking to participate in national legal system and its law.[1118] Furthermore, other developments in post-war legal aid were also linked to changes in the functions of the Federal welfare state. For instance, its new ability to intervene to protect the social welfare of indigenous peoples, the adoption of new environmental functions, the pursuit of international obligations in war crimes, family law and civil justice and facilitating the operation of trade practices, industrial and courts-martial legislation.[1119]

The post-war expansion also promoted the performance of core objectives and functions of the modern state. For instance, it once again helped to facilitate and legitimate the prosecution of those charged with criminal offences, while simultaneously publicly reinforcing the legitimacy of the exercise of coercive governmental power.[1120] Moreover, the "most invariant feature of all legal aid programs [was] their preoccupation with family matters".[1121] Abel speculated that this was a response "to the crisis of reproduction posed by the dissolution of the extended family and the breakdown of lifelong parental union", reflecting the interest of the welfare capitalist states in the reproduction of labour power.[1122] In fact, the involvement of the modern state in divorce and family matters embraces many public policy interests, include the public interest in the related processes of marriage formation and remarriage, 'family' policy, the public interest in social protection and public morals and the political significance of private interests in the equitable termination of marriage.[1123] Nevertheless, Abel has directed our attention to the links between the post-war expansion and broader agendas of the welfare state. In yet other instances, the changes to legal aid benefited the post-war state in ways which were "both paradoxical and complex".[1124] For example, whilst its judges in the family and criminal trial courts generally welcomed the greater availability of legal assistance, other judges, especially conservatives and some in the appellate courts, objected. The latter ostensibly on the grounds that greater access to legal aid clogged up the courts by financing spurious appeals, especially in criminal matters. Nor was the post-war expansion always welcomed by all parts of the state, with sometimes

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1117 Ibid at 528.

1118 Above at pp 83-86.

1119 Above at pp 83-86 & 107-108.

1120 R L Abel, above n 2 at 606 & 587-589.

1121 Ibid at 529.

1122 Ibid at 529 & 608-609.

1123 F G Castles F G & M Flood, "Divorce, the Law and Social Context: Families of Nations and the Legal Dissolution of Marriage", Discussion Paper No. 22, January 1991, at 5-7; S B Kamerman & A J Kahn (eds), *Family Policy: Government and Families in Fourteen Countries*, (1978); R Phillips, *Putting Asunder: A history of divorce in Western society*, (1988) at 612-634.

1124 R L Abel, above n 2 at 534.

visible tensions between national and regional or local governments.[1125] Nevertheless, it was generally a significant and favourable development for most political and institutional interests within the post-war welfare states.

The Significance of the Post-War Schemes for Lawyers

The lawyers and the legal profession were the other major non-recipient beneficiaries. Behind the post-war expansion were new or increased levels of public expenditure. This both increased the income of the legal services industries, and expanded national markets for lawyers' services. Whilst this notionally benefited all lawyers, the actual economic significance of these developments was dependent on several factors. In increasing opportunities for legal assistance in criminal, family law and social welfare matters, the post-war expansion changed the market serviced by 'personal plight' private lawyers.[1126] It not only created new paying clients, but it also increased the economic value of the existing market. For instance, in Australia and Britain lawyers were paid to provide legal aid services previously performed on a charitable or semi-charitable basis in law society schemes.

The economic impact was also influenced by the rates of remuneration paid to lawyers in the post-war schemes. Nowhere did these match fees charged to private clients, although Abel probably overstates this when he claims that remuneration levels were "deliberately ... depressed (to protect the public treasury, stigmatize clients, and keep legal aid at a competitive disadvantage with respect to the private sector)".[1127] Those private lawyers who subsequently developed extensive legal aid practices generally experienced difficulty in achieving adequate levels of profitability and income.[1128]

The scale and scope of particular national schemes was also an important variable factor. For instance, in the late 1970s and early 1980s legal aid was a major source of income for many barristers and solicitors in England, and accounted for "one-fourth to one-third of the total revenue" of all lawyers in The Netherlands.[1129] Whereas in both Australia and the United States it represented only an insignificant part of the income of the legal services industry.[1130] Increased public spending on legal aid also created new or wider opportunities for salaried employment for lawyers. In Australia, Canada, The Netherlands, the United States, Scandinavia and elsewhere, small but significant numbers of lawyers were employed in the new national schemes, or in 'community' based legal aid services.

The legal profession itself also benefited from the post-war expansion. However, we face a number of difficulties in attempting to generalise its significance. The legal

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1125 Ibid.

1126 M Hetherton, above n 473, (1981) at 62-63.

1127 R L Abel, above 2 at 514.

1128 Ibid.

1129 Ibid at 507-508.

1130 Ibid at 508; National Legal Advisory Committee, above n 7 at 185-186.

profession in each society is constituted by a variety of lawyer interests.[1131] Moreover, national differences clearly existed in its functions, culture and educational traditions across post-war western society.[1132] In part, these reflected its contrasting modern paradigms of the Anglo-American private lawyer advocate, and the European judge or civil service administrator. National differences in the political economy of the legal profession were also evident within Europe itself. For instance, in the different attitudes of the legal profession in Germany and The Netherlands to post-war developments in legal aid.[1133] Nevertheless, we can make some general observations about the importance of the post-war expansion.

Everywhere, it promoted the ideology and interests of the modern legal profession. In particular, the post-war expansion served its socio-economic interests in fostering the social construction of 'legal' problems around established lawyer paradigms. It achieved this directly by reinforcing the role of private sector lawyers. In most countries, the organised profession had initially opposed the expansion of legal aid. However, once "state subsidies became inevitable, professional suspicions about 'officialism' rapidly dissolved," the organised legal profession in the welfare capitalist countries generally embraced the post-war schemes.[1134] Thereafter, it aimed to maximise spending on services provided by private lawyers and "to minimize the state funds available to salaried lawyers (staffed office programs)".[1135] This certainly had the effect of reinforcing the interests of the 'personal plight' lawyers in the mainstream of the private legal profession. However, as we have also seen, it did not prevent the emergence of professional sub-groups in the form of legal aid lawyers specialising in legal assistance, employed in public agencies and working in the community sector. The post-war expansion gave a new credence or cohesion to these sub-groups, who themselves identified with the legal profession. In doing so, their members were gradually coopted into the organised profession, and therefore indirectly contributed to its objectives in maintaining professional control over the social construction of 'legal' problems.[1136]

The lawyer-focused operations of the post-war schemes also served to reinforce professional control over the operations of the market for legal services. Moreover, in various ways - and especially in the Anglo-American countries - the post-war expansion entrenched the position of the organised profession. The involvement of its organisations and agents in the administration of the post-war schemes enabled it to project and protect agendas of the professional mainstream. For instance, the English Law Society, through its involvement in administering regional duty lawyer schemes in the 1970s, was able to regulate the work practices of local solicitors and

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1131 R L Abel, above 2 at 499 & 510-519; M Hetherton, above n 473, (1981) at 99-112; R Tomasic, "Social Organisation Amongst Australian Lawyers", (1983) 19(3) ANZJS 447.

1132 E Blankenburg, above n 852 at 250-251.

1133 Ibid.

1134 R L Abel, above n 2 at 503.

1135 Ibid.

1136 Z Bankowski & G Mungham, n 834 above at 75-76.

thereby reinforce the professional culture protecting the economic terms of work of private lawyers.[1137] A comparable situation existed in Australia in the late 1970s and the 1980s via the dominant role of the professional organisations and their agents in the management of the State and Territory legal aid commissions. The post-war expansion also provided a vehicle for these organisations to harmonise internal conflicts between different interests and actors within local or national legal professions. In part, this was a by-product of increased public spending on legal assistance which enabled more of its members to actually participate in 'helping the poor'. This had the effect of promoting internal cohesion by celebrating the professional "ethics of public service", and fostering a sense amongst the professional mainstream of "personal satisfaction accruing from a good job well done".[1138] Increased mainstream professional involvement in legal aid also acted to moderate the complaints of a few dissidents who historically had been active critics of its failure to adequately assist the 'poor'.[1139]

The post-war expansion also presented professional organisations with opportunities to institutionalise the dissenting voices amongst a new generation of lawyers. In the late 1960s and early 1970s a significant minority of young lawyers, legal academics and law students were articulating new and 'radical' social expectations of law. In Australia, Canada, The Netherlands and the United States, the creation of new legal aid sectors provided new types of employment for some of these potentially disaffected members and embryonic members of the legal profession. At least for a few years, the internal culture of these organisations was subordinated to the ideals and norms of the legal profession.[1140] The result was to produce a new segment of the legal profession - critical, reformist and sometimes radical, but nevertheless always within its broad church. A similar result obtained in England, where the private sector had largely absorbed the post-war expansion. In the early 1970s, the Law Society played a powerful - if passive - role in the establishment of neighbourhood law centres, and these too worked to its advantage, inter alia by creating new and alternative avenues of professional work.[1141]

The role of the post-war schemes in institutionalising dissent was not restricted to diverting the energies of those lawyers actually employed in legal aid agencies. They also served to demonstrate, both to the public, and all lawyers, the role of the organised profession in legal assistance, and the continuing significance of the

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1137 Ibid at 51.

1138 Ibid.

1139 For instance, the minority of lawyers in Australia, Britain and the United States who had been consistently actively interested in the legal plight of poorer people: ibid at 75-76; C Menkel-Meadow, above n 1057 at 33-36. In England, for instance, as Bankowski and Mungham (at 75-76) point out, poverty in England was not new, and there had "always been a small caucus of lawyers interested in 'law for the poor' and, in particular, in the part neighbourhood law schemes could play in making the intolerable tolerable"

1140 Eg, Abel's description (above n 2 at 510-519) is of a different type of professional culture adapted to the exigencies of legal aid practice, but nevertheless still essentially 'lawyer' in social outlook.

1141 Ibid at 520; Z Bankowski & G Mungham, n 834 above at 77.

lawyer paradigm in post-war society. Moreover, the presence of the new legal aid agencies benefited the organised profession in other ways. In the 1980s and 1990s the Western legal profession has had to adapt to new social and political demands for it to make a greater contribution to improving 'access to justice'. Legal aid lawyers, the reformist and critical sub-culture their "daily encounters with deprivation, oppression, and injustice" has engendered and the adaptation of the profession itself have provided an important repository of ideas and experience to enable the profession to respond to these pressures.[1142] As Abel concluded, the "idealism that inspires lawyers everywhere, because it is inherent in law, should be mobilized by making exposure to legal aid an intrinsic part of professional socialization."[1143]

The Significance of the Social Prominence of Anglo-American 'Legal Aid'

It remains to consider the significance of the social prominence of the 'legal aid' ideals of 'modern Anglo-American law' in the post-war Western world. Once again, we must distinguish between the Anglo-American welfare states, and other Western or Westernised societies. In the case of the latter, the prominence of the Anglo-American 'legal aid' ideal reflected the ongoing "compression of the world" through "global interdependence and consciousness", which itself became an increasingly prominent feature of late 20th century society.[1144] In particular, as we saw above, the new prominence of Anglo-American 'legal aid' indicated the internationalisation of its 'modern law' and regulatory paradigms, especially those of the modern American state and its post-war society.

'Within' the Anglo-American welfare states themselves, the significance of the post-war social prominence of the ideals of 'legal aid' was as a 'litmus paper' or 'litmus test'. Its court-focused, lawyer-administered paradigms were not only key organisational ideals of the liberal legal centralist alliance. The 'internal' mediative and 'external' legitimating functions which 'legal aid' performed had significant social ramifications in societies which officially celebrated governance through 'modern Anglo-American law'. As we have shown, courts, judges and lawyers, and 'access' to the courts through lawyers, and the social 'benefits' this promised, were, to varying degrees, vital social axes in post-war Australia, Britain, Canada and the United States. The ideals of 'legal aid' were a high-profile 'embodiment' of the institutional reality and the ideological 'promise' of the modern legal systems, its 'law' and the liberal legal centralist alliance in these countries. They were, if you like, a 'lubricant' of the axes of 'justice'. Thus, the social prominence of 'legal aid' during the post-war experience served as an 'indicator' of the condition or 'chemistry' of 'modern law' and its political and institutional associates in the Anglo-American welfare states. Once again, however, there were appreciable and

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1142 R L Abel, above n 2 at 621.

1143 Ibid.

1144 R Tomasic, "The Nationalisation and Internationalisation of Australian Lawyering: Some Reflections", paper presented to the 1997 Australasian Legal Education Forum, 4/5 July 1997, Griffith University, Brisbane at 9 referring to R Roberston, *Globalization*, (1992) & D Harvey, *The Conditions of Post-Modernity*, (1989) at 293-295.

important differences in the changes revealed by the 'litmus test' of post-war 'legal aid' in the United States, and elsewhere in Anglo-American society.

In the United States, as we saw above, 'legal aid' ideals rose to prominence in the 1960s as part a defensive reaction of the governments and the legal profession to threats posed to their 'modern law', including the growing power of other forms of social ordering.[1145] Hunt has observed that developments evident in sociological jurisprudence by mid-century:

> ... marked the close of the development of Western jurisprudence ... [What] came after [was] concerned to find new ways of expressing this 'same' solution to the legitimacy of the legal and social order.[1146]

Very much the same can be said of developments in modern American law following the post-war experience of legal aid. The social prominence of its 'ideals' in the 1960s was an indicator of the declining social hegemony of the system of legal ordering 'engineered' by the modern American legal system. It was a final attempt to defend a social construction of 'law' and 'legal system' which no longer effectively fulfilled its modern functions in social governance. The capacity of legal scholars, judges and lawyers to convincingly 'reinvent' or adapt the social construction of 'modern Anglo-American law' was exhausted. The post-war experience of 'legal aid' had signalled the final demise of the modern phase of social ordering officially orchestrated by the parties to the liberal legal centralist alliance.

By 1970, "the great quinquennium ... of reform and concern in the area of legal aid" was over.[1147] The focus of legal reform in the United States had shifted to addressing the problem of "representing group and collective - diffuse - interests other than those of the poor".[1148] For liberal legalist scholars like Cappelletti and Garth, this new focus was part "of a worldwide movement" towards representing "important public policy issues involving large groups of people" through "public law" litigation".[1149] Representing 'diffuse interests' demanded 'mass procedures' and was said to have "forced a rethinking of very basic traditional notions of civil procedure and the role of the courts."[1150] The new focus of reform was also said to generate an increasingly popular edge to the control of civil procedure, allowing "private individuals and groups to act as champions of diffuse interests", thereby impacting upon the modern role of the courts, judges and lawyers. More importantly, according to the liberal legalists, these reforms were followed by a new and broader

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1145 Above at pp 207-208.

1146 A Hunt, above n 1022 at 136.

1147 M Cappelletti and B Garth, above n 2 at 35.

1148 Ibid.

1149 Ibid at 36.

1150 Ibid at 35.

'wave' of reforms to the modern legal systems of post-war Western society - the so-called "access to justice approach".[1151]

The political background of this new phase of the Western post-war response to 'access to law' does not concern us here, and is pursued in the Australian context in Chapter Eight.[1152] Whatever the originating politics of 'access to justice' in the United States, in the 1970s and 1980s its modern legal system and 'engineers' of centralist law explored:

> ... a wide-variety of reforms, including change in forms of procedure, changes in the structure of courts or the creation of new courts, the use of laypersons both on the bench and in the bar, modifications in the substantive law designed to avoid disputes or to facilitate their resolution, and the use of private or informal dispute resolution mechanisms.[1153]

These new legal developments changed the politics of the legal domain in post-war American society. The 'old' modern assumptions about the role and functions of courts, judges, lawyers and judicial-types of centralist law came increasingly under challenge. 'Alternative dispute resolution' and its informal modes of ordering was officially sanctioned within the legal system, increasing the diversity of the central legal domain. The social significance of modern centralist-types of law of all kinds declined, in the face of the resurgence of 'lesser' forms of legal ordering, thereby according a more plural type of ordering. Generally, the modern configurations of law and legal regulation in the United States shifted, and saw the emergence of new legal ideologies, as Galanter describes:

> We shifted from the centripetal image (implicit in the idea of "access to justice") of courts as resolvers of those disputes which come before them, to a centrifugal image of courts as one component of a complex system of disputing and regulation. In that system, courts (and other official institutions) are not the only sources of normative messages, just as they are not the only arenas in which controls are directly applied. We must examine the courts in the context of their rivals and companions. To do so we must put aside our habitual perspective of "legal centralism," a picture in which state agencies (and their learning) occupy the center of legal life and stand in a relation of hierarchic control ... to other, lesser normative orderings such as the family, the corporation, the business network.[1154]

In the other Anglo-American societies, the results of the 'litmus test' were different. The post-war prominence of 'legal aid' signalled the essential integrity of the modern 'bargain' between governments, the courts, judges, the organised legal profession and lawyers. In the 1950s, 1960s and early 1970s, the parties to the national versions of the liberal legal centralist alliance in Australia, Britain and Canada retained their modern mutuality. The hegemony of the social construction of 'modern Anglo-American law' and its governmental configurations had not been assailed, as it had

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1151 See Chapter Eight below.

1152 Below at pp 240-268.

1153 M Cappelletti & B Garth, above n 2 at 52.

1154 M Galanter, above n 879 at 17.

in post-war America. Nor, as we have seen, had these societies undergone comparable experiences in the 'reconstruction' of the social efficacy of 'law' through developments in sociological jurisprudence. In Australia in the mid-1970s, for instance, 'analytical', asocial, 'apolitical' jurisprudence remained the paradigm of judicial reasoning, and of social expectations of the courts and judges.[1155] The legal profession and lawyers, moreover retained their control of the systems of civil justice, and there were few discernible changes to the politics of modern law, either in the central legal domain or in pluralism. Thus, 'legal aid' really served to demonstrate the stability or continuity of modern legal ordering.

This was to prove to be an illusion, as we demonstrate below in the Australian context in unravelling the origins of its 'problems' in 'access to justice' in the 1980s, and the state response. Administrative law and its modes of ordering had already assumed a greater public significance with the expansion of the post-war welfare state. Moreover, by the early 1970s, as we discuss in Chapter Eight, an economic 'crisis' in the Western economy was pending.[1156], This would produce changes in the political economy, public policy and functions of legal regulation in the English-speaking welfare states. However, at the time of the post-war experience of legal aid, the modern configurations of law and government were substantially intact in the Anglo-American societies outside the United States.

The 'Benefit' of Revisiting the Post-War Experience

Revisiting the post-war experience of legal aid has shown it to be a complex phenomenon. However, we already knew this before we revisited its origins and significance in this chapter. Part I of the thesis showed how the Australian post-war scheme originated in an amalgam of social factors, including the fading of the existing legal aid schemes, changes since the late 1950s in the political economy of the legal profession, acknowledgment of the social entrenchment of poverty and developments in public policy.[1157] Moreover, the legal aid literature, save for its cruder and less considered liberal legalist components, had alerted us to the presence of links between the post-war experience and social change, politics and government in the welfare state. This was especially true of the majority of the contributors to the explanatory literature reviewed above.[1158] Furthermore, Chapter Six had illustrated the diversity and complexity of the social and political forces which shaped the transition of the poor persons institutions into modern legal aid.[1159]

What, then, has been the 'benefit' of the analysis in this chapter? How has it 'added value to' our understanding of the origins and significance of the post-war

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1155 D Fleming, "Jurimetrics and the Jurisprudence of the High Court of Australia: A Study of the Court in the Years 1976-78", unpublished LLM thesis, Faculty of Law, University of Melbourne, 1981 at 395-398.

1156 Below at pp 246-247.

1157 Above at pp 70-76.

1158 Above at pp 142-146.

1159 Above at pp 169-190.

experience? The chapter began by 'de-constructing' "the post-war experience" into its two phenomenological elements: the establishment of the post-war legal aid schemes and the social prominence of the Anglo-American 'legal aid' ideals. This 'separation' employed the explanatory model of the origins of modern legal aid developed in Chapter Six, and parts of its revised analytical framework. It provided a new 'sorting table' on which to throw the 'fleece' of legal aid, to examine its origins and significance. Thus, the first 'benefit' of the analysis in this chapter was its new analytical assumptions and methodology. It provided a means of 'seeing' the post-war experience in a fresh light, not available from the perspectives of the existing explanatory frameworks.

So, what then, are the insights offered by this alternative methodology? In the first place, the analysis in the chapter confirmed the social complexity of the post-war experience. What we knew at the beginning was even clearer at the end. Indeed, the origins and significance of the post-war experience were shown to be even more complex than we imagined. Secondly, the alternative methodology applied in the chapter has offered us important new insights into the post-war experience of legal aid. It has shown that to explore its origins is to descend into the maze of the modern Western legal domain. Acknowledging the dual aspects of the post-war experience took us first into the politics of public policy in the participant welfare states to explain the origins of the post-war schemes. It then carried us into the post-war politics of the modern legal systems, 'law' and social governance in the Anglo-American welfare states. And finally the inquiry into the origins of the social prominence of Anglo-American 'legal aid' elsewhere in Western society moved into the international realm of its post-war legal domain. In various ways, the post-war experience was shown to originate in the politics of law in the modern state and its schemes of legal regulation in post-war Western society. In this respect, therefore, it was an 'experience' of legal aid not unlike its origins in the modern Western legal systems, or its initial modern development through the transition of the poor persons schemes. An 'experience' which in this case was located within the politics of law in the participant welfare states, and the wider politics of the Western legal domain.

Applying an alternative methodology has also produced new 'benefits' for understanding the origins of the post-war experience. They are, however, something of a mixed blessing. On the one hand, the 'story' which emerges from revisiting its origins overcomes the shortcomings of the existing explanatory literature discussed earlier.[1160] By adopting the explanatory base and 'tools' developed in Chapter Six, this chapter has factored in the political dimensions of law 'missing' from those analytical frameworks, i.e., the contributors' neglect of modern legal plurality, the presence of the modern Western legal domain and the modern dynamics of centralist law.[1161] In doing so, it has produced a 'story' which, whilst more complicated, is nevertheless far more consonant with the modern political reality of law in the Western world. This was a positive 'benefit' of having revisited the origins of the post-war experience.

[1160] Above at pp 147-149.

[1161] Above at pp 151-154.

On the other hand, factoring in its political dimensions also produced negative 'benefits'. Acknowledging these dimensions highlights limits implicit in our capacity to explain the origins of the post-war experience. In the first place, it demonstrates what we cannot 'know'. Locating the post-war schemes in the public policy of the participant welfare capitalist states renders them subject to the explanatory brake identified in the revised analytical framework.[1162] As such, we can make the background decision-making process more transparent, as we have done in this chapter. However, aspects of this process will inevitably always remain inexplicable, for the reasons which the Public Policy scholars and Renner adverted to. Secondly; the chapter has highlighted the limitations on generalising the origins of the post-war experience across the Western world. The post-war schemes and the social prominence of the Anglo-American 'legal aid' ideals had distinctive national origins. Thus, whilst cross-national comparison and theorising is useful and informative, each society has its own particular 'story'. Thirdly, the chapter has highlighted the fact that there is yet more to 'know' and 'learn' about the respective national experiences. Questions will remain to be asked, and new answers 'found', until we rehearse their origins in greater detail with the aid of the analytical methods of Public Policy which we described in Chapter Six.[1163]

Revisiting the post-war experience has also provided insights into its significance. The chapter demonstrated the post-war experience was significant for other reasons than 'helping the poor' in the participant welfare states. We 'knew' - or at least strongly suspected - that this was so. In different ways, Abel, Alcock, Blankenburg, Cousins and Regan had already indicated the diverse significance of the post-war schemes.[1164] In this respect, therefore, the 'value added' aspects of the chapter are marginal. In dissecting the various interests of poorer people, the welfare state and its organs, and lawyers and the legal profession in the post-war schemes, it had, however, heightened our sense of social ambiguity in understanding the significance of the post-war experience.

Nevertheless, amidst these 'political' insights, we must be careful not to diminish the significance of the post-war experience for poorer people and their legal problems. The post-war schemes reorganised legal aid and generally increased the volume, quality and accessibility of publicly-funded legal services in the participant welfare states. Moreover, across the Western world, the post-war experience highlighted the goals and ideals of citizens' 'access to law', and promoted the values of social citizenship. Politically, these related developments contributed to a climate of systemic reform, which encouraged and promoted improved effective popular access to national legal systems in the Western world.

However, the 'benefits' of revisiting the significance of the post-war experience goes beyond confirming the 'political' insights of the explanatory literature. The chapter has shown that, whilst the post-war experience 'helped the poor', it ended, in the

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1162 Above at pp 160-161.

1163 Above at pp 159-160.

1164 Above at pp 142-146.

words of Bankowski and Mungham, by "helping law much more, by increasing its domination-legitimacy."[1165] To quote from these authors in this context is to take some liberties. The analyses in this chapter proceeded from the various premises of the revised analytical framework in Chapter Six, and not the legal centralist perspective of Marxism. Moreover, its interpretation of the significance of the social prominence of the Anglo-American 'legal aid' ideals did not claim the post-war experience was an unqualified 'victory' for modern Western centralist law and its ideals. Indeed, in the case of the United States, the chapter adopted a contrary position, arguing that its post-war experience of legal aid indicated a decline in the social significance of 'modern American law'.

Nevertheless, the polemics of Bankowski and Mungham serve to radically portray "what trying to solve the problems of the world with the help of law and men with 'lawyer-like' skills really means".[1166] The 'problems' ostensibly sought to be solved by Western governments in the post-war experience of legal aid were the legal problems of their poorer citizens. The 'equipment' which they used was their modern legal systems and its social constructions of 'modern Western law'. One outcome was, as we have shown, to 'help' the poorer citizens of the participant welfare states, with some 'flow on', indirect effects for other poor people in the Western world. The other outcome was to 'help' the legal systems and 'modern law' of post-war Western society. This was the major and lasting outcome of the post-war experience of legal aid. Revisiting its significance in this chapter has allowed us to identify three different and important reasons why this was so.

In the first place, the post-war experience increased and reinforced the scale and scope of the machinery of the modern legal systems in the Western world. In this respect, its significance for the interests of centralist law was negligible. The modern Western legal systems were already large and socially pervasive, and the new legal aid schemes did not increase their size or social penetration to any significant degree. They merely added to the existing accumulation of Western legal technology.

Secondly, and more importantly, the post-war experience served to reinforce the global significance of modern Western centralist law and its institutions. Its legal aid schemes - and the associated new prominence of the Anglo-American 'legal aid' ideal - formed part, as we have seen, of the projection and transfer of modern Western styles of legal ordering into the de-colonising and developing countries of the post-war world.

Thirdly, the post-war experience of legal aid promoted the interests of the liberal legal centralist alliance - the political epicentre of 'modern Anglo-American law' and its associated configurations of social governance. It saw, in the case of the United States, the defence of the alliance against external threats to its modern hegemony. In the other Anglo-American welfare states, the new social prominence of 'legal aid' served to consolidate the integrity of the alliance, and the political interests of

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1165 Z Bankowski & G Mungham, n 834 above at 77.

1166 Ibid at xiii.

governments and the legal profession in maintaining the modern social construction of 'law'. 'Outside' the Anglo-American welfare states, the post-war experience served to project their Common Law version of 'modern law' and its court focused, lawyer administered ideals of 'legal system' and social ordering throughout the post-war Western legal domain.

Thus, the real significance of the post-war experience was that it advanced the social imperium of modern Western centralist law. It enhanced the dominion of centralist types of law in Western countries, and increased the global dominion of 'modern Western law', predominantly through the projection of the ideals of 'Anglo-American law'. This was its most significant and lasting outcome, far exceeding any short-term benefits it conferred on poorer people.

However, in adapting the polemics of Bankowski and Mungham we are not obliged to adopt their driving premise that the state legal system is solely an instrument of ruling class oppression, or their nihilist conclusion that social reform through its law is ultimately a "waste of time".[1167] Neither the modern Western legal systems nor their law are such singular inventions. Nor can we sensibly attribute to either such a singular objective - the "operation [of a modern legal system] is a complex thing: its personnel act in different ways and for different motives".[1168] In any event, to claim that the real significance of the post-war experience was that it 'helped' the interests of modern centralist law more than those of the 'poor' is not as outrageous as it may first appear. The *raison d'être* of the modern Western legal systems was not to ameliorate the plight of the 'poor' or to provide them with 'access' to its courts and lawyers. It was instead the legal regulation of modern capitalist society, where the interests of its poorer citizens were never paramount. As an Australian Attorney-General lamented in 1943, "in the field of law, from time immemorial the social structure has always been so weighted that the poor are at a disadvantage when opposed by the wealthy and powerful".[1169]

However, the actual operation of the modern Western legal systems cannot be said to have so consistently disadvantaged poorer and ordinary people. Certainly, their poorer citizens have suffered large-scale exclusion from the courts, or, at least, those courts with the capacity to 'engineer' or encourage social and political reform. Similarly, save for the interventions of legal aid, they have largely been denied adequate access to lawyers, or to lawyers with comparable skills to those who serve the 'rich'. Moreover, the prevailing tendency of the legal institutions of the modern state has been against facilitating or protecting the interests of poorer people. On the other hand, the modern legal systems have not been solely concerned with procedural justice or with deploying courts and lawyers as agents of social mediation and reform. The principal agents of reform have been governments, using social welfare and economic policies, administrative law and legislation to pursue a greater degree of social justice as between 'rich' and 'poor'. The legal system has been used

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1167 Ibid.

1168 N Naffine, *Law and the Sexes: Explorations in feminist jurisprudence*, (1990) at 15.

1169 NSW PD 1943 Vol CLXX at 2709.

with the intention of ameliorating and improving the social well-being of poorer people, while simultaneously serving the 'rich' and powerful. It has, moreover, been used to administer access to the various material benefits in education, health, welfare, wage regulation, employment and public infrastructure which the welfare state has distributed to its citizens.

Conclusion

It remains to consider how this chapter has contributed to the three objectives defined at the beginning of Part II. The first objective was to complete the explanatory 'gap' in our understanding of the origins of the Australian post-war experience and its social significance. In Chapter Five, we noted that this 'gap' arose because the institutional and ideological record portrayed in Part I explained developments in legal aid in a 'legal' context, i.e., it explained the 'story' of legal aid within the schema and ideals of the modern Australian legal system. Thus, we concluded that it was not possible to adequately explain either the origins of the scheme or its significance in Australian society 'within' this self-referential framework.[1170] We also concluded that the 'gap' could not be overcome merely by adding the other originating factors identified in Chapters Four and Five to the explanatory equation. For neither the ideological context of the Australian experience nor the background political actors, forces and events of 1973-76 contested the role and functions of 'modern Australian law'.[1171]

This chapter has remedied the explanatory 'gap' in our understanding of the Australian post-war experience. Its 'revisiting' of the cross-national experience has shown its national scheme to have similar origins to the post-war legal aid schemes in comparable welfare capitalist states. The originating factors identified in Chapters Four and Five, i.e., the post-war changes and trends in public policy, politics, the legal profession, and the lawyers' services industry, played an important background role. As did the presence and social penetration of the liberal legal centralist alliance, and the success of governments and the legal profession in dictating the construction of 'law' in Australian society in the 1950s, 1960s and early 1970s. Similarly, the more immediate background forces in the politics associated with the embryonic national scheme in 1973-75 were also clearly influential. However, this chapter has shown that the catalyst in the post-war schemes was a change in public policy in the participant welfare states. The hopes and dreams of contemporary social reformers and lawyers played a part, but in the end the Australian post-war scheme as elsewhere was, as Regan explains:

> ... merely one example of the new publicly-funded welfare programs which were part of a profound change in the role of governments to one of actively promoting the

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1170 Above at pp 109-110.

1171 Above at pp 118-132.

> citizens well-being by funding a range of welfare programs, including health, housing [and] income maintenance".[1172]

The pattern of significance in the Australian scheme was also similar to comparable societies. The welfare state, public administration, the organised legal profession and lawyers shared in its 'benefits'. So indisputably and importantly did poorer Australians, especially those in need of legal advice, duty lawyer services and lawyer representation in family law and criminal law proceedings. However, as elsewhere in the Anglo-American world, the real and lasting 'beneficiary' of the post-war experience was the legal system and 'modern Australian law'. The national scheme 'bolstered' the former, and consolidated the political interests behind the latter. The result was to demonstrate the continuing hegemony of governments, the courts, judges, the organised legal profession and lawyers in the regulation of mid-1970s Australian society.

The second objective of Part II was to defend and explain the opening contention of the thesis, i.e., that revisiting the origins and significance of the post-war experience holds the key to determining whether fair and effective access to law is a feasible expectation of contemporary Australian society. This chapter has defended and explained this contention in three ways. In the first place, it located the origins of the national scheme in public policy thereby confirming its significance as an 'intervention' or 'response' of the post-war welfare state. As we described in Chapter One, this 'intervention' is conventionally interpreted as the first coordinated response of the Australian welfare state to the legal problems faced by its poorer citizens. In revisiting the post-war experience we have suggested the motives of the state were more diverse, and the significance of legal aid more socially ambiguous. In both interpretations, however, the national scheme was the 'product' of a coordinated state response, and thus its lessons are relevant to whatever future 'interventions' governments might contemplate. Moreover, irrespective of the conclusions reached in this chapter, the national scheme continues to be perceived as a state 'response' to improve 'access to law' by Australian governments and citizens alike.

Secondly, the analysis in the chapter provided us with a 'profile' of the politics of law in Australian society in the mid-1970s. The 'profile' reveals a society which the liberal legal centralist alliance, its configurations of modern government and social construction of 'law' were paramount. Australia was very much a model of a modern society governed under the maxims of 'modern Anglo-American law'. The 'profile' also revealed a welfare state willing, for whatever combination of reasons, to 'intervene' in the legal services system to organise and subsidise lawyers' services to benefit its poorer citizens. Since the mid-1970s, however, the social circumstances affecting the politics of law in Australia have changed. Judges and lawyers now enjoy a diminished hegemony, and governments appear to be neither as committed to the alliance nor to legal aid or its ideals. Yet, as we noted in Chapter One, there are ongoing and unresolved 'problems' in adequate provision of legal aid,

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[1172] F Regan. above n 858 at 5.

'access to law' and citizens' access to the legal system. By revisiting the post-war experience, and 'de-constructing' its origins and dissecting its significance, this chapter has articulated a 'benchmark' for understanding these new 'problems'. It has told us what Australian law was 'like' in the mid-1970s and 'why' Australian governments 'intervened' to administer a national legal aid scheme. We have a base from which to 'measure' what changed in the 1980s and early 1990s, and a political matrix in which to portray 'how' those changes occurred. Revisiting the post-war experience has provided an analytical platform fixed in time and space from which to consider the Australian 'access to justice' response.

Thirdly, it has also provided us with an explanatory 'key' for unlocking the origins and significance of this second 'response' to the problems of 'access to law'. In Chapter Six, we first applied the analytical 'tools' of its revised analytical framework to develop an alternative explanation of the origins of modern legal aid. This chapter used those same 'tools' to reveal the 'benefits' of revisiting the post-war experience. In doing so, it demonstrated the 'value' of the revised analytical framework as an explanatory model of legal development and change. The social circumstances of the politics of 'access to law' in Australia may have changed since the 1970s, but not so the constitution of its welfare state, legal system or modern legal domain. The explanatory model of the revised analytical framework is prima facie equally applicable to examining the origins of the 'new' problems in 'access to law' in Australian society in the 1980s, and the significance of the federal 'access to justice' response of the early 1990s. Thus, through 'revisiting' in this chapter, we have equipped ourselves with an explanatory 'key' to pursue the lessons of the post-war experience of legal aid in the context of 'access to justice' in Part III below.

Part III:
The Lessons of the Post-War Experience

Chapter Eight
Making the 'Access to Justice' Response Transparent*

> In the past decade, Australia has experienced a fundamental restructuring and strengthening of the economy and a parallel strengthening of social justice and democratic rights. Australians have access to the fundamental social services of universal education and universal health care. We have a safety net of social security benefits to sustain us through periods of unemployment or illness. We also have the right to income support when we are unable to work due to age or disability. In key areas of public life, equality of opportunity is protected by law. With the help of community education campaigns, the message is getting across that discrimination, whether at work or in other areas of public life, is unacceptable and will not be tolerated. Government policies across the whole spectrum of community life are oriented towards enabling our citizens to participate fully in the life of the nation.
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> The Rt Hon Paul Keating, Prime Minister in Attorney-General's Department, *The Justice Statement*, (1995) at 1

Introduction

Part III proceeds to demonstrate 'why' and 'how' the lessons of re-visiting the post-war experience enable us to better assess the feasibility of achieving fair and effective access to law. It begins by applying the insights, 'benchmarks' and analytical methodology of Part II to reconsider the origins of the new 'problems' in 'access to justice', the jettisoning of the legal aid response and the significance of the 'access to justice' response of the Keating Government. In doing so, Part III allows us to find answers to the remaining unanswered questions of the NLAAC report, i.e., those in the fourth category listed in Chapter One, which stemmed from its release in mid-1990.[1173] Part III concludes by briefly considering the implications of the thesis for the feasibility of achieving fair and effective access to law in the contemporary Australian welfare state.

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* A draft version of this chapter was presented as a paper entitled "Beyond the 'law' frontier: The meaning and significance of the 'access to justice' phenomenon in contemporary Australian society" at the Fourth European Conference on Legal Professions, Peyresq, France, 17-19 July 1996.

1173 Above at pp 8-9. Two of the questions in this category related to the release of the report. First, why were the major actors in the national scheme - especially the Federal Government - so obviously disinterested in the findings and recommendations of the NLAAC report? Secondly, and more importantly, why had the star of legal aid, so bright in the social firmament of the 1970s, faded so quickly in the 1980s? The other question related to the adoption of the 'access to justice' response in 1993. Why did this policy shift occur? Why had the Keating Government replaced legal aid and its ideals with an 'access to justice' response - and what did this signify for popular access to law in the Australian welfare state?

This chapter begins by describing the circumstances in which the Keating Government decided to adopt an 'access to justice' approach in 1993. It outlines the reasons behind the decision, and how the AJAC construed its task as an investigatory committee. This first part of the chapter then contextualises the Australian response, noting its links with the 'access to justice' approach as defined by Cappelletti and Garth and other liberal scholars. It also reminds us of the demonstrated shortcomings of liberal analyses of legal developments in the welfare state and highlights the paradoxes in the justifications advanced by the Keating Government to adopt an 'access to justice' policy.

The chapter then proceeds to demonstrate 'why' and 'how' the lessons of revisiting the post-war experience of legal aid enable us to better assess the feasibility of achieving fair and effective access to law. It begins by exploring the wider social context of the conclusion reached in Chapter Seven that the post-war experience indicated the integrity of the liberal legal centralist alliance, and the continued hegemony of its 'law' and actors in Australian society. This part of the chapter defends the proposition that the period from the mid-1970s until the early 1980s saw the twilight of the modern configurations of Australian law and government. Thereafter, as the following part demonstrates, Australian society saw the fissuring of these configurations, through the sea change in the political economy of the welfare state in the mid-1980s, the reorganisation of the welfare state and growing state intervention in the affairs of the legal profession.

The result was to change the politics of law in Australian society. The chapter demonstrates 'how' and 'why' this occurred, by reference to the fragmenting of the liberal legal centralist alliance, the emergence of new paradigms of law and government, changes to the politics of the central legal domain and the dilution of social citizenship. It then continues to explain how portraying these legal transformations in the 'new' Australian welfare state of the late 1980s and early 1990s allows us to give greater transparency to the 'access to justice' response.

The final part of the chapter identifies the real and ongoing problems in popular access to the legal system, and the popular and other perceptions of its growing inaccessibility which lay behind the new 'problems' in 'access to justice' in Australian society. It also reviews the reasons 'why' the Keating Government acted, both to adopt an 'access to justice' response and to jettison the legal aid response, which Australian governments had pursued as the premier national policy of access to law since the mid-1970s. In doing so, the analysis in the chapter suggests that the government and its advisers acted from mixed motives, some of which genuinely pursued the social ideals of 'modern Australian law', and other less noble motives consistent with the principles of social governance in the 'new' Australian welfare state. The chapter concludes by considering some of the implications of this new transparency.

The 'Access to Justice' Response

As Chapter One first indicated, the 'access to justice' response was the second response of the post-war welfare state to facilitating citizens' access to the legal system. In 1993, the Keating Government commissioned the AJAC to recommend reforms to legal services to "enhance access to justice and to render the system fairer, more efficient and more effective."[1174] In part, its decision reflected the impact of the new consciousness of the cost of legal transactions and the socio-economic significance of adequate access to legal services, which had emerged in Australia in the mid-1980s.[1175] The decision also reflected a growing public perception that it was no longer just the 'poor' who were disadvantaged by inadequate access to the legal system, but increasing numbers of "average income Australians".[1176] The pursuit of an 'access to justice' response also reflected the political interest which these issues had attracted nationally - especially in the Senate - and the resulting 'Cost of Justice' inquiry.[1177] However, the Keating Government had its own concerns, as its Minister of Justice revealed when establishing the AJAC, referring to:

> ... the pressing need to address the "crisis of confidence" in the institutions fundamental to the rule of law in a democratic society. Opinion polls in Australia had suggested a "corrosion of faith" in the integrity of most of our social, corporate, economic and political institutions. In his view, public cynicism had extended to the very institutions at the heart of the justice system - the legal profession and the judiciary. The Minister argued that the erosion of public confidence in the legal profession and the judiciary is a matter of critical importance, since:
>
> > "the rule of law can, in the end, only be maintained if it rests on the absolute confidence and support of the people. The people must believe that the justice system will given them a fair hearing, that rules and procedures will be simple and work in the interests of justice, not against it, and that the law will be applied without fear or favour to the strong and the weak alike."[1178]

These institutional 'crises' were not the government's only concern. The 1993-94 social justice strategy of the Keating Government recorded its belief that all "Australians deserve a fair deal from the justice system ... Access to law and justice should be fair, simple and affordable".[1179] These latter concerns were shared by the AJAC itself. Its members, in describing the purpose of the inquiry and the approach they pursued in their investigations, said:

> We think that the time has come for concerted action to make justice more accessible to all Australians ... [and that] three objectives that a national strategy for improving

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1174 Access to Justice Advisory Committee, above n 5 at v: above at p 3-4.

1175 Above at p 3-4.

1176 National Legal Aid Advisory Committee. above n 7 at 182: above at p 2-3.

1177 Above at p 3.

1178 Access to Justice Advisory Committee, above n 5 at 3, also quoting from an address by the Minister, The Hon Duncan Kerr MP to Annual Regional Conference of the Law Society of New South Wales, 20 October 1993.

1179 Ibid at 5, citing the Commonwealth *Social Justice Strategy 1993-1994* at 15.

> access to justice should attempt to achieve [are] equality of access to legal services ... national equity [and] equality before the law."[1180]

In other words, the AJAC interpreted its role in the 'access to justice' inquiry in terms of the ideals of 'modern Anglo-Australian law' and the liberal legalist ideals which were abroad elsewhere in the post-war Western world. In both contexts, 'access to justice' was used to describe the "two basic purposes" of the modern Western national legal systems: one, they "must be equally accessible to all; and, two, their processes must lead to results that are individually and socially just"[1181]

Contextualising the 'Access to Justice' Response

How can we explain the origins of the 'access to justice' response in the context of the welfare state? Why did the Federal Government take this action? Why did it adopt an 'access to justice' approach, given the mid-1970s rhetoric of its predecessors supporting 'legal aid' and the relative success of the national scheme in the 1980s?[1182]

There is one explanation which is consistent with the ideals of promoting fair and effective citizens' access to law evident in Commonwealth social justice strategy and with the objectives identified by the AJAC. We could say that the early 1990s were the time when the "access-to-justice approach" made its first appearance in Australian society.[1183] For Cappelletti and the many Western scholars who subscribed to his global study in the late-1970s, this 'approach' marked the 'third wave' of post-war reforms taking Western societies towards equal and effective access to law.[1184] Like legal aid, which had been the 'first wave', the 'access to justice' approach was said to have originated in the new social regimes in pre-war Western society defining citizens' 'rights' and legitimate expectations of fundamental well-being.[1185]

In the 1950s, 1960s and 1970s, according to Cappelletti and Garth, some governments recognised many of these basic 'rights' and made them legally enforceable. Official transformation gave renewed significance to the problem of

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1180 Ibid at 4.

1181 M Cappelletti and B Garth, above n 2 at 6.

1182 National Legal aid Advisory Committee, above n 7 at 104-108.

1183 M Cappelletti and B Garth, above n 2 at xi.

1184 Ibid at x-xi. In the late-1970s, Cappelletti was the general editor of a four volume series produced by the Florence Access to Justice Project comprising a worldwide comparative investigation of the "legal, economic, social and psychological obstacles which make it difficult or impossible for many to make use of the "legal system "and, therefore of their right to liberty": M Cappelletti & B Garth (eds), above n 2 at vii. M Cappelletti & J Weisner (eds), *Access to Justice: Promising Institutions*, Vol 2 (1978), M Cappelletti & B Garth (eds), *Access to Justice: Emerging Issues and Perspectives*, Vol 3, (1978) & K F Koch (ed), *Access to Justice: Anthropological Perspectives*, Vol 4, (Milan, Dott A Giuffre, 1978).

1185 M Cappelletti & B Garth (eds), above n 2 at 7-8. A brief "second wave", according to Cappelletti and Garth, followed legal aid in the 1970s. This was public advocacy, a phase of "reforms aimed at providing legal representation for 'diffuse' interests, especially in the areas of consumer and environmental protection" (ibid at 21).

mass inequality in popular access to the modern legal systems of the post-war welfare states. For effective access was pivotal, if these new, fundamental legal rights were to be socially effective. Consequently, Western countries are said to have begun to recognise the existence of effective 'access to justice' 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".[1186]

As a contextual option, the 'access to justice' approach was - like its predecessors - seen as concerned with bridging the 'gap' between citizens and law. Its approach differed, however, from both legal aid and public advocacy in its conception of the causes of the 'gap' and the remedies available. The 'access to justice' approach did not identify the financial cost and accessibility of lawyers' services as the sole cause of the problems in fair and effective access to law in post-war Western societies. Whilst embracing "the earlier approaches", the 'access to justice' approach went "much beyond [them] ... thus representing an attempt to attack access barriers in a more articulate and comprehensive manner".[1187] The 'access to justice' approach was, as Cappelletti describes, "a multi-faceted response to perhaps the most basic challenge of our modern legal systems ... who has access to that justice system, i.e., 'justice for whom?'"[1188]

The AJAC inquiry did indeed take a multi-faceted approach. Its report traversed the lawyers' services market, information for consumers, regulation of legal costs, contingency fees, professional complaints and discipline, tax deductibility of legal costs, legal aid reforms, alternative funding for litigation, dispute resolution outside the courts, court reform, including fees, civil procedures, criminal proceedings, dress and the electronic media, legislation and harmonisation of laws affecting access to justice.[1189] Therefore, it is open to us to explain the origins of the Australian response in the context of the 'access to justice' approach model. If we accept Cappelletti and Garth's time table, this response took place some 10 or 15 years later than other Western societies, where the 'access to justice' approach was first evident in the early 1970s. But post-war Australian society was also 'behind' with legal aid, so lateness in itself does not disqualify the 'access to justice' approach as an explanatory model.

However, explaining the 'access to justice' response as the moment when the 'third wave' of a post-war movement towards equal access to law hit Australia is unconvincing. As an explanatory model, the 'access to justice' approach originates from the same 'stable' as the liberal legalist and legal centralist accounts of the post-war experience of legal aid. Therefore, for the reasons we outlined in Chapter Six, it is an inadequate contextual model, i.e., the analytical framework of the 'access to

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1186 Ibid at 8-9.

1187 Ibid at 21.

1188 Ibid at viii.

1189 Access to Justice Advisory Committee, above n 5 at 65-497.

justice' approach is apolitical, acontextual and ignores the politics of modern law in the welfare state.[1190]

Furthermore, in the Australian context, the model is also unconvincing because the 'access to justice' response had paradoxical features. The extract from the ministerial statement establishing the AJAC above revealed the Keating Government as primarily concerned with institutional problems - "a crisis of confidence in the institutions fundamental to the rule of law"- in Australian society.[1191] The Australian people were said to have 'lost faith' in the "integrity of most of [its] social, corporate, economic and political institutions."[1192] In particular, the Minister for Justice believed that the public had become cynical about the role of "the very institutions at the heart of the justice system - the legal profession and the judiciary".[1193]

Therein lies the paradox of the Australian experience. Ostensibly, the 'access to justice' response was aimed at improving the quality of citizens' access to the legal system, yet at the same time the government appeared to doubt the social efficacy of the key institutions of its system of civil and criminal justice - the courts - and the judges and the legal profession. The latter were not only the principal 'performers' in the justice system and the courts, but they had also acted as the stage managers and entrepreneurs of 'modern Australian law'. Even more importantly, they had also served as the intimate 'legal' allies of modern Australian governments. The Minister's statement, moreover, was even more remarkable because it contained more than a hint that the judges and the legal profession were somehow culpable or blameworthy in the institutional 'crises' afflicting Australian society. This fact may account for the often ambivalent attitude of the latter towards the government's response and the AJAC report.

Thus, the Australian 'access to justice' response had two aspects. First, there was the desire of the Keating Government to improve equality in citizens' 'access to justice', and fairness and accessibility in the legal system. The other aspect was its perception of a 'crisis' in the institutions of Australian society. A 'crisis' which the Keating Government identified with a failure in the social performance of courts, judges and the legal profession. Consequently, we must understand both these aspects of the 'access to justice' response, if we are to explain its origins in the context of the early 1990s Australian welfare state.

The explanatory 'key' to the 'access to justice' response lies in the post-war experience of legal aid, as we explained regarding its origins and significance in Part II. In particular, revisiting the post-war experience provided us with 'benchmarks' of the 'condition' of the politics of law in the mid-1970s, and with a model of legal development or change in the welfare state. We can deploy these 'tools' to

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1190 Above at pp 142 & 147-148.

1191 Access to Justice Advisory Committee, above n 5 at 3.

1192 Ibid.

1193 Ibid.

investigate the changes in the politics of Australian law in the 1980s and to render the adoption of the 'access to justice' response more transparent.

The Twilight of the Modern Configurations of Law

In Part II, we showed that the post-war experience of legal aid functioned as a 'litmus test' of the integrity of the Australian version of the liberal legal centralist alliance.[1194] It measured the 'health' or vitality of two central components in the legal regulation of the post-war welfare state. The first was the alliance between the state, the courts and the legal profession, which we have identified as the basis of the construction of 'law' in modern Australian society.[1195] The post-war experience indicated that the core elements of the liberal legal centralist alliance - its social construction of 'law' and 'delegation' of the administration of civil and criminal justice to the legal profession - were essentially intact. The establishment of the national scheme necessitated some 'internal' readjustment in the relationship between the parties. It saw Australian governments intervene in the provision of lawyers' services, an arena which was originally 'agreed' to be the realm of the legal profession. However, this intervention, whilst unprecedented in scale and intent, did not significantly disturb professional control over the delivery of lawyers' services, or the role of lawyers in the political economy of the welfare state. The second central component which the post-war experience 'tested' was the hegemony of 'modern Australian law'. The 'test' revealed that its court-centred, lawyer-administered paradigms remained the dominant and omnipresent conceptions of 'law' in mid-1970s Australian society.

However, neither the alliance, its 'distribution' of responsibility for legal services nor its social construction of 'law' existed in isolation. The alliance and its political relationships were imbricated in the overall configuration of modern law and government, including its legal system, the administration of government and social governance. The mid-1970s Australian system of government remained monarchical and parliamentary, its citizens subjects of the British Crown, living under the 'rule of law' in a democratic society administered by state officials in the public interest, whose actions were supervised by the courts. Consequently, in reaffirming the social significance of the alliance and its 'law', the post-war experience was also 'testing' this system. The 'test' demonstrated the integrity of its configurations of modern law and government and affirmed the continuing significance of its regulatory and civic relationships in mid-1970s Australian society. However, in Chapter Seven we warned that the post-war experience of legal aid was the zenith of the liberal legal centralist alliance.[1196] The alliance was not alone. The years immediately following the establishment of the national scheme also proved to be the Indian Summer of the modern configurations of law and government in the Australian welfare state.

1194 Above at pp 228-229.

1195 Above at pp 183-188.

1196 Above at p 229.

The changes which brought about this decline were not immediately obvious. In the late 1970s, there were no dramatic changes to the constitution of the core institutions of the Australian legal system. Neither were there to be any such changes in the 1980s. In fact, both the Whitlam and Fraser Federal Governments had sought to enhance the operation of the national legal system. The former, as we saw in Chapter Five, was distinguished by its interest in law reform.[1197] During its term of office, there were a number of significant changes, including the establishment of a Commonwealth law reform commission in 1973.[1198] Three years later, the Fraser Government created a new superior federal court, and later streamlined the existing, archaic process of judicial review of federal administrative action.[1199] By 1983, it had also introduced an ombudsman and freedom of information legislation.[1200] National interest in 'improving' the legal system was mirrored in the States, where, in some cases, coordinated programs of law reform had been underway since the late 1960s.[1201]

Furthermore, the size and scope of the Australian legal system had continued to grow. Its growth was in part a product of new directions in Commonwealth social polices and functions. In 1973-75, the new national social welfare programs introduced by the Whitlam Government had increased the size and functions of Commonwealth departments and agencies.[1202] Try as it might, the Fraser Government was unable to significantly reduce the scale of the 'social' machinery of the federal welfare state during its six year tenure.[1203] However, the growth in the legal system was not only a product of expanded social welfare provision. Commonwealth intervention in national economic affairs grew steadily throughout the 1970s, adding to the regulatory apparatus of the post-war welfare state.[1204] Increasingly, moreover, governments deployed executive, regulatory, commodity, service agencies, research bodies and advisory bodies as instruments of regulation and administration.[1205]

However, all was not as it appeared to be. In the first place, there was a major element of 'catch-up' in these 'improvements' to the legal system, especially in the

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1197 Above at p 110.

1198 Law Reform Commission Act 1973 (Cth): M Crommelin and G Evans, above n 492 at 45-52.

1199 Administrative Decisions (Judicial Review) Act 1977.

1200 Ombudsman Act 1976 (Cth).

1201 The Law Reform Commission Australia, *The Law Reform Digest*, (1983) at xii-xvi.

1202 *Report of the Review of Commonwealth Administration*, (1983), paras 2.3-2.4 at 8.

1203 M A Jones, above n 134 at 65.

1204 Eg. the reform of trade practices legislation, banking industry regulation, attempts to control prices and incomes, the enactment of securities legislation and involvement in the mineral and energy industry: M Crommelin and G Evans, above n 492 at 25-33 & 54-57.

1205 In the early 1980s, a survey of 105 Commonwealth statutory authorities conducted for the Royal Commission into Government Administration found 25 had been established between 1901-41, 16 during World War II and its aftermath and 31 between 1951 and 1970. In 1971-74, however, 34 new authorities were established, mainly in the executive, research and advisory groups: Royal Commission on Australian Government Administration, Appendices to Report, Vol 1, at 322 & Table 1 at 348.

early to mid-1970s. In the case of the Whitlam administration, many of its law reform initiatives responded to the neglect of previous post-war Federal governments.[1206] Changes to reflect new styles of legal regulation appropriate to the requirements of government in post-war society were necessary and overdue, not only in social welfare, like legal aid and family law, but also in business. The 1960s had been a decade of significant change in the national economy.[1207] 'Much was required to be done to achieve effective public intervention in the legal regulation of business activity in Australian welfare capitalism.[1208] Other 'improvements' to the legal system in the mid-1970s - like the establishment of the Federal Court, the Administrative Decisions (Judicial Review) Act 1977 (Cth) and the Ombudsman Act 1976 - had their genesis either in the 1960s or early in the 1970s.[1209]

Furthermore, the new, national 'social' functions of the welfare state simply meant that Australia had 'caught-up' with post-war developments in comparable welfare capitalist societies. Countries like England, The Netherlands and the United States had already significantly increased national expenditure on social security, health, education and legal aid. Neither was the emphasis on administrative law and its institutions in the legal system in the 1970s a novel development. Legal regulation for the purposes of the welfare state had been a feature of modern Australian law and government since the 1880s.[1210] Nor was this the first time that it had so rapidly grown in size and significance. Comparable developments had occurred in 1941-45, even if fading somewhat in social significance at the end of the war, and in the late 1940s and early 1950s.[1211]

Secondly, almost as soon as it had left its legal imprint on Australian society, the mid-1970s version of the post-war welfare state began its long retreat. One reason for this was that the expansion of its social functions in 1973-75 had coincided with the end of the great period of economic growth in the post-war Western world.[1212] In Australia - and many welfare capitalist states - the result was a reassessment of the direction of public policy, the role of the state and existing commitments to social expenditure.[1213] Reassessment did not always or inevitably mean retreat from public expenditure and the functions of the post-war welfare states, but it did so in

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1206 As the law reform proposals in the 1972 election platform of the Australian Labor Party indicates: G Hawker, above n 486 at 62.

1207 O Mendelsohn & M Lippman, above n 205 at 28-80.

1208 As the 'interventions' and attempted 'interventions' of the Whitlam Government over 1973-75 indicated: M Crommelin and G Evans, above n 492 at 25-37 & 52-64.

1209 Eg, the establishment of a federal superior court was in contemplation in the mid-1960s: H Reps Deb 1965 Vol 47 at 1120. In 1971, the Kerr Committee investigated the need for reform of the review of Commonwealth administrative action and recommended the establishment of an appeals tribunal, a general counsel for grievances, a review council, an administrative procedure statute and a codified judicial review system: R Tomasic & D Fleming, *Australian Administrative Law*, (1991) at 1.

1210 Above at pp 28-29.

1211 G E Caiden, above n 251 at 282: G Sawer, above n 240 at 184.

1212 R Mishra, *The Welfare State in Crisis*, (1984) at 20.

1213 F G Castles, above n 821 at 492.

Australia.[1214] Since the first days of the Fraser Government in late 1975, the constant refrain of Australian governments has been one of 'cuts' in public spending and of reductions in public functions.

Indeed, the post-1975 experience of the national legal aid scheme instances these processes of retreat and reassessment. The 1976 inter-governmental agreement reflected the 'new Federalism' of the Fraser Government. This was a plan designed to limit Commonwealth expenditure and spread governmental functions amongst the States.[1215] Moreover, the subsequent history of Commonwealth involvement in the national scheme demonstrates that it was no longer willing to perform the central management and policy-making role envisaged in the inter-governmental agreements.[1216] In the late 1970s, the Commonwealth Legal Aid Commission was never able to fulfil the supervisory role contemplated by its constituent legislation, being constantly plagued with infrastructure, staffing and funding problems. These problems were symptomatic of a reassessment of the Commonwealth commitment to involvement in the national scheme. When the Commission was abolished in 1981, its role was assumed by a succession of statutory committees, comprised of part-time members, with ever-diminishing resources and real functions.[1217]

By the early 1980s, Federal Governments had abandoned any pretension at performing a central management role in national legal aid. Instead, their attentions were focused, through a series of reconfigured administrative organs in the Commonwealth Attorney-General's Department, upon managing and controlling expenditure. In 1983, the Hawke Government established a task force to "examine legal aid delivery in all States and Territories to ensure that, where practicable, there is uniformity of approach and that cost-effective practices are employed in relation to Commonwealth-funded legal aid."[1218] In itself, this was not an undesirable development. There were 'open-ended' aspects to the first Commonwealth-State agreements, which made it difficult for Federal Governments to monitor expenditure in the national scheme.[1219] But problems in monitoring expenditure also meant problems in control, and controlling Commonwealth expenditure in the national

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1214 Below at pp 251-254.

1215 M A Jones, above n 134 at 284.

1216 See Apendix "A".

1217 The Commonwealth Legal Aid Commission was replaced by the Commonwealth Legal Aid Council. The Commonwealth Legal Aid Commission Amendment Act 1981 (Cth) gave the Council diminished functions, resources and research capacity, seriously eroding the policy-making base of the Commonwealth in national legal aid administration. In 1987, the Council was replaced by the National Legal Aid Representative Council, abolished in 1991, and the NLAAC, which was abolished in the mid-1990s. This reorganisation did little to redress the defects in the Commonwealth supervisory role in the national scheme.

1218 Attorney-General's Department, Legal Aid Task Force, *Discussion Paper, November 1984*, (1985), para. 1.1 at 1.

1219 National Legal Aid Advisory Committee, above n 7 at 11-12.

scheme became the preoccupation of its managing officials and Federal Governments.[1220]

Thirdly, the period from the mid-1970s until the early 1980s also saw shifts in the politics of modern Australian law. These changes were not apparent in the machinery of the legal system or the retreat of the welfare state. They were, however, at least equally important in signalling a movement away from the modern configurations of law and government in Australian society. One arena of change was the legal domain. The expansion of the legal system associated with the growth of the welfare state saw a corresponding increase in the significance of modern centralist law. This increase, however, occurred largely at the expense of its judicial-types of law. The 'weapons of choice' of the welfare state - in Australia as elsewhere - are legislative and administrative types of centralist law. In the 1970s, the volume of legislation and administrative law in Australian society dramatically increased. The national legal aid scheme, and its legislative structures and financial and other eligibility guidelines, was but a minor instance compared to the great legislative and administrative schemes in social security, taxation, health and education.

The late 1970s also saw the beginnings of a reversal in the fortunes of administrative law, its legal system and modes of regulation. In judicial review proceedings and the interpretation of Commonwealth regulatory legislation, the actual tasks performed by the judges of the newly-constituted Federal Court were indistinguishable from the functions of other senior civil servants. It often became increasingly difficult for the judges to convincingly demarcate 'law', public administration and 'policy'. Furthermore, the 'new administrative law' of the 1970s - the changes to the 'legal' regulation of administrative action - was not only concerned with judicial review. The Whitlam Government had also introduced a federal administrative appeals tribunal.[1221] The Administrative Appeals Tribunal was incorporated into public administration - although presided over by a judge - and was empowered to review administrative decision-making on its 'merits', in accordance with 'the law', but not constrained by the ideology of judicial review. This further blurred the distinction between 'law' and 'administration' in modern Australian government.

Furthermore, the establishment of investigative, dispute resolving agencies like the Commonwealth Ombudsman and the Human Rights Commission gave renewed significance to administrative law and its techniques. These and similar types of new agencies were legally required to pursue non-adversarial, purposive, fact-finding approaches to problem-solving. Australian governments began to give 'open' legislative sanction to administrative styles of civil dispute resolution and legal regulation. Generally, the expansion of governmental functions generated new bodies of legal rights, expectations, duties and processes, greatly increasing the popular scope and social penetration of Commonwealth administrative law. Its changed fortunes led to a growing confidence of its senior 'architects' and actors to

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1220 Ibid.

1221 Administrative Appeals Tribunal Act 1975 (Cth).

speak out against the influence of the judges and lawyers, as their resistance to the mid-1970s reforms of the review of administrative action demonstrated.[1222]

Australian governments also began to take an interest in the affairs of the legal profession and lawyers.[1223] The national legal aid scheme itself, as we have seen, saw governments intervene in an arena which had substantially been the preserve of lawyers in the post-war period. In the late 1970s, however, their interest in the profession began to go beyond legal aid. The Law Reform Commission of New South Wales began a major inquiry into the organisation of the profession, and the regulation and cost of lawyers' work.[1224] Governments had begun to investigate the organisation and 'terms' of lawyers' work, broaching what had hitherto been an essential part of its modern alliance with the legal profession. State interest was matched by a few - but significant - pieces of research funded by the law foundations in Victoria and New South Wales.[1225] Interest groups also began to consider the future role of the legal profession.[1226] These 'interventionist' trends continued into the 1980s and would culminate in the AJAC report, its recommendations for increasing deregulation of lawyers' work and the gradual relinquishment of the 'monopoly' by the profession in the late 1990s.[1227]

Finally, the period surrounding the post-war experience of legal aid also saw the transformative changes affecting citizenship. In the mid-1970s, there was a change to the expectations which had underpinned civil relations in modern Australian society. Previously, the relationship between the citizen and the state had been defined predominantly in terms of political rights to participate in public life.[1228] Civil rights existed, but largely by default, with little recognition at common law and in few, overt instances in the Australian Constitution.[1229] The changed social

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1222 P Bayne, "Administrative Law" in J Halligan & R Wettenhall (eds), *Hawke's Third Government: Australian Commonwealth Administration 1987-1990*, (1992) at 91-93; P Bayne, *Freedom of Information*, (1984) at 14-18.

1223 D Weisbrot, above n 461 at 3-4.

1224 In 1977-78, a number of discussion papers were circulated by the Commission, including work on professional complaints and discipline, the 'division' into solicitors and barristers, continuing legal education, the cost of services, regulation, demography, advertising and specialist certification. The inquiry culminated with publication of a series of reports in the early 1980s.

1225 M Hetherton, above n 473; R Tomasic, *Law, Lawyers and the Community*, (1976), R Tomasic, *Lawyers and the Community*, (1978), R Tomasic & C Bullard, *Lawyers and their Work in New South Wales*, (1978) & R Tomasic (ed), *Understanding Lawyers*, (1978).

1226 Eg, "Reforming the Organisation of the Legal Profession: Is the Victorian Profession prepared?", papers from a conference sponsored by the La Trobe University Department of Legal Studies and Legal Profession Committee, Australian Legal Workers Group (Victoria), Melbourne, June 1982.

1227 Eg, Senate Standing Committee on Legal and Constitutional Affairs, Cost of Legal Services and Litigation, *Access to Legal Services: The Role of Market Forces*, (February 1992) & Senate Standing Committee on Legal and Constitutional Affairs, Cost of Legal Services and Litigation, Discussion Paper No. 8, *The Legal Profession: A Case for Microeconomic Reform*, (May 1992): Access to Justice Advisory Committee, Access to Justice: An Action Plan, above n 5 at 65-221 reviews comparable types of studies in the Australian States in the early 1990s.

1228 W Kymlicka & W Norman, above n 47 at 354.

1229 P Bailey, *Human Rights: Australian in an International Context*, (1990) at 79-105.

expectations of citizenship had a variety of causes. One influence were the pressures for social and cultural change which had accompanied the election of the Whitlam Government in 1972.[1230] Australians and their opinion-makers now expressed expectations of 20th century modern "social rights", like "public education, health care, unemployment insurance and old-age pensions."[1231] Another cause was that the expansion of health, education and welfare services had encouraged popular awareness of the social 'rights' of citizenship, directly linking those expectations to the state.

Allied to these changed expectations were new profiles in the civil rights of citizenship. In 1980, Australia agreed to ratify the International Covenant on Civil and Political Rights.[1232] This development, which also had its origins in the late 1960s, was preceded by the establishment of machinery to "promote ... the better observance of human rights generally".[1233] Proposals for the legal protection of human rights had first been advanced by the Whitlam Government in 1973, but were unsuccessful.[1234] By 1981, however, the Fraser Government had overcome the political obstacles, and Commonwealth human rights legislation was enacted to administer its new sex and racial discrimination laws, and to generally promote the objectives of the International Covenant on Civil and Political Rights.[1235]

These changes to the modern configuration of law and government occurred in the context of a new national political profile of the Australian welfare state, its governments and legal machinery. In the 1970s and early 1980s, the legal system and the relationships it 'engineered' began to matter more - and more frequently - to Australian citizens, governments and businesses. Its 'presence' was more obvious, the social 'benefits' it could bestow more delineated and its impact 'felt' more often, and in a wider variety of forums than ever before. The only Australian parallel was the experience of wartime legal regulation. On this occasion, however, the changes did not 'disappear' with peace, but constituted a new phase in legally regulating the post-war welfare state.

For these reasons, the late 1970s and early 1980s were the twilight years of law and government in the configurations which had previously served modern Australian society. The enthusiasm of the mid-1970s federal welfare state for its expanded social functions had dissipated, and generally the Australian welfare state had begun to retreat. Governments and consumers had slowly begun to voice their criticisms of the legal profession and to raise their social and economic expectations of lawyers' work. Australians had developed a new sense of their social worth and individual expectations of the state, which had equipped them with new means of asserting their social 'rights', including protecting their human rights. Administrative law, its

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1230 Above at p 77.

1231 Above at 111: W Kymlicka & W Norman, above n 47 at 355.

1232 P Bailey, above n 1229 at 108.

1233 Ibid at 147.

1234 Ibid at 106.

1235 Ibid at 112-113.

institutions and actors had begun to recontest the desirability of judicial supervision of administrative action and to publicly assert their role in the Australian legal system. Moreover, law reform had given 'open' encouragement the purposive and policy-oriented solutions of administrative law to the problems of modern legal regulation.

The Fissuring of Modern Law and Government

In themselves, however, these shifts and changes in the politics of Australian law and government were not the harbingers of the 'access to justice' response. Neither did they mark the 'end' of its modern configurations or of the social hegemony of the liberal legal centralist alliance. Nor did they 'indicate' a system of governance destined for collapse or in a condition approaching a state of 'crisis'. The shifts and changes of the late 1970s and early 1980s were instead cracks in the facade. What they indicated - as the experience of the 1970s demonstrated - was a need for ongoing repair, and even modest reconstruction, after several decades of serious neglect. At the time, it appeared that Australia was simply witnessing a new phase of modern legal regulation, with an increasingly reluctant, but nevertheless still socially responsive and responsible welfare state. A phase, moreover, in which its citizens were less passive and more assertive in their desire to match the 'promise' of 'modern Australian law' with social reality. There was to reason to believe otherwise. Indeed, in 1983, when the Fraser Government was electorally defeated, we might have expected the new government to have continued down the path of socially oriented law reform. After all, it was a Labor Party government, ostensibly with similar commitments to fair and effective citizens' access to the legal system as its predecessor in the early 1970s. However, this did not prove to be the case. The Hawke Labor Government adopted and pursued reformist policies which had the effect of fissuring the cracks which had appeared in the modern configuration of Australian law and government in the late 1970s and early 1980s.

The Sea Change in the Political Economy of the Welfare State

The Hawke Government's election was the turning point in the politics of law in the post-war Australian welfare state. Throughout the rest of the 1980s, the Hawke Government pursued economic policies which produced a sea change in its social assumptions of the welfare state. To understand 'how' this occurred, we need to first consider the basis of public policy in the pre-1983 welfare state.

Historically, in Australia - like in Canada, New Zealand, the United Kingdom and the United States - the political economy of the welfare state had been premised on "the management and manipulation of broad macroeconomic policy factors".[1236] This was different from the "countries of democratic corporatism", like the smaller Western European nations, Germany and Japan, where welfare state policy reflected "detailed and negotiated agreement between major societal interests or on

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[1236] F G Castles, above n 821 at 493.

microeconomic policy intervention".[1237] In Australia and New Zealand, moreover, the political economy of the welfare state had a distinctive focus:

> From as early as the first decade of this century, the Antipodean nations had consolidated a set of coherent and consistent policies clearly distinguishable from those of other democratic capitalist nations. Elsewhewer [*sic*] I have labelled this policy stance as the strategy of 'domestic defence'.[1238]

In Australia, according to Castles, the policy of domestic defence had three major components, "each involving strong regulative intervention in the economy, but rather little in the way of state ownership on the British model".[1239] The first component was tariff policy - or import controls - which were used to protect domestic manufacturing from overseas competition. Secondly, there was the component in the legal system whereby quasi-judicial powers of compulsory conciliation and arbitration of industrial disputes were used to regulate the labour market. The objective was to simultaneously achieve a social policy minimum - "a 'fair' wage to support a bread-winner and family" - while adjusting wage levels to reflect fluctuations caused by dependence on highly unstable primary commodity markets.[1240] The third component was the regulation of migrant intake in order to adjust labour supply, with the aim of minimising unemployment and protecting the wage levels decided on through the arbitration system.[1241] Thus, the strategy of 'domestic defence':

> ... may be characterized in terms of its "conservative social welfare function", by which any decline in real income was minimised, the government providing insurance against income loss and social peace was protected by ensuring "no significant income shall fall if that of [*sic*] other is rising".[1242]

In the 1970s, for the reasons we indicated above, most welfare capitalist countries reassessed "existing public policy strategies".[1243] In Australia, the Hawke Government continued this process, stimulated as elsewhere by "the continuation of slow economic growth".[1244] In the English-speaking welfare states, however, policy reassessment in the 1980s took a particular direction:

> Only in Australia, Canada, New Zealand, the United Kingdom and the United States was economic crisis an occasion for a major reappraisal of the role of the state, and of an attempt, either in the arena of the welfare state and/or economic regulation, to diminish the degree of public intervention that had become customary in the post-war period ... although at some level of generality, it is possible to identify common themes in an attack on the state in these countries - expenditure and taxation were seen

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1237 Ibid at 492-493.

1238 Ibid at 494 citing F G Castles, *Australian Public Policy and Economic Vulnerability*, (1988) at 91.

1239 Ibid citing F G Castles, above n 57 at 91-108.

1240 F G Castles, above n 821 at 494.

1241 Ibid.

1242 Ibid at 494-495 quoting from W M Corden, *Trade Policy and Economic Welfare*, (1974) at 108.

1243 Above at pp 246: ibid at 492.

1244 Ibid.

> as being too high, the state's direct role in production and regulation was seen as too extensive and market forces were seen as a means of enhanced efficiency[1245]

According to Castles, the reappraisal of the role of the post-war welfare state in the English-speaking countries was a product of three factors. First, it was practicable because relations between government and capital had not assumed a corporate form. Instead, the political economy of the welfare state in Australia, Canada, New Zealand, the United Kingdom and the United States was organised around a high degree of state economic regulation. Therefore, by reducing the amount of state regulation, it was within the power of governments in these countries to reorder the political economy of the post-war version of the welfare state.[1246] The second common factor was that the social climate was opportune, as Castles explains:

> ... the occasion for policy challenge and subsequent transformation of policy strategy in the 1980s was a combination of sustained low economic growth in nations which had once been rich together with poor policy effectiveness in arenas affecting popular support for the existing policy regime. This was a combination of circumstances which characterised all five English-speaking countries in the 1970s. In the period of the greatest economic crisis of the western world since the 1930s, it was in these nations, together with Denmark, that the populace had the strongest reasons for feeling that the existing policy orthodoxy had outlived any utility it had once possessed.[1247]

The third factor was that it was possible for incumbent governments in the English-speaking countries to reconsider national post-war policy orthodoxy. All, according to Castles, were able to react decisively to "popular discontent". Each was able to distance themselves from the responsibility for the administration of their national welfare state in the 1950s, 1960s and 1970s. In the 1980s, this enabled incumbent governments to jettison the existing policy orthodoxy and to reshape the political economy of the welfare state. This common factor was more important than overt ideological differences between conservative governments in Canada, Britain and the United States, and social democratic Labor governments in Australia and New Zealand, as Castles once again explains:[1248]

> In both Australia, and to a somewhat lesser degree, New Zealand, Labour had been the architect of the politics of 'domestic defence', but for most of the post-war period had been out of office and the policy stance they had helped shape was administered by their conservative opponents. In Britain, Labour had created the welfare state and presided over it for much of the 1960s and 1970s. In the US, an uninterrupted Democratic congressional hegemony could be blamed for all that was wrong with the existing policy pattern, even if that pattern had been the template for many of the policy initiatives of occasional Republic (sic) Presidents. Similarly, economic nationalism was firmly nailed to the masthead of the hegemonic Canadian Liberal Party.[1249]

1245 Ibid at 493.

1246 Ibid.

1247 Ibid at 507.

1248 Ibid at 495-496.

1249 Ibid at 509.

The reaction of these five governments differed, reflecting national differences in the role and political economy of the welfare state.[1250] Nevertheless, Castles argues that the policy reassessments can be divided into two types:

> ... a retreat from the socially-protectionist welfare state and a shift away from economic nationalism or 'domestic defence' in the form of internal economic deregulation and/or freeing up trade barriers.[1251]

The second type of policy reassessment describes the Australian experience. In the mid-1980s, the Hawke Government identified the policies of 'domestic defence' "as the primary cause of [Australia's] weak competitiveness in world markets and of persistently poor economic growth".[1252] The pattern of national policy moved away from "a big state".[1253] For governments - and their policy-advisers - it seemed that the "public generosity" of the post-war Australian welfare state "was no longer economically practicable [and] even that past generosity was amongst the causes of presents discontents". Thereafter, "the central theme for challenge of the existing role of the state was [to be] ... its regulative activities and the way in which these impeded economic competition"[1254] Throughout the remainder of the 1980s, and into the 1990s, we saw a dismantling of the post-war welfare state, and a reorientation of the role of governments.

The Reorganisation of the Welfare State

As part of its realignment of public policy, the Hawke Government set about reorganising the administration of the welfare state. In the mid-1980s, the Commonwealth system of public administration was substantially transformed. This transformation manifested itself in three principal ways. The first was the restructuring and 'reform' of the Commonwealth Public Service, including important changes in personnel management, and the terms and conditions of civil service employment.[1255] With associated downsizing, these changes were to have significant effects on the direction and administrative capacity of the welfare state.

The second transformation was in the 'culture' of public administration. The modern Anglo-Australian paradigm of regulation in the 'public interest' under the 'rule of law' which had hitherto governed the system of public administration was displaced. In its place, came the philosophy of 'New Public Management' (NPM) which would

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1250 Ibid at 493. The exceptional emphasis on privatization in Thatcher's Britain can be seen as a reaction to the particular historical manifestation of statism in that country. The Australian and New Zealand approach involved far more detailed government intervention in the economy than was common in either the United States or Britain (ibid at 493-495).

1251 Ibid at 497.

1252 Ibid at 495.

1253 Ibid at 505.

1254 Ibid at 494.

1255 Eg, J Halligan, I Beckett & P Earnshaw, "The Australian Public Service Reform Program" & J Dorrington, "The Nature and Measures of Industrial-Based Reform to Personnel Management in the Australian Public Service" in J Halligan & R Wettenhall (eds), above n 1222 at 7 & 167.

carry the Australian welfare state into the 1990s.[1256] NPM is the philosophy of 'managerialism'- or 'new managerialism' - which adopts 'economic efficiency' as its core value, i.e., its central managing 'test' is whether what has been or is proposed to be done represents the 'maximum output' for the minimum input of resources. The adoption of NPM as the administrative culture of the welfare state had implications beyond the Commonwealth Public Service and its functions. As Yeatman indicates, the 'economic rationalism' and objectives of public management had an uneasy relationship with the governmental and civic assumptions of mid-1970s Australian society:[1257]

> ... the discourse of management sits uncomfortably with, and by its logic tends to preclude, reference to substantive public service obligations like maintaining the rule of 'law', upholding citizen' rights of access to fair and equitable government administration, and providing high quality legal services.[1258]

The third significant transformation in public administration was the 'commercialisation' of the welfare state. The 1980s saw the 'corporatisation' and 'privatisation' of its machinery and economic functions, and the adoption of private sector business practices and models.[1259] At the national level, the changes wrought by 'commercialisation' covered a wide spectrum, including the corporatisation of state-owned transport, communications and other commercial enterprises and non-social welfare functions.[1260] In some cases, 'commercialisation' involved the transfer of the assets and functions of existing Commonwealth statutory corporations to new public companies. In other cases, public assets and functions were transferred to new statutory corporations, which were "required to conduct their activities in accordance with sound commercial principles and to operate on a largely self-financing basis".[1261]

The 'commercialisation' of the eight principal Commonwealth business enterprises - Qantas, Australian Airlines, Australian National Line (ANL), Australian National Railways (ANR), Telecom, the Overseas Telecommunications Corporation (OTC),

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1256 G Davis, "Arguing About Management" & P Bayne, "Administrative Law" in J Halligan & R Wettenhall (eds), above n 1222 at 259 & 90 respectively: above at p 139.

1257 For an account of the impact of the former on federal public policy and administration in the 1980s see M Pusey, *Economic Rationalism in Canberra: A Nation Building State Changes its Mind*, (1991).

1258 A Yeatman, "The Concept of Public Management and the Australian State in the 1980s", (1987) 46 *Australian Journal of Public Administration* 4 at 341.

1259 R Wettenhall & J Beckett, "Movement in the Public Enterprise and Statutory Authority Sector" in J Halligan & R Wettenhall (eds) above n 1222 at 183. The terms 'corporatisation' and 'privatisation' are part of the "newspeak of the new managerialism". The former connotes vesting the conduct of government activity in a corporation formed under the law governing public companies: R Wettenhall, "Public Administration Newspeak" (1990) 66 (12) *Current Affairs Bulletin* 13.

1260 P Bayne, "Administrative Law" above n 1222 at 93; R Wettenhall & I Beckett, "Movement in the Public Enterprise and Statutory Authority Sector" in J Halligan & R Wettenhall (eds) above n 1222 at 181-183, 192 & 195-200. A few Commonwealth commercial enterprises were already formally incorporated as public companies, eg, Qantas and Aussat.

1261 R Wettenhall & I Beckett, "Movement in the Public Enterprise and Statutory Authority Sector" in J Halligan & R Wettenhall (eds) above n 1222 at 192.

Aussat, and Australia Post - was a notable instance.[1262] Those enterprises that were in direct competition with private sector companies, or served no explicit social objective, or had a well-developed commercial culture - like Qantas, Aussat, Australian Airlines, ANL and OTC - were converted or continued as corporations under the Commonwealth companies legislation. The ANR remained a statutory corporation under its recently updated legislation. Telecom and Australia Post were renamed as 'corporations' - although they formally remained statutory authorities - and their management was remodelled along corporate lines. At the same time, the Hawke Government abolished "almost all remaining direct controls over the eight enterprises day-to-day operations".[1263]

The impact of 'commercialisation' was not limited to Commonwealth business enterprises. The 1980s also saw transformation of industry and trade functions into the public company form.[1264] Private sector management practices were adopted in Commonwealth statutory corporations and agencies providing public services and performing public functions.[1265] Increasingly, in the late 1980s and early 1990s, the Commonwealth experience of 'commercialisation' in public administration was mirrored in the States.

State Intervention in the Affairs of the Legal Profession

The reorganisation of public administration was only a means of the Hawke Government facilitating its wider objective. This was to improve the 'economic performance' of late 20th century Australian society. The principal instrument of reform which the Hawke Government deployed was national economic policy. From the outset, it was vigorous in its pursuit of major reforms to the Australian economy to redress the perceived retardant legacy of the policies of 'domestic defence'. These reforms included:

> ... financial deregulation and floating of the Australian dollar in the 1980s and the reduction of tariff protection, and ... more recent initiatives such as moving from the centralised wage fixing system to more flexible enterprise bargaining arrangements ...[1266]

By the late 1980s, the general thrust of national microeconomic policy was towards reforms intended "to make the best use of Australia's true economic potential, to secure a more productive economy capable of delivering more jobs and higher

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1262 Another example was the transfer in 1988 of aviation property management and regulatory functions from the Department of Transport and Communications to the Federal Airports Corporation and the Civil Aviation Authority. In 1990, the maritime functions of the Department were transferred to a new Australian Maritime Safety Authority.

1263 R Wettenhall & I Beckett, "Movement in the Public Enterprise and Statutory Authority Sector" in J Halligan & R Wettenhall (eds) above n 1222 at 188.

1264 Eg, the primary industries and trade portfolio. The Commonwealth Attorney-General's Department also began to 'commercialise' its lawyers' services functions.

1265 Eg, the Australian Broadcasting Tribunal, the Australian Broadcasting Corporation and the Special Broadcasting Service.

1266 B Scales, "National Competition Policy" (1996) 55 *Australian Journal of Public Administration* 68 at 68.

growth."[1267] The legal profession and the lawyers' services industry were not immune from the impact of these new policies. In 1988, the Commonwealth Trade Practices Commission announced "its intention to conduct a study of competition in markets for professional services" in Australia.[1268] More importantly, in late 1992 the Hawke Government commissioned an Independent Committee of Inquiry into a National Competition Policy to design "a competition policy framework" for the Australian economy.[1269] The report of this committee, known as the "Hilmer Report" was completed in mid-1993, and, as Scales describes:[1270]

> ... took a broad approach to competition policy which identified the need both to strengthen pro-competitive regulation and to remove anti-competitive government interventions. It proposed extending the Trade Practices Act to government business enterprises, statutory marketing arrangements and unincorporated associations, which all [had] considerable protection from trade practices scrutiny. It also identified many government regulations and interventions that impeded the functioning of markets.[1271]

The Hilmer Report did not specifically address the position of the legal profession, or the application of its proposals to the operations of the lawyer services market.[1272] Nevertheless, it was, together with the final report of the Trade Practices Commission, which was completed in 1994, one of the principal reports the Keating Government directed the AJAC to consider in its inquiry into remedies to the 'problems' in 'access to justice'.[1273] Moreover, in its national strategy the AJAC made clear that whilst its members believed there was "far more in improving access to justice than applying competition policy to the legal profession ... [n]onetheless [it] ... has a significant part to play," noting that:[1274]

> We think that the reasons given by the Hilmer Committee and the TPC for the application of the Trade Practices Act to the legal profession, as part of a national strategy for subjecting all business and professional activity to competition principles, are convincing. Lawyers are, after all, active participants in commercial activities. It

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1267 Ibid at 69.

1268 Trade Practices Commission, *Regulation of professional markets in Australia: issues for review*, (1990) at 1.

1269 B Scales, "National Competition Policy" (1996) 55 *Australian Journal of Public Administration* 68 at 69.

1270 National Competition Policy Review, *National Competition Policy - Report by the Independent Committee of Inquiry*, (1993).

1271 B Scales, "National Competition Policy" (1996) 55 *Australian Journal of Public Administration* 68 at 69. It also "proposed new policy principles to regulate markets traditionally supplied by government, particularly where there are natural or mandated monopolies. These principles included reviews of regulatory restrictions to competition on national level, structural reform of monopolies, the granting of access rights to essential facilities (such as telecommunications networks), limits on monopolistic pricing and ensuring that public and private enterprises compete on neutral t .ms": ibid; Access to Justice Advisory Committee, above n 5 at 87-88.

1272 Access to Justice Advisory Committee, above n 5 at 13.

1273 Ibid at xxvi.

1274 Ibid at 5.

> is also undeniable that the legal services market constitutes a significant component of the national economy.[1275]

These 'pro-competition' premises formed the basis of the reforms the AJAC proposed to the legal profession, lawyers and the lawyers' services market. Its reforms addressed issues such as 'external' regulation of the profession, entry requirements, the traditional division into barristers and solicitors, lawyers' business practices, specialisation and structuring a national legal profession.[1276] In particular, the AJAC favoured deregulating of the market for lawyers' services, noting:

> Legal work is reserved to lawyers by virtue of legislation that prohibits non-lawyers from carrying out legal work for reward or from holding themselves out to be qualified to perform such work ... We think that consumers of legal services should, to the greatest extent possible, have a choice about legal services delivery in appropriate areas ... Accordingly, we think that there may well be benefits in opening the legal services market to non-lawyers in some areas ...[1277]

Nor were practising lawyers the only target of the AJAC's concerns. Its inquiry also considered the work of the courts and judges, noting recent initiatives to present a more 'consumer-oriented' approach, and proposing the adoption of 'charters' to mark service delivery and performance. The AJAC also recommended greater provision for judicial education, recording the view of its members that "judges will benefit from having the opportunity to attend appropriate training courses at the commencement of and during their terms of office".[1278]

In its report, the AJAC observed - somewhat cheekily - that "the prospect of the application of competition policy has been a powerful force for change in the structure of the legal profession in Australia".[1279] However, in 1993 and 1994 national competition policy was only beginning to make its presence felt amongst the legal profession and its various interests groups. Major changes had already occurred in New South Wales, but in other States, reforms to the regulation of the profession and work practices of lawyers, whilst on the agenda of governments, were yet to be realised.[1280] Victoria, however, was already on the cusp of change, with reforms in 1996 creating a statutory authority charged with regulating the legal profession and responsible for managing new disciplinary regimes[1281] However, the AJAC did not see national competition policy as the sole justification for state intervention in the affairs of the legal profession. It referred to other principles to

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1275 Ibid at 94.

1276 Ibid at 99-128.

1277 Ibid at 70. 107 & 108.

1278 Ibid at 373 & generally at 347-380.

1279 Ibid at 66.

1280 Ibid at 83-86 referring to Government of South Australia. *A White Paper: The Legal Profession*. (1992). Law Reform Commission of Victoria. *Competition Law*. Report no 49 (1992). Law Reform Commission of Victoria. *Access to the Law: Restrictions on Legal Practice*. Report no 47 (1992) & *Inquiry into the Future Organisation of the Legal Profession in Western Australia* (1983).

1281 Legal Practice Act 1996 (Vic); G E Dal Pont. *Lawyers' Professional Responsibility in Australia*. (1996) at xi & 11-12.

which its members "had regard in framing [their] proposals" to remedy the 'problems' of 'access to justice':[1282]

> These include, in addition to competition principles, the accountability of public institutions and organisations, such as the legal professional organisations ... Any reforms to the regulatory structure of the legal profession must ensure that bodies that exercise rule making functions are subject to appropriate scrutiny and that rules themselves are examined in the public interests. Similarly, the principle of consumer orientation requires that any reforms recognise the interest of consumers in gaining ready access to affordable legal services that are responsive to their needs ...[1283]

By 1993 these policies had already begun to threaten and change the socio-legal assumptions of state, law and citizenship which had previously appeared politically sacrosanct. In the following three years these transformative forces were accelerated and adapted to the national competition agendas of the Hilmer Report.[1284]

The Impact on the Politics of Law in Australian Society

Abandoning the policies of 'domestic defence', 'commercialising' state functions and assets, national competition policy and a new willingness to 'intervene' in the legal profession had a profound impact on the politics of law. By the early 1990s, there had been a substantial and significant change to the modern configurations of law and government in Australian society. These transformations not only truncated the patterns of incremental reform which had marked the new phase of the late 1970s and early 1980s. The fissures of the later 1980s and early 1990s threatened fundamental modern assumptions about social governance in the post-war welfare state.

So far, neither legal, public administration nor Public Policy scholarship have sufficiently linked these changed configurations of law and government with the Australian 'access to justice' response. One reason is the 'intellectual' divide which continues to separate these otherwise natural bedfellows. Since the mid-1980s, moreover, the attention of mainstream Australian legal scholarship has been focused upon commercial and corporate law. Furthermore, the AJAC and Australian governments have successfully defined the agenda and discourse for reform of the legal system and developments in 'access to law' policies. In any event, the Australian welfare state - with its social fields of law and reform, scholars, media and other opinion leaders - is only one generation removed from its experience of legal aid. In the mid-1970s, the liberal legal centralist alliance, and its social construction of 'modern law', still determined the dominant paradigms of legal regulation in Australian society.[1285] Moreover, the sea change in the public policies of the welfare

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1282 Access to Justice Advisory Committee, above n 5 at 66.

1283 Ibid.

1284 Council of Australian Governments, Competition Principles Agreement, 25 February 1994: Council of Australian Governments. Conduct Code Agreement, 25 February 1994. See also *Competition Policy Reform Act* 1995 (Cth).

1285 Above at pp 228-229.

state have taken place in the shadow of the apparently unchanging institutions of the modern Australian legal system and its centralist types of law.

This part of the chapter aims to increase our awareness of the 'linkages' between these changed public policies and the origins and significance of the 'access to justice' response. The analysis which follows below proceeds from the premises of the revised analytical framework in Chapter Six, and from the insights gleaned from revisiting the Australian post-war experience of legal aid. It investigates the impact of the changed policies of the welfare state in different arenas of the politics of the modern Australian legal domain in the years of the 1980s.

The Fragmenting of the Liberal Legal Centralist Alliance

Perhaps the key shift in the politics of the legal domain was the fragmenting of the liberal legal centralist alliance - the modern 'bargain' between Australian governments, courts, judges, the organised legal profession and lawyers. The post-war cohesion between the parties to the alliance had been weakened in the 1970s when governments began to contemplate reforms to the lawyers' services market and its *modus operandi*.[1286] The reappraisal of the role of the welfare state and the adoption of national competition policies produced an abrupt change to the 'internal' politics of the alliance. In fact, it signalled the end of a vital part of the modern 'bargain' between the state and the legal profession.

Modern Australian governments had 'delegated' responsibility for the administration of civil and criminal justice to the profession and given lawyers substantial, independent control of the 'private' market for legal services. In subjecting the legal profession and its markets to scrutiny by the Trade Practices Commission the Hawke Government was indicating the terms of these 'delegations' were to be renegotiated. Five years later, its successor, by including the principles of national competition policy in the AJAC agenda, made very clear it did not intend to maintain the 'bargain' which the post-war welfare state had kept with the legal profession. The AJAC itself, moreover, reflected the new attitude of Australian governments in its proposed reforms to the market for lawyers' services, 'alternative dispute resolution', the courts and legal aid.[1287] In the case of the latter, neglect of the management of the national scheme since the late 1970s was another instance of the loss of comity between the interests of governments and the legal profession. The AJAC may have liked to give the impression the latter was freely participating in the process of 'reform'. In reality, governments forced the legal profession to participate and defend its political interests in the face of a unilateral 'breach' of the alliance.

In any event, professional commitment to the 'delegatory' advantages of the alliance had itself fragmented, although not to the same degree or consistency as the 'breach' by governments. The late 1970s had seen a continuation of the bifurcation of the legal profession evident at the end of the 1960s.[1288] In 1979, a Sydney corporate firm

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1286 Above at p 249.

1287 Access to Justice Advisory Committee, above n 5 at PARTS III-VI.

1288 Above at pp 74-75.

of solicitors - Freehill Hollingdale & Page - had become the first 'mega-firm', via a Canberra office and a cross-State partnership with Perth solicitors.[1289] This marked the beginning of a limited, but significant trend. In 1982, the Sydney firm of Stephen Jaques became the second Australian 'mega-firm', merged with Stone James & Co in Perth.[1290] Other major corporate law firms in the State capital cities quickly followed suit, usually by cross-State mergers, but sometimes reorganising existing practices to serve a national market.[1291] The economic welfare of these 'mega-firms' was not dependent on the legislated 'monopolies' which enforced the delegatory 'bargain' of the alliance. They participated in a competitive, unregulated market for the provision of 'non-individual', business or 'corporate-type' legal services and transaction making skills, with "rivals such as accountants, management consultants and investment bankers".[1292] Moreover the culture, employment practices and structures of the 'mega-firms' - like those of their counterparts in the United States - increasingly resembled those of their corporate clients.[1293] In these contexts, neither the 'protections' implicit in the alliance, nor the 'collective' interests of the Australian legal profession carried much weight.

Even amongst its sole practitioner and small firm majorities, the mutuality of the Australian legal profession had declined since the mid-1970s.[1294] The 'collective'

1289 R A Tomasic & B D Pentony, "The expanding role of the large corporate law firm in Australia: the case of takeover litigation", unpublished paper presented at the 25th Annual Meeting of the Law and Society Association, Madison, Wisconsin, 8-11 June 1989 at 4.

1290 Ibid at 4: M Wilson, "Mallesons move may only be the start" *Sydney Morning Herald* 15 October 1983 at 32.

1291 Eg. in 1986 the Sydney solicitors Minter Simpson merged with two Melbourne firms: A Pollak, "Law firms offering one-stop service", *Sydney Morning Herald*, 1 December 1986 at 27. Mallesons in Melbourne later merged with Stephen Jaques Stone James to form Mallesons Stephen Jaques: Munton J, "Legal leviathan to open offices in Asia and US" *Australian Financial Review*, 7 November 1986, Pollak A, "Stephen Jaques, Mallesons merger forms legal giant" *Sydney Morning Herald*, 5 November 1986 at 34 & "A Matter for Merger" *The Australian*, 12 November 1986 at 15. In the late 1980s, Dawson Waldron in Sydney merged with Blake and Riggall in Melbourne to form Blake Dawson Waldron: Chanticleer, "A real marriage of legal minds" *Australian Financial Review*, 2 September 1986 at 72. On the other hand, the Sydney corporate firm of Allen, Allen & Hemsley initially concentrated on its local market and its overseas offices. In 1987, it entered the national market through a federation with solicitors practices in Melbourne, Adelaide, Brisbane and Perth known as the Australian Legal Group: R A Tomasic & B D Pentony, above n 1296 at 4-5; T Horwtitz, "47 floors up, this law giant thunders on ... but the cottage firm stays happy" *Sydney Morning Herald*, 23 April 1987 & G Burge, "Legal firms to form giant network" *Sydney Morning Herald*, 23 April 1987 at 19. See also J Jameson, "Clayton Utz builds up, not out" *Business Review Weekly* July 24 1987 at 86, J Wasiliev, "The end of the old boy network" *Australian Financial Review*, Wednesday October 19 1983 at 1, A Davies, "Law firms with 200 partners approved" *Australian Financial Review*, 14 May 1986 at 1 & T Skotnicki, "The Rising Stars", October 10 1986 *Business Review Weekly*, (Professions Liftout) at 8.

1292 M Shapiro, "Lawyers, Corporations and Knowledge" (1990) 38 *The American Journal of Comparative Law* 683 at 688.

1293 Richard L Abel, "The Contradictions of Professionalism" in Richard L Abel & Philip S C Lewis, *Lawyers in Society*, Vol 1, (1988) at 230-232.

1294 In the mid-1980s, the 'mega-firms' accounted for only a few per cent of the total number of Australian law firms. The majority (63%) were sole practitioners, followed by small (2-3) (27%) and medium sized (4-9) partnerships (8%): J Disney, P Redmond, J Basten & S Ross, above n 72 at 58-58. This profile was

sense of a single, professional community was rapidly unravelling. The number of lawyers continued to grow in the 1980s, whilst its mid-century work base in the 'needs' of individuals for 'personal-type' lawyer services declined, as we discuss below.[1295] The impact of these diversifying and economically downward trends was compounded by the 'interventionist' stance of governments and the implications of the principles of national competition policy. By the end of the 1980s, the professional majority of Australian lawyers occupied comparable social circumstances as their contemporaries elsewhere in the Western world, as Abel described:

> ... greater numbers have intensified competition within the profession and led to the erosion of restrictive practices ... Expanded university education has rendered the profession more heterogeneous, complicating efforts at concerted action and intensifying (and delegitimating) professional stratification ... Notwithstanding the visibility of a few high fliers, the income and status of the profession as a whole have declined ... The cumulative effect of these changes has fundamentally transformed the professional configuration, if we can still perceive its successor only dimly.[1296]

Thus, quite apart from the 'breach' by governments, the 'collective' interests of the professional majority of Australian lawyers in the 'delegatory' functions of the alliance were more diverse and less cohesive than in the mid-1970s. These new interests were, moreover, increasingly difficult to coordinate on the ever more significant national public policy stage. Moreover, the 'decline' which Abel describes may not be explicable merely as a reconfiguration of the modern legal profession.[1297] It occurred within the context of the new social climates of post-industrial society and its huge corporations.[1298] Changes which, in the Australian context in the 1980s, were reflected in the spread of NPM and the 'commercialisation' of the welfare state and its society. As Shapiro has suggested, these developments may have had more fundamental transformative consequences for the legal profession.[1299] The pre-eminence of the 'mega-firms' and other concentrations of 'legal expertise' - as in segments of the Bar, law schools and the legal aid sector - may represent continuing 'pockets' of 'real', marketable skills amongst a professional majority sliding into an 'unprofessional' world of lawyer service providers. By the mid-1980s, for the many Australian lawyers falling into the latter category, the 'delegations' of the alliance were already becoming remnants of history, even if the welfare state had not acted to truncate them.

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later confirmed by the first national study of the lawyer services industry: Australian Bureau of Statistics. *Legal Services Industry, 1987-88*, Catalogue No. 8666.70.

1295 Between 1975 and 1986 the number of lawyers increased from 12580 to 26007: D Weisbrot, above n 461 at 63.

1296 Richard L. Abel, "Comparative Sociology of Legal Professions" in Richard L Abel & Philip S C Lewis. *Lawyers in Society*, Vol 3 (1989) at 136-137.

1297 Ibid: R L Abel, "Toward a Political Economy of Lawyers", (1981) 4 *Wisconsin Law Review* 1117: R L Abel, "The Transformation of the American Legal Profession", (1986) 20 *Law and Society Review* 7.

1298 M Shapiro, above n 1292 at 691.

1299 Ibid at 689-695.

The New Paradigms of Law and Government

The new public policies of the welfare state did not only impact upon the 'delegatory' functions of the liberal legal centralist alliance. For Australian governments, this part of the modern 'bargain' with the legal profession had always been of secondary importance. From the outset, they controlled alternative regulatory options, exercisable by expanding the scale and scope of the system of administrative law, and reversing its 'de-legitimation'. Neither had governments originally been attracted to 'working' with the legal profession for other than pragmatic reasons. The courts, judges and lawyers were the 'actors' and 'stage managers' of the system of civil and criminal justice. They embodied its legal technology and - as we argued in Chapter Six - represented an acceptable, privatised form of administration, consonant with the ideology and financial capacities of mid-19th century liberal capitalist governments. Furthermore, the legal profession 'brought' its peculiarly appropriate social ideology to bear in the interests of governments. Legalism was both aspirational and national in outlook. Its images of 'law' and 'legal system' coincided with the needs of governments required to mediate amongst the irreconcilable, competing demands of administering democratised modern capitalist societies. Thus, for governments the primary importance of the alliance had been its 'external' role in projecting and organising the social construction of 'modern Australian law' - its version of the great legal enterprise of modern Anglo-American society.[1300]

By the late 1980s, however, the importance of the political 'benefits' of the alliance for governments had declined. The regulatory significance of public administration and administrative law had steadily increased throughout the life of the modern Australian legal system. As we have indicated earlier, its everyday reality throughout the 20th century was not only courts, judges and lawyers, but ever-increasingly public policy, the work of the decisional organs of the state and public officials. In the 1960s and 1970s, the role and governmental functions of the latter had increased exponentially. At the beginning of the 1980s, therefore, governments had long persisted in 'choices' which favoured administrative law and its modes of regulation. 'Choices', moreover, which highlighted the disjunction between the social construction of the 'Australian legal system' and the reality, and which served to decrease the reliance of the modern state on the administrative technologies of the legal profession. The assumptions which underpinned government involvement in the alliance had shifted. This shift was reflected in the new phase in the modern configurations of Australian law in the late 1970s and early 1980s discussed above.[1301] The basic assumptions of Australian government shifted again in the 1980s, as a consequence of the sea change in public policy, and the reorganisation of the welfare state. Governments no longer required the support of the alliance - or its attendant system of 'public administration' - in the administration of Australian society. The 'commercialisation' of public functions signalled the adoption of new assumptions of government. NPM and its dictates no longer required the state to

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1300 Above at pp 183-188.

1301 Above at pp 244-251.

perform its 'balancing', mediative role to the same degree or in the same configurations as it had done in modern Australian society since the 1850s and 1860s.

NPM also dissipated the political incentives for Australian governments to sustain their post-war commitment to the liberal legal-centralist alliance. The 'engineering' of law under the guidance of the legal profession and the auspices of legalism lost its modern social essentiality. The rise of economic rationalism in the 'engines' of the 1980s welfare state saw economists and econometricians displace judges and 'public service' lawyers in key decisional forums.[1302] The diminution of the value of 'lawyer's expertise' was part of a wider and far more significant decline.[1303] Legalism, its ideals and styles of 'legal rationality' were no longer the dominant paradigms of modern social governance. In the 1980s, the 'economic rationalist' ideas associated with NPM became the dominant regulatory paradigms of the Australian welfare state. Bayne has described the implications of this "fundamental change" in the context of its impact upon administrative law, in the world of 'public administration':[1304]

> Mark Considine observes that, heretofore, "the dominant form of rationality which has underpinned bureaucratic work has been legal rationality", that is, "rational to the extent that they follow the standardised steps of a logical procedure". On the other hand, "[c]orporate management ... elevates economic rationality to primary status "and in so doing attempts to replace the legal and procedural framework of the classical model" ... .[1305]

These observations are equally applicable to the commitment of governments and their executive organs in the state to legalism, and its social constructions of 'law' through the alliance. The primary organising values of legalism had never been those of 'economics', but were instead ideals of highly 'legalised' societies, administered by the state, in conjunction with the legal profession, where government, business and social life were safeguarded through the conduits of the 'rule of law'. In the 1980s version of the welfare state, however, the legal system, social life and 'modern Australian law' had become commodities to compete in the 'market' for the favours of government and business.

The Changed Politics of the Central Legal Domain

The changes in public policy and assumptions of social governance in the welfare state had two other important effects on the modern configurations of Australian law. The first is that they changed the politics of the central legal domain. The second

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1302 P Bayne, "Administrative Law" in J Halligan & R Wettenhall (eds), above n 1222 at 92 quoting M Considine, "The Corporate Management Framework as Administrative Science" (1988) 47 *Australian Journal of Public Administration* 1.

1303 P Bayne, "Administrative Law" above n 1222 at 92.

1304 Ibid.

1305 Ibid quoting M Considine, "The Corporate Management Framework as Administrative Science" (1988) 47 *Australian Journal of Public Administration* 1.

effect, which is discussed below, is that these changes prompted the dilution of social citizenship in the 'new' version of the post-war welfare state.

The changes in the welfare state changed the politics of the central legal domain in two significant respects. The first was that they produced a functional transformation in its legal institutions and centralist law. The circumstances of functional transformation were explained in the revised analytical framework and its social preconditions rehearsed in Chapter Six.[1306] In Australia in the 1980s and early 1990s, comparable circumstances existed as when the 'old' institutions and law of Western society were incorporated into the modern national legal systems.[1307] As then, changes in legal ideology and the functions performed by centralist law saw a change in the social functions of the legal institutions of the modern state. In the post-war state in Australia, these changed social functions were not as spectacular as the transformation of the 'old' Western legal systems into modernity, nor did they exhibit the same dramatic degree of difference with the recent past.

However, the changes in social function were analogous to modern transformation of the poor persons institutions on their voyage to legal aid.[1308] In the welfare state in the 1980s there was also a near contemporaneous change within the 'legal' realm and society itself. On the one hand, the 'economic rationalist' ideas of NPM became the dominant regulatory paradigms of the welfare state. On the other hand, the abandonment of the policies of 'domestic defence', the adoption of 'market economics', national competition policy and the reorganisation of administration altered the regulatory functions of the legal institutions and law of the welfare state. Modern centralist law and its institutions still served the state and its governments, but for different social purposes and with different social objectives.

These functional transformations changed the role and functions of centralist-types of law in Australian society. In the case of judicial-types of centralist law, the impact is difficult to measure. Unlike legislation and administrative law, judicial law remains within the effective control of the courts and the legal profession, through its judges and lawyers. One might speculate and say that changes in the welfare state have relegated to the courts problems in social ordering which once may have been mediated by governments. In any event, the courts, their 'management' of judicial law and their interpretation of legislation are now frequently criticised "as getting in the way of achieving the goals" of governments.[1309] The standing of judicial types of law and their actors in the central legal domain has been diminished, a decline inextricably associated with the fragmentation of the liberal legal centralist alliance and the attitude of the 'new' welfare state towards to lawyers.

The impact of the functional transformation on legislative and administrative-types of centralist law in the 1980s and early 1990s is easier to assess. It has also been

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1306 Above at pp 156-158.

1307 Above at pp 163-164.

1308 Above at pp 169-190.

1309 P Bayne, "Administrative Law", above n 1222 at 92.

more pronounced, as these law types were more vulnerable to the 'architects' of NPM and economic reform. Nevertheless, there are dangers in generalisation, especially in the case of the enormous scope of the legislation, even in the 'new' welfare state. However, in the case of regulatory legislation it is safe to say that it has increasingly taken on the flavour of deregulation, and the ideals of national competition policy. In other fields, legislation, its 'internal' values and its design is more flexible in its procedural safeguards, and more easily separated from the templates 'engineered' during the long period of modern administration under the 'rule of law'. Abandoning the guiding policies of 'domestic defence' has also truncated the legislative tendencies of Australian Parliaments to accord social precedence to objectives of popular or 'collective' well-being.

Functional transformation has had its most marked impact upon administrative-type of centralist law and its modes of regulation. The changes in the social direction of the welfare state have called "[f]undamental values (such as due process) inherent in administrative law principle [into] question".[1310] As Yeatman described above, the techniques and technologies of modern administrative law have been seriously threatened, and have been displaced in many departments and agencies of the 'new' welfare state.[1311] Moreover, implementation of regulatory and economic reforms through the paradigms of NPM have generated new and different styles of decision-making and administrative regulation, as Bayne once again describes:

> The new thinking proposes or implies a certain form of action for governments; that is, "purposive action" (as opposed to "bureaucratic action" defined "legalistically") "which attempts to elevate values of strong leadership and systematic control and restructuring"... It is conceded by the advocates of change that mistakes will be made. "[P]erformance management assumes a relatively high degree of failure but seeks to ensure that critical targets are met" ....[1312]

The other significant change the central legal domain was to increase its diversity. Deregulation of the political economy of the welfare state unleashed the 'law-making' potential of non-government corporate actors. Private corporations, industry and trade associations, service providers previously were freer to order their own affairs and to regulate their 'external' relationships. Moreover, the 'self-regulatory' objectives sanctioned by governments and national competition policy gave them positive encouragement. The reorganisation of the welfare state created new privatised regulatory regimes to administer business enterprises, and to negotiate new relationships with its central regulatory system.

1310 Ibid.

1311 Above at p 255.

1312 P Bayne, "Administrative Law", above n 1222 at 92 quoting M Considine, above n 1305 at 15 & R B Cullen, "Business, Government and Change: Managing Transition in the Public and Private Sectors" (1987) 46 *Australian Journal of Public Administration* 10 at 16.

The Dilution of Social Citizenship

The expanded conceptions of citizenship in the 1970s had raised popular expectations of the welfare state.[1313] The Whitlam Government had positively encouraged Australians to view the state as a provider of benefits and a protector of rights. Its successor, whilst discouraging the former, had sanctioned the latter, expanding state involvement in the protection of civil and human rights.[1314] The public policy transformations of the 1980s, however, saw Australian governments dilute and diminish the significance of the modern ideals of social citizenship.

As part of its 'reforms', the Hawke Government adopted the alternative "vision of citizenship" promoted by New Right critics in Britain and the United States, although not to the same degree as its Conservative colleagues.[1315] Citizenship began to be linked to - and conditioned upon - the fulfilment of the personal obligations of individuals to contribute to 'society'.[1316] Its primary obligations, therefore, now rested with and were seen to shift to the citizenry. The state was portrayed as a facilitator, to ensure that citizens had the 'opportunity' to participate. Its primary role was to enable full social participation by ordinary citizens, who were assumed to be willing and able to contribute. The Keating Government affirmed this in responding to the AJAC report in 1995, saying that it "policies across the whole spectrum of community life are oriented towards enabling our citizens to participate fully in the life of the nation".[1317] The secondary role of governments was to actively 'encourage' social participation by recalcitrants, the 'poor', the unemployed, the marginalised, or others unaware of the 'opportunity' of attaining full citizenship. In this new vision of citizenship, as Mead makes clear, it was necessary for the state:

> ... to obligate the dependent as others are obligated is essential to equality, not opposed to it. An effective [welfare] policy must include recipients in the common obligations of citizens rather than exclude them.[1318]

The 'safety net' approach to welfare, 'work testing' and 'tightening' of social security eligibility which these visions inspired in the "Thatcher/Reagan years" in Britain and the United States appeared in Australia in the 1980s.[1319] The result was to significantly dilute the newly acknowledged 'social' rights of the 1970s , at least for those on the margins, for whom they mattered most.

The significance of social citizenship was also diminished by the 'commercialisation' of the welfare state, and by its national competition policies. In

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1313 Above at pp 249-250.

1314 Above at pp 250.

1315 W Kymlicka & W Norman. above n 47 at 355-357.

1316 Ibid at 356.

1317 The Rt Hon Paul Keating. Prime Minister in Attorney-General's Department. *The Justice Statement.* (1995) at 1.

1318 W Kymlicka & W Norman. above n 47 at 356 quoting L Mead, *Beyond Entitlement: The Social Obligations of Citizenship.* (1986) at 12-13.

1319 Ibid at 353.

Australia, as in other English-speaking countries in the 1980s, this type of economic reform "aimed to extend the scope of the market in people's lives - through freer trade, deregulation [and] tax cuts".[1320] The result was the 'consumer-citizen' of the 1990s, whose presence we first identified in Chapter One.[1321] 'Market-oriented' policies in the welfare state can, on the one hand, be seen as enhancing social citizenship by elevating ordinary citizens to equality in the 'market'. This 'market', moreover, now has its social efficacy of its mechanisms guaranteed by public policy, including official recognition of 'consumer' rights and interests. 'Consumer-citizenship' can, on the other hand, also be seen as a device of welfare states in retreat to teach citizens "the virtues of initiative, self-reliance, and self sufficiency".[1322] Its association with these social ideals of the New Right means, according to their critics, that 'consumer-citizenship' and its 'market-oriented' social imperatives are, as Kymlicka and Norman describe:

> ... most plausibly seen not as an alternative account of citizenship not as an assault on the very principle of citizenship. As Plant puts it, "Instead of accepting citizenship as a political and social status, modern Conservatives have sought to reassert the role of the market and have rejected the idea that citizenship confers a status independent of economic standing."[1323]

Making the 'Access to Justice' Response Transparent

In making these linkages, we have sought to demonstrate important features of the impact of the 'new' post-war welfare state on the politics of Australian law. The fragmenting of the liberal legal centralist alliance, the changed assumptions of government and law, the new politics of the central legal domain and the rise of 'consumer-citizenship' combined to end its modern configurations. This did not happen in the sense of changing the structures of the modern Australian legal system: few changes occurred in its 'machinery', save for the reorganisation of the welfare state. Nor did the modern configurations of the system of government change overtly. Australia retained the monarchical and parliamentary system of government as it was in the mid-1970s. Its citizens, moreover, remained subjects of the British Crown - although more distantly so - and still lived under the 'rule of law' in a democratic society.

However, the new politics of law had changed the established relationships of modern social governance in the welfare state. In significant instances, as we have shown above, those relationships were transformed. Previous notions of 'collective' public interest disappeared with the 'old' policies of 'domestic defence' and the 'traditional' system of public administration and its notions of disinterested social service. NPM, economic deregulation, national competition policy and their acolytes

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1320 Ibid at 350 citing G Mulgan, "Citizens and Responsibilities" in G Andrews (ed), Citizenship, (1991).

1321 Above at p 11.

1322 W Kymlicka & W Norman, above n 47 at 357 quoting from R Plant, "Social Rights and the Reconstruction of Welfare" in G Andrews (ed),above n 1320.

1323 Ibid at 357 quoting from Plant, "Social Rights and the Reconstruction of Welfare" in G Andrews (ed). *Citizenship*, (1991).

'contractualised' the social space of the welfare state. Citizenship became commodified and conditional, and citizens' assertiveness became a precondition of 'rights', instead of a state-backed outcome. The link between the design of legislation and administrative law and planned, coordinated social ordering became less predictable. The fragmentation of the liberal legal centralist alliance meant that the courts, judges, and lawyers themselves could no longer be confident of a hearing in the administration of the state. In society itself, the liberal assumptions of 'modern Australian law' also had a diminished resonance. None of these transformations, however, meant that the 'old' ways of legal ordering and social governance had been banished or destroyed. From any perspective, however, their modern configurations had been badly fractured, if not cracked beyond immediate prospects of repair.

Against this backdrop, we can finally begin to contextualise the 'access to justice' response. Earlier, we formulated a series of questions based on the remaining unanswered questions of the NLAAC report, which were restated at the beginning of the chapter.[1324] We asked how the origins of the 'access to justice' response could be explained in the context of the welfare state. Why did the Keating Government initiate this action in 1993? Why did it adopt an 'access to justice' approach, given the mid-1970s rhetoric of its predecessors supporting 'legal aid', and the relative success of the national scheme in the 1980s?

In providing answers to these three questions, the chapter does not purport to provide an exhaustive explanation of the origins and significance of the Australian 'access to justice' response. To do so would require a full-scale investigation applying the Public Policy techniques outlined in the revised analytical framework developed in Chapter Six. This is impracticable at this stage in the thesis, and, in any event, is beyond its stated objectives. The studies of the twilight of the modern configurations of law and government, the subsequent fissuring and the impact of those developments has increased what we 'know' about the politics of law in Australian society in the mid-1980s and early 1990s. The value of these studies is, moreover, enhanced by the insights gleaned from revisiting the origins and significance of post-war legal aid in Part II and, more generally, the institutional and ideological history in Part I. These and associated 'databases' within the thesis are sufficient to enable us give greater transparency to the 'access to justice' response and thereby to better understand its significance for the feasibility of achieving fair and effective access to law in the Australian welfare state.

The Reasons behind the 'Access to Justice' Response

Like its national legal aid scheme, the Australian 'access to justice' response had its origins in the public policy of the welfare state. When the Keating Government 'decided' to respond to the 'problems' in access to the legal system, especially its courts and lawyers, it did so for political reasons and in response to political pressures. Foremost amongst those pressures were the two separate, but related phenomena which constituted the 'problems' in 'access to justice' in Australian

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1324 Above at n 1137.

society in 1993.[1325] The first was the presence of real and ongoing problems in popular access to courts and lawyers, which had risen to national prominence since the mid-1980s. The other constituent phenomenon was the perception of the growing inaccessibility of the courts and their machinery of civil dispute resolution. A perception which was based in part on popular observation and experience of the operation of these legal institutions and actors. It was, however, also based upon expectations of the 'legal system' which were the legacy of some 130 years of social governance under the supervision of the liberal legal centralist alliance and its 'modern Anglo-Australian law'.

The Real and Ongoing Problems in Popular Access to the Legal System

In 1993 it was indisputable that there were real and ongoing problems in popular access to the legal system, particularly its courts and lawyers. Yet, as we indicated in Chapter One, the evidence of the scale or degrees of inaccessibility is more equivocal than in some comparable countries.[1326] Nevertheless, real and ongoing problems existed, even if we significantly discount the more polemical Australian 'assessments'.

In the case of case of poorer and disadvantaged people, the work in the thesis so far has demonstrated the historical foundations of these problems. In Chapter Six, we showed that the functions assigned to courts and lawyers in the modern Anglo-American legal systems did not disturb the trends established in earlier phases of legal modernisation. Instead, it institutionalised the separation which had emerged between the role and administration of judicial-types of centralist law and the worlds of poorer and disadvantaged people. Thus, modern Australian courts and lawyers had functioned primarily to serve the social interests of the state and to administer its system of civil and criminal justice. Poorer people were clearly beneficiaries of the new social welfare policies of modern governments and of judges and lawyers giving expression to the 'charitable' ideals of the modern legal profession. Nevertheless, providing poorer citizens with acceptable degrees of access to courts and lawyers remained an intractable problem for reforming liberal capitalist governments. The 'solution' to this problem was the development of modern legal aid, as we explained in Chapter Six.

However, neither the pre-1973 Australian legal aid schemes described in Part I, the national scheme, nor its operations since the mid-1970s had solved all the problems of poorer litigants and accused and other poorer people experiencing legal problems. As we saw in Chapter Seven, the establishment of the national scheme certainly 'helped' poorer Australians.[1327] However, it did not alter the institutional biases of judges and courts in the legal system or significantly impact upon the social distribution of lawyers' services. Moreover, the improved access to advice and representation, which its schemes provided, were generally within established arenas of lawyer expertise, like family law, criminal law and - to a markedly lesser degree -

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1325 Above at pp 240-241.

1326 Above at p 10.

1327 Above at pp 215-221.

civil litigation in the superior courts. The national scheme did little to address citizens' ordinary everyday legal problems, which often potentially had extraordinary significance in the lives of poorer and disadvantaged people.

Moreover, the scheme proved incapable of adequately addressing the special legal problems of poor people, including those identified by the Commissioner for Law and Poverty, the Commonwealth Legal Aid Commission and Legal Aid Council and the researchers commissioned by its Attorney-General's Department.[1328] One reason was the restrictive funding formulae in the first Commonwealth-State legal aid agreements discussed in Chapter Four.[1329] Another was that, as the national scheme commenced operations, the Australian welfare state began to retreat. Thenceforth, its managers became involved in a continuous process of restricting eligibility criteria, and rationing the availability of legal aid. In the 1980s, the expanded network of community legal centres and Aboriginal and Torres Strait Islander Legal Services had alleviated some of the special legal problems of poorer and disadvantaged people, but not on the scale or to the degree required.[1330] By 1990, the limitations of the national legal aid scheme were clear. The scheme was failing to provide sufficient numbers of poorer people with access to the civil courts, criminal defences and advice, and failing to satisfy the acknowledged 'unmet needs' generated by the special legal problems experienced by poorer and disadvantaged people. Moreover, its managers had a very limited capability to finance the legal aid services which contemporary evidence and new research indicated were required by disadvantaged Australians.[1331]

In any event, as we indicated in Chapter One, by the early 1990s there was a growing public perception that it was no longer just the 'poor' who were disadvantaged by inadequate access to the legal system.[1332] Whilst this had an ideological dimension, as we explain below, it also had very solid foundations. In the first place, the 'commercialisation' of the welfare state and the 'corporatisation' and 'privatisation' of its functions in the 1980s had quietly produced a very different kind of Australian society. For individuals and business alike, the protective umbrella of the administrative machinery of the 'socially defensive' welfare state had rapidly vanished. Its institutions now played a greatly diminished role in the legal regulation

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1328 Australian Government Commission of Inquiry into Poverty, *Migrants and the Legal System*, above n 562; Australian Government Commission of Inquiry into Poverty, *Poverty and the Legal Profession in Victoria*, above n 1102; Australian Government Commission of Inquiry into Poverty, *Poverty and the Residential Landlord-Tenant Relationship*, above n 562 & Australian Government Commission of Inquiry into Poverty, *Legal Needs of the Poor*, above n 562. E R Chamberlain, *Legal Services for Low Income Persons in the United States and Britain: Trends for Consideration in Australia*, (1981); E Chamberlain, W De Maria, M Foley, K Lavender & R Melville, *Legal Needs of Social Security Claimants*, (1984); S Rendalls, R West & D Whitmont, *The Legal Needs of Institutionalised People*, (1985) & I O'Connor & C Tilbury, *Legal Aid Needs of Youth*, (1986).

1329 Above at pp 97-100.

1330 D Fleming, above n 715 at 180-193.

1331 National Legal Aid Advisory Committee, above n 7 at 268-282; Human Rights and Equal Opportunity Commission, *Our Homeless Children: Report of the National Inquiry into Homeless Children*, (1989).

1332 Above at pp 2-3.

of economic and social relationships, including wage fixation, the terms and conditions of employment and, indirectly, the protection of social well-being through employment itself. Instead, the 'consumer-citizen' of the 'new' welfare state was increasingly expected to be legally self-reliant, and its businesses and organisations given new freedoms to deploy lawyers and rely on the courts as forums to negotiate their relationships with their 'client citizens'.

Secondly, average-income and ordinary Australians no longer enjoyed the same levels of social access to lawyers, particularly the sole practitioners and lawyers in the small and medium-sized partnerships, which comprised the majority of the solicitors' industry.[1333] As we showed in Chapter Four, in the late 1960s and early 1970s these segments of the industry exploited a healthy market for 'personal type' legal services, although experiencing upward overhead cost pressures.[1334] Little changed over the next few years leading up to the national legal aid scheme. Thus, in the mid-1970s, real property transactions - including sales and purchases, leases and mortgages - were the major source of income for ordinary solicitors.[1335] Income from motor accident and other personal injury proceedings, including workers compensation and industrial accidents, probate, wills and estate management was also significant, as was commercial and company work.[1336]

By 1993, however, these client bases and markets had changed, and the income base of the majority of Australian solicitors had declined. The most obvious and celebrated causes were the gradual deregulation of the solicitors' monopoly over conveyancing and increased industry price competition within the residual market.[1337] The result was a marked decline in the income of most solicitors, and the "strong likelihood is that conveyancing will steadily decline as a proportion of solicitors' work ...".[1338] Less obvious causes were the liberalisation of the requirements of probate and estate administration law, and substantial reductions - if not abolition - in the imposition of death duties. Since the mid-1980s, moreover, many Australian States have radically altered the law applying to common law claims for personal injury and statutory rights in industrial accidents. These reforms further diminished the work base of ordinary solicitors, as did the steadily restricted availability of legal aid. Furthermore, like their 'mega-firm' colleagues, sole practitioners and 'non-corporate' partnerships faced increased competition across the board from other legal

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1333 Above at pp 260-261.

1334 Above at pp 73-75.

1335 M Hetherton, *Victoria's Lawyers*, 2nd rep, (1981) at Appendix 1; D Weisbrot, "The changing face of Australian Legal Practice", (1986) (Summer) *The Australian Quarterly* 426 at 426 & D Weisbrot, "From Provincial Family Firms to Multinationals" in Richard L Abel & Philip S C Lewis, above n 1296 at 292.

1336 M Hetherton, *Victoria's Lawyers*, 2nd rep, (1981) at Appendix 1. Other significant areas of the work of the majority of Australian solicitors practices in the mid-1970s included tax returns, real estate management, financial or personal counselling, family law, tax and estate planning, debt recovery and criminal law.

1337 D Weisbrot, above n 461 at 233-235; T Dusevic, "Lawyers lose grip on conveyancing" *Australian Financial Review*, 29 March 1989 at 38; D Bluth, "The Conveyancing Monopoly", paper presented to the 28th Australian Legal Convention, Hobart 26-30 September 1993, Vol. 3, Convention Papers at 69.

1338 D Weisbrot, above n 461 at 236.

services providers. This trend was already evident in the mid-1970s, increased in the short reformist phase which followed, and was accelerated by the 'interventions' of the new welfare state.

As a consequence, the gross incomes of many solicitors servicing "individuals and their own small businesses" declined in the 1980s and early 1990s.[1339] Their operating costs, however, did not. In fact, they probably increased through the need to improve work practices, productivity and adopt new technologies to more effectively compete in the shrinking market for 'personal type' legal services. Thus, the real incomes of the 'non corporate' solicitor majority were also on a downward slide. This encouraged the more flexible and responsive sole practitioners and small and medium-sized solicitor partnerships to adopt business management practices to maximise profit-making potential, to reinvigorate 'old' income lines and to create new ones.[1340] For these practices, the provision of 'personal type' lawyer services remained an important source of work. However, the fees attached to service provision increased to match the new 'business' income expectations of the practice managers. A significant number of sole practitioners and small partnerships, however, had not adapted to the changing organisational, technological and commercial demands of solicitor practice. Neither had they kept abreast of developments in legal regulation so as to be able to respond to the changing 'needs' of individuals for legal services, or to supply them at appropriate standards of quality. Whether from the 'cost' or 'quality' perspective, or both, the result was a decline in the social accessibility of lawyer services for average income and ordinary Australians.

Thus, both poorer and 'ordinary' Australians faced problems in access to the courts and lawyers. In February 1993, after hearing "357 submissions, the comments made by many witnesses during the 12 days of public hearings, and remarks made informally", the Senate 'Cost of Justice' inquiry advised that the evidence "painted a truly bleak picture".[1341] Moreover, the majority of its members noted that:

> Australia has a basically sound legal system which nevertheless is in urgent need of substantial reform ... The disrepair is of such a degree that it will require continual attention by those who share the responsibility for the current situation and who, through that responsibility, have an opportunity to contribute to making the system what it should be ... The vast majority of the users of the system are touched by it

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1339 Ibid at 7.

1340 In 1993, a consultant described changed demographics, polarisation and consolidation, brand name emergence, price competition, the bargaining power of clients, incursion by other providers, income polarisation, backward integration, client sophistication, investment in marketing, geographic expansion into other markets, shake-out, income polarisation and changes in practice funding as factors affecting 'non-corporate' practice management in the early 1990s. He warned that willingness to accommodate these factors would prove a major factor in practical survival: M S Beasley, "Legal Practice Management in the Nineties", paper presented to the 28th Australian Legal Convention, above n 1337 at 65: M Murrill. "Specialisation the key for mid-size firms" *Business Review Weekly*, The Professions, January 16 1987 at 12; G Beaton, "Survival rules for the suburban solicitor" *Business Review Weekly*, The Professions Liftout, , October 10 1986, at 18.

1341 Senate Standing Committee on Legal and Constitutional Affairs, above n 9, para 16 at 4.

> only occasionally in their lives. When they try to use the system and find it unsatisfactory, the consequences, both personally and financially, can be devastating.[1342]

The Perception of the Growing Popular Inaccessibility of the Legal System

The other constituent of the 'problems' in 'access to justice' was an ideological phenomenon. By 1993, Australians had lived for almost 10 years in a social environment forged by the reordering and reconfiguration of the policies and institutions of the 'new' welfare state. The experience of 'commercialisation', its paradigms of government and projection of the virtues of 'consumer-citizenship' had been confronting. For the majority, life under NPM and the internationalisation of the economy was a marked contrast to the historical experience of a century of state capitalism. Social governance in the 'new' welfare state, moreover, followed different patterns to those which had subtly managed well-being for poorer and ordinary people in a 'socially protective' welfare state for over 70 years.

Furthermore, the configurations of law and government as they had existed in modern Australia were fractured. The system of public administration had already been substantially transformed, together with the social functions of administrative law and its institutions.[1343] Increasingly, legislation had become the instrument of the 'architects' of national competition policy and of others set upon transforming the political economy of the welfare state. Moreover, Australian governments had demonstrated their intention to revoke their commitment to the liberal legal centralist alliance, and - in some cases - had already done so.

Yet changing public policy, even on the scale achieved in Australia in the 1980s, and reorganising the machinery and legal technology of the modern state is more rapidly achieved than transforming social perceptions. In 1993, the great majority of citizens retained expectations of the 'interventionist' social functions and responsibilities of the Australian welfare state. These expectations were difficult to quantify. Few Australians fully understood the significance of the policies of 'domestic defence' in the social administration of the pre-1983 welfare state. Furthermore, by 1993 it was almost 20 years since the peak of the great post-war expansion in national education, health, welfare, transport and other social welfare expenditure under the Whitlam Government. The memory - and its long-term social consequences - however, lingered on. Thus, whilst public policy reform had been very active in distancing governments from the responsibilities implicit in modern social citizenship, the message was yet to permeate throughout Australian society. Most Australians were yet to comprehend the implications of the governmental assumptions of their 'new' welfare state, or to assume their new social responsibilities as 'consumer-citizens'.

Indeed, it was difficult to expect them to have done so. For it is even more difficult for governments to change social conceptions of 'law'. In the mid-1980s, the modern configurations of Australian law and government had existed for nearly 150

1342 Ibid, paras 18, 19 & 22 at 5.

1343 Above at pp 254-256

years. Its legal system, liberal legal centralist alliance, 'public administration' and the social construction of 'modern Anglo-Australian law' were culminant products of Western legal modernisation. As we discussed in Chapter Six, at the time courts the legal profession and its ideology of judicial law and 'legal system' were already indelibly implicated in modern Anglo-American society.[1344] Throughout the 20th century, moreover, the court-based, lawyer-administered 'institutional' paradigms of a 'modern legal system' 'engineered' in the modern Australian legal system by governments through their alliance with the legal profession were hegemonic and omnipresent. These paradigms of 'modern law' were imbricated in the Australian welfare state and omnipresent in Australian society, defining its conceptions of law. This situation had not changed by the mid-1970s, as we demonstrated in Chapter Seven when revisiting the significance of the social prominence of 'legal aid' during the post-war experience. The hegemony of the alliance and its 'modern law' had slipped by the early 1980s, as we discussed earlier in this chapter.[1345] Nevertheless, in 1993 these ideals of 'law', defined by reference to courts, judges and lawyers, in a 'legal system' administered under the 'rule of law', remained the most powerful and coherent conception of law in the society of the 'new' welfare state. The legal transformations of the 1980s had so far been superstructural and too recent to dislodge the images of 'modern Australian law' from the minds and expectations of its citizens.

The social presence of this 'law' was the principal source of the ideological dimensions of the 'problems' in 'access to justice'. Its ideals continued to constitute the defining social association between citizens and the state. As we described in Chapter Six, in the common law world the modern state had deliberately deployed the ideals of a 'legal system' within 'modern Australian law' as an adjunct to the performance of its administrative and governmental functions.[1346] Since the 1980s, however, the weighting accorded to these ideals in the policy and administrative mechanisms of the 'new' Australian welfare state had been significantly diminished. Moreover, the content of 'modern Australian law' - with its focus on courts, judges and lawyers - had permitted Australian governments to 'disguise' the locus of control over social administration, as we argued in Chapter Six.[1347] In their modern role as 'stage managers' of the Australian legal system, courts, judges and lawyers became deeply associated in the popular 'mind' with the administration of government. As importantly, in the present context, they became deeply identified as conduits of the social 'benefits' which the modern state could confer in a 'legal system' governed by the rule of 'law'. For Australian citizens, moreover, the historical experience of the welfare state had been one of governments which had delivered social 'benefits', initially - before the 1970s - through covert policies of 'domestic defence', and - in the mid-1970s - in a hybrid form of a 'defensive' overtly welfarist style of government.

1344 Above at pp 180-183.

1345 Above at pp 260-261.

1346 Above at pp 183-188 & 192-194.

1347 Above at pp 192-194.

Since the late 1970s, however, Australian governments had begun to withdraw from their role as 'benefit' providers, as we have described earlier. However, courts, judges and lawyers remained in the frontline, facing the legacy of popular experience of a socially-oriented welfare state and ongoing popular expectations of the state and its 'legal system' as a source of social 'benefits'. As mere 'stage managers', they were unable to satisfy these expectations. In fact, courts, judges and lawyers, and the civil and criminal justice systems which they administered, had rarely been the source of material state 'benefits' in modern Australian society. Neither was this their function, nor were modern justice systems designed to do so. Modern administrative law had supplied the vehicle for supervising the distribution of material social 'benefits', through the configurations of 'public administration'. By 1993, however, as we have shown above, these original modern social functions of administrative law had been transformed. Its role as the 'hidden' public face of law in the welfare state had thereby been diminished. Moreover, the *de facto* functions of administrative law, its actors and 'public administration' in 'buffering' the harsher social consequences for citizens unable to 'access' the courts to advance their social 'rights' had been removed. In their place had come the 'architects' of NPM and competition policy, and the 'new' administrative law of the 'new' welfare state. This not only reduced the buffer, its new paradigm of government made access to the courts seem even more significant.

The other source of the ideological dimensions of the 'problems' in 'access to justice' was in the reaction of interest groups. The legal professional groups, reformers, social welfare organisations, judges and lawyers and many individuals who made submissions to the NLAAC inquiry and the Senate 'Cost of Justice' inquiry had deep investments in the modern configuration of law and government.[1348] So did the players in national political forums who highlighted the presence of ongoing problems in access to courts and lawyers. The social capital of these political interests groups was adversely affected by the demise of the liberal legal centralist alliance and other cracks in the modern configurations of Australian law and government. Furthermore, by 1993, the 'control' of the legal system was at stake. Governments now took counsel from economists and economic rationalists about the legal system's future role and social functions. This threatened the influence established by the interest groups over the public policy processes of law-making and law reform. Furthermore, the political capital invested by the interest groups in legislation, judicial types of law and 'law' itself was threatened by the changed politics of the central legal domain. New axes of social governance had been established in the worlds of business and the 'privatised' corporate machinery of the welfare state. Its techniques of social ordering and regulation were not welcomed by the 'legal' interest groups, who were hostile to the 'removal' of political responsibility for legal regulation from governments, and who feared the implications for their future capacity to participate in law-making and to mould the content of centralist law to protect the social interests which they represented.

[1348] National Legal Aid Advisory Committee, above n 7 at 15-22; Senate Standing Committee on Legal and Constitutional Affairs, above n 9 at 53-63.

Why the Keating Government Adopted an 'Access to Justice' Approach

Prima facie, the actions of the Keating Government in adopting an 'access to justice' response are explicable by reference to the reasons discussed above. In 1993, there were real and ongoing problems in popular access to the Australian legal system. Moreover, there was a perception - amongst ordinary citizens and the 'legal' interest groups - that the legal system was becoming increasingly inaccessible. Either of these reasons provided a sufficient political justification for renewed state action to improve fair and effective access to law in Australian society.

However, what is not so clear is why that action necessarily involved jettisoning the legal aid response, which had been the premier national policy towards access to law since 1973. Neither is it clear why the new response took the particular form which it did. Why did the Keating Government adopt its 'access to justice' response and why did its ostensible justifications exhibit the paradoxical features we described above? If the response was intended to improve the quality of citizens' access to the legal system, why did it, at the same time, appear to doubt the social efficacy of the key institutions of its system of civil and criminal justice - the courts - and the judges and the legal profession?

The Jettisoning of the Legal Aid Response

By 1993, the 'legal aid' response had already faded into history. It was no longer a credible base for the public policy of access to the legal system in the 'new' welfare state. As a public policy response, legal aid suffered from two irremediable problems. The first was that it was 'guilty by association' with the past. In the eyes of the Keating Government and its policy-advisers, the national legal aid scheme was tarnished by the 'inefficiencies' of government in the 1970s and deeply implicated in its 'out-dated' attitudes to social welfare and citizenship. Moreover, within the Labor Party and the federal conservative parties - and, indeed, Australian society itself - the national scheme was linked to the perceived maladministration of the Whitlam Government For the dominant 'right wing' political factions of the Keating administration, this was an experience of Labor in government which they were anxious to forget.

Moreover, the national scheme and 'legal aid' had become closely associated in the 'minds' of governments, policy-makers and the public with the legal profession and lawyers. In 1993, the organised profession and lawyers still dominated the administration of the national scheme. Furthermore, private practising lawyers continued to be the major recipients of public expenditure on legal aid. Neither of these factors made expanding the legal aid response an attractive option to governments determined to subject the profession and the lawyers' services industry to competition policy, the 'market' and 'consumer-oriented' policies.

It was, however, not only that governments saw the profession and lawyers as economic dinosaurs. They were also unattractive because the organised profession and the majority of Australian lawyers remained deeply committed to the ideals of legalism and 'modern Australian law'. As a lobby group, lawyers and their

professional organisations projected ideals of the role of the courts, the responsibilities of the state and social citizenship which were increasingly antithetical to the thrust of government and public policy in the 'new' welfare state. Governments, therefore, were unlikely to have reinvigorated a policy so irrevocably linked to these rapidly vanishing configurations of modern Australian law and government.

The 'legal aid' response was also 'guilty by association' with the expansion of the post-war welfare state. The idea that Australians might possess a 'right' to legal aid - either as an incident of poverty or social citizenship - was not in keeping with the prevailing 'contributory' notions of the 'New Right', and its flourishing notions of 'consumer-citizenship'. Moreover, in the national corridors of power - particularly amongst those ministers and officials responsible for managing public finances - the national legal aid scheme had achieved a reputation for profligacy, as unjustified as this might have been. The Keating Government was, therefore, unlikely to have resolved to have increased expenditure on an already questionable response. A response, moreover, which was widely perceived amongst its advisers and officials to have for too long unduly enriched lawyers and subsidised the operation of their practices.

The second irremediable problem of the legal aid response was its diminished relevance. By 1993, as we have seen above, Australian governments had breached their modern 'bargain' with the legal profession. Neither the ideals of 'modern Australian law', nor a lawyer-centric market for legal services dominated access to law policy, as they had done in the mid-1970s. Governments had stepped away from the legal profession and its 'solutions' and towards the market-managed answers of the economists. The 'problems' in 'access to law' were seen as resolvable by establishing 'level playing fields' for lawyers' services providers, in which 'consumer-citizens' could purchase cost-effective services appropriate to their incomes and 'needs'. To the extent that the poor had any residual special claims on the state for legal aid, the ever more restrictive eligibility criteria applied within the national scheme guaranteed the presence of a minimal safety net, consistent with the changed assumptions of government in the 'new' Australian welfare state.

The Paradoxical Features of the 'Access to Justice' Response

It would be all too easy to dismiss the paradoxical features of the decision to adopt an 'access to justice' response as a cynical exercise of a government bent on pursuing policies of economic reform and disciplining the legal profession and lawyers. The opinion polls cited by the federal Minister for Justice in 1993 which "suggested a 'corrosion of faith' in the integrity of most ... social, corporate, economic and political institutions" had not been conducted in a social vacuum.[1349] They reflected the views of citizens living in the 'new' Australian welfare state. Moreover, "the pressing need to address the 'crisis of confidence' in the institutions fundamental to the rule of law" had not occured by accident.[1350] It was a product of

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1349 Above at p 248.

1350 Above at p 248.

the changed politics of law in Australian society in the 1980s and, in particular, of the decline of its modern configurations of law and government. In turn, these transformations were not the outgrowth of some unforeseen evolutionary process. The role of the Australian welfare state and the functions of its legal institution and law changed through the deliberate actions of governments, especially those of successive Federal Labor Governments since 1983. No doubt, these transformations were influenced - and even exacerbated - by extra-national changes in the global economy. Nevertheless, the overt instruments of change were the new styles of social governance 'engineered' through the legal system of the Australian welfare state.

As always, however, the causes of modern legal development are complex. Cynicism is an inadequate explanatory perspective, as are the cruder forms of Marxist critiques of the role of the state and its agents in the legal system. Care must also be taken in interpreting the significance of the rhetoric of the Minister for Justice and the liberal ideals of 'modern Australian law' espoused by the AJAC outlined at the beginning of the chapter. On the one hand, the celebration of the ideals of the 'rule of law', whilst at the same time engaging in deep criticism of the courts, judges and practising lawyers, might simply reflect the contradictions of a radical agenda of law reform. Indeed, this was partly so, both on the part of the Keating Government and its advisers and also on the part of the members of the AJAC. The chair of the latter, Mr. Justice Sackville, had been the Commonwealth Commissioner for Law and Poverty in the 1970s and remained - like other lawyer members of the AJAC - genuinely and deeply committed to reform and 'modern Australian law'. In this respect, they were not unlike other lawyers and the Australian citizenry at large in 1993, as we have indicated above. Thus, these residual perspectives on 'law' and the modern configurations of Australian law and government clearly influenced the decision to adopt an 'access to justice' approach, and to pursue its particular reform agendas.

On the other hand, it is difficult to avoid the conclusion that the Keating Government was also motivated by less noble factors. By 1993, Australian governments had breached the liberal legal centralist alliance and distanced themselves from their modern relationship with the legal profession. Governments no longer relied on the profession to the same degree or in the same proportion to manage the state and its justice system, or to administer lawyers' services. The legal profession had been relegated to the status of one amongst many competing interest groups, bereft of its modern privileges, and with its lawyers demoted to the status of 'day labourers'. Yet governments had retained the construction of 'law' originally designed by the legal profession as the continuing basis of 'modern law' in Australian society. In doing so, they had disconnected 'modern Australian law' both from its modern roots in the liberal legal centralist alliance and from the designing liberal assumptions of social governance of its 'architects' and 'stage managers' amongst the legal profession. and its judges and lawyers.

Moreover, these functional transformations had occurred in a social context where the legal system itself was increasingly disconnected from its role in the 'old' welfare state as a distributor of material 'benefits' and the guarantor of social well-

being, as we have shown above. Thus, by 1993 the ideals of 'modern Australian law', which had informed the 'access to justice' response, had increasingly become an ideological 'shell'. Significant parts of its 'legal system' had become remnant ideals of 'ideals' of 'law', existing amongst the shards of the modern configurations of Australian law and government. Moreover, disconnected from the modern social constraints imposed by the legal profession, they had become the exclusive property of the 'new' welfare state, now free to 'engineer' and design new social functions for 'modern Australian law'.

All these legal transformations occurred, as we have shown above, in a context where Australian governments were pre-occupied with minimising public expenditure, reducing their civic responsibilities and maximising 'efficiency' in social governance. Thus, it is difficult to avoid the conclusion that the adoption of an 'access to justice' response was also attractive to the Keating Government because it was relatively inexpensive, whilst at the same time redressing some of the real and ongoing problems in access to the legal system and satisfying some of the popular and other expressions of concern about its growing inaccessibility. For by 1993, the ideals of 'modern Australian law' had become another public commodity in the 'new' welfare state, subject - like its other assets - to the exegetical prescriptions of NPM and economic rationalism. Its newly disconnected character, allied with the transformations of the legal system, meant that it was a low cost commodity, both in design, 'manufacture' and content. This 'commodification' of 'law' was another and less obvious aspect of the explanation for the adoption of the 'access to justice' response. It saw the Keating Government sanction the 'production' of a new social construction of law, which transformed the unfulfilled expectations of 'modern Australian law' into a hollow promise of fair and effective access to law in the 'new' welfare state.

Conclusion

In applying the lessons of revisiting the post-war experience of legal aid, we have rendered the 'access to justice' response more transparent. Like the post-war experience of legal aid, neither the origins of the 'problems' in 'access to justice' which emerged in the mid-1980s, nor the significance of the response of the Keating Government are adequately explained within the self-referential ideals of 'modern Australian law'. This chapter has shown that the appearance of the 'problems' was linked to the transformation in public policy and legal regulation in the Australian welfare state. These transformations exacerbated the ongoing shortcomings in popular access to the legal system, making them both more socially prominent and the inaccessibility of courts and lawyers more socially significant. Moreover, like the post-war experience, the origins of the 'problems' in 'access to justice' were linked to developments in the political economy of the legal profession and to the changing functions of lawyers. These developments and changes were, in part, a continuation of trends evident in the 1960s and 1970s, but they were also a product of the growing interventionism of Australian governments since the late 1970s.

Furthermore, the chapter has shown that the experience of 'access to justice' in Australian society also had bifidial dimensions. On the one hand, the new 'problems' of the 1980s reflected real and 'concrete' difficulties faced by poorer and ordinary citizens in paying the transaction costs of the legal system and overcoming its social, non-financial barriers. These disabilities impacted upon greater numbers of citizens and produced heightened levels of social inequity in popular access to legal services, particularly those 'supplied' by courts and lawyers. The 'access to justice' response of the Keating Government, and its acceptance of many of the recommendations of the AJAC, were similarly 'concrete' responses to these real difficulties in access to legal services faced by its citizens. Moreover, both were in large part genuine responses to the shortcomings in fair and effective access to law in the 'new' Australian welfare state. Even if the scope and scale of the 'access to justice' response and the 'solutions' proposed by the AJAC fell impossibly short of the measures required to restore the social reciprocity which Australians had come to expect from modern governments. Although conceived in confusion, following the departure of the modern configurations of Australian law and government from the centrefield of social governance, they remained genuine responses by well-meaning reformers, who were ignorant of the need - and neglected the ideological 'options' - to construct new images appropriate for fair and effective access to law in the society of the 'new' welfare state.

On the other hand, like the social prominence of 'legal aid' in the post-war experience, 'access to justice' was also an ideological phenomenon, eliciting an ideological response. Unlike 'legal aid', the Australian experience of 'access to justice' was not a celebration of the vitality of the liberal legal centralist alliance, but an indication of its demise. Viewed in the context of the politics of the welfare state, it indicated instead a society still deeply committed to the ideals of 'modern Anglo-American law', but administered by governments which had become selective in their commitment to its ideals of social governance under the 'rule of law'. This chapter has shown that the ideological dimensions of the 'problems' in 'access to justice' were in a tangible sense a form of social protest by ordinary citizens objecting to their increasing exclusion from the 'traditional' protective regulatory umbrella of regulation in the Australian welfare state. The reaction of the Keating Government also had ideological dimensions, and it was not alone. It signalled that Australian governments were now prepared to 'manufacture' new social constructions of law through the 'engines' of the Australian legal system. These were constructions which, unlike those 'engineered' in the great modern enterprise of governments, the courts and the legal profession in the liberal legal centralist alliance, increasingly treated modern centralist law as a commodity, to be bartered in the 'markets' of governance, citizenship and access to legal services in the 'new' welfare state. This, as we see in Chapter Nine, would have implications for the feasibility of achieving fair and effective access to law in contemporary Australian society.

Chapter Nine
Conclusion

In Chapter One, we began by posing the general question of whether fair and effective access to law is a feasible expectation of citizens or governments in the contemporary Australian welfare state. This question was posited in the context of the reality of the on-going 'problems' citizens experienced in access to the legal system, and 'access to justice'. The thesis proclaimed as its goal to consider whether these problems are realistically capable of being resolved.

In answering this initial question, our emphasis is upon whether these 'problems' are "capable" of being resolved and upon the "feasibility" of citizens achieving fair and effective access to law in the Australian welfare state. This conclusion neither prescribes specific remedial measures, nor does it conclusively assess the practicability of law reform and changes to public policy or their prospects of success. Instead, it reviews the results of defending the opening contention of the thesis, explains why it holds 'keys' to understanding access to law and briefly discusses the feasibility of achieving fair and effective access to law in the contemporary Australian welfare state.

The Results of Defending the Opening Contention

The opening contention of the thesis was that revisiting the origins and significance of the mid-1970s national legal aid scheme held the key to determining the feasibility of achieving fair and effective access to law in contemporary Australian society. The thesis has successfully defended this contention. In the first place, it has done so by revealing the origins of the phenomenon which was the Australian post-war experience of legal aid. Part I of the thesis narrated the institutional developments which preceded the national scheme and described its ideological context. This history gave us a clearer picture of its origins and significance, particularly with respect to its connection with post-war changes in the legal profession, the economics of solicitors' practices, the growing consciousness of the plight of poorer Australians and developments in public policy in the welfare state over 1973-76.

Part II began by pursuing the 'missing' aspects of the story of the Australian experience in a cross-national context. Modern legal aid in Western society was shown to have been a product of legal modernisation, and of the establishment of its national legal systems. Legal aid assumed its familiar bifidial form, i.e., simultaneously being part of the 'concrete' legal machinery of the modern state and an ideal of 'modern Western law', through the subsequent functional transformation of the poor persons procedures. However, contrary to the explanatory orthodoxy, the thesis demonstrated that the ideals of 'legal aid' fulfilled different social functions in the modern civil law and common law worlds. In the former, its ideals were closely linked with emerging social 'rights' of citizenship. Whereas, in the common law

world, 'legal aid' was seen as an 'institution' of the 'legal system' of the 'modern Anglo-American law' created by the liberal legal centralist alliance.

By locating its origins in modernity and identifying the impact of the different social constructions of 'modern Western law', the thesis has presented an alternative history of legal aid. This is a history, moreover, which sourced legal aid in the same legal systems which continued to service the regulatory needs of post-war modern Western governments, performing comparable tasks and functions to their mid-19th century ancestors. Furthermore, to reconstruct the history of legal aid, Part II of the thesis developed a revised framework to analyse modern legal developments. This framework promised to be applicable in revisiting the post-war experience of legal aid, as it proved to be.

In the light of this alternative history and its underlying investigative 'tools', the thesis provided new insights into the origins and significance of the post-war experience. Importantly, it showed that, instead of looking for 'answers' to the causes of a single phenomenon, i.e., "post war legal aid", we were actually looking at the causes of dual phenomena: first, the reorganisation of national arrangements for legal aid, and, secondly, the unprecedented social prominence of the Anglo-American 'legal aid' ideal in the post-war Western world. In the case of the former, the thesis confirmed that the post-war national schemes were products of changes in public policy in the welfare capitalist states. These changes were caused by a variety of political factors, which had their origins across the social experience of modernity. The catalytic cause, however, was shown to be the great post-war expansion of the social functions and responsibilities of the welfare capitalist states. The thesis confirmed that the post-war schemes were demonstrably important in advancing popular social well-being, whilst highlighting some of their limitations in addressing the legal problems of poorer and disadvantaged people. It also explained 'why' and 'how' the new legal aid schemes were significant for the welfare state and its organs, lawyers and the legal profession, as Abel and others had suggested.

However, the thesis demonstrated that the principal 'benefits' of revisiting the post-war experience came from exploring the origins and significance of its second dimension. The social prominence of the ideals of Anglo-American 'legal aid' were shown, in the first place, to 'test' the social integrity of the liberal legal centralist alliance and its 'law' in the Anglo-American welfare states. In the United States, the thesis argued that the post-war experience revealed an alliance facing 'external' threats to its hegemony. Elsewhere, in countries like Australia, Britain and Canada, it showed the modern alliance of governments, courts and the legal profession to be vitally intact, and its social constructions of 'modern law' to be both omnipresent and hegemonious. In the second place, the thesis linked the prominence of the ideals of Anglo-American 'legal aid' in other parts of the Western world to the post-war social penetration of Anglo-American culture, and the gradual internationalisation of its ideals of 'modern law'. Part II concluded that the ultimate and lasting significance of the post-war experience, in both its 'concrete' and 'ideal' dimensions, was to reinforce and consolidate the political interests of modern centralist law in the Western legal domain. In doing so, the thesis was recording an important new insight gleaned from revisiting the experience. Incidentally, however, this

conclusion also deliberately confronted our deeply ingrained liberal sensibilities about legal aid. Thus, revisiting its post-war experience was also important because it illustrated the 'mind' shifts necessary, if governments, policy-makes and lawyers in liberal welfare capitalist states like Australia are to effectively engage with the social problems of access to law.

The previous chapter has been a practical demonstration of this policy imperative. It has applied the methodology, insights, 'benchmarks' and other lessons of revisiting the post-war experience to give greater transparency to the Australian 'access to justice' response. Once again, the thesis has revealed the shortcomings of liberal and other centralist analyses in explaining the origins of legal developments in the welfare state. These manifested themselves, in this instance, in the justifications for renewed state action offered by the Keating Government, and echoed by the AJAC. In part, its decision to adopt an 'access to justice' response reflected a desire amongst Australian governments to enhance the social 'rights' of citizenship. More significantly, it was a reaction to political pressures and social discontent arising out of real and ongoing problems in access to the legal system, and especially to its courts and lawyers. Many of these problems were a legacy of modernity, left unaddressed by the national legal aid scheme. However, the thesis showed that others were a direct result of actions of Australian governments since the mid-1970s, beginning with the retreat from social services in the late 1970s, and compounded by the transformations of the welfare state in the 1980s. Not only did these actions exacerbate the existing problems, but they created a new climate in which access to lawyers and courts became more socially significant - in both actual and perceived terms.

In various ways, Chapter Eight has shown that the transformations in public policy, government and law in the welfare state in the 1980s cracked the modern configurations of Australian law and government beyond immediate hope of repair. Thus, like legal aid before it, the 'problems' in 'access to justice', and the subsequent response of the Keating Government, served as a 'litmus test'. In this case, however, the thesis has shown its results were confused, and indeterminate. On the one hand, the 'test' revealed governments which had abandoned their political compact with the legal profession, and were pursuing alternative ideas of social governance, styles of legal regulation and civic relationships, with the aid of non-lawyer, economic advisers. On the other hand, daily life in Australia was still governed by conceptions of 'modern law', and by citizens' expectations of a 'legal system' in a welfare state designed to promote social well-being. From either perspective, however, the 'test' revealed a society where modern centralist law, its ideologies and social functions had undergone major transformation in less than 20 years. The thesis has not fully explored or explained the 'story' of this transformation. Neither has it fully considered its implications. It has, however, demonstrated that improving our understanding of the origins and significance of the post-ware experience lets us begin to 'see' its real story, and points in the direction in which it can eventually be fully told.

The 'Keys' to Understanding Access to Law

The contribution of the thesis to understanding access to law goes beyond revisiting the origins and significance of post-war legal aid and unravelling the 'access to justice' response. The work in the thesis has provided other insights into post-war law, government and society impinging upon access to the legal system. These are scattered throughout its chapters, and include the constant presence of the legal profession and changes in the political economy of legal practice and the organisation of the lawyers' services industry. However, the thesis has also provided three important 'keys' or methodological insights into studying the causes and solutions to problems in access to law. In particular, it has provided insights from the perspective of researching, planning and developing the public policy of access to the law - and courts and lawyers - in the contemporary welfare state.

In the first place, the thesis has reminded us of the significance of history, something all too frequently forgotten in economic modelling of the 'new' welfare state. This refers not only to the significance of the history of the modern Australian social experience of law and its legal systems, ideologies and actors. The history relevant to access to law includes the stories of the Australian welfare state, its policies and public administration. Moreover, it includes the yet largely overlooked stories of 'lesser', socially-based forms of legal ordering. If we are to understand modern Australian law today and to plan or speculate about its future development, we must first better understand its past, even if - as in the case of modern centralist law - the evidence suggests that its future may be quite different to its disappearing, post-war modern past.

Secondly. the thesis has throughout emphasised the connection between developments in centralist law, and the decision-making processes and public policies of the modern state. In Chapter One, we noted that the law of the welfare state is its servant, and that its legal agendas project public policy. Part II, however, showed that the modern legal system and its law are creatures or 'inventions' of the state. In Australia, we had become accustomed to viewing public administration - and its 'public servants' - as part of the legal machinery of the state, with notionally little room for independent manoeuvre. However, until very recently, 'we', like others in the modern common law societies, had seen courts, judges and lawyers as inherently different, apart from and 'independent' of the state in their role and functions. Much of the work in the thesis has demonstrated this to be a social artifice. Modern courts, judges and lawyers have always been creatures of the state and its functions, far more so than the imprints of the modern configurations of Australian law disclosed. For these reasons, the thesis suggests that judges, lawyers and 'lawyer-educated' policy makers may not be the most appropriate people to shape the future direction of access to law policy. The role of economists in the 'new' welfare state may be socially delterious, as Chapter Eight implies. Nevertheless, this does not mean that economists, Public Policy scholars and practitioners, 'New Public Managers' and others will not be needed in sufficient numbers to leaven the presence of lawyers and their images of law. For like war,

access to law policy, "is much too serious a thing to be left to military men", or, in this case, lawyers of either gender.[1351]

Thirdly, in Part II the thesis articulated a revised analytical framework for better understanding the modern origins of legal aid. This framework adopted a 'kaleidoscope approach' to modern legal development. It drew upon what we 'knew' from history, together with the insights offered by the liberal legalist, liberal centralist and Marxist-oriented ideological premises which informed the explanatory accounts of the post-war experience of legal aid. However, the framework sought to redress the defects in the existing - or 'old' - analytical perspectives, and to accommodate the political dimensions of modern law. Accordingly, it included four new explanatory perspectives: first, a legal pluralist perspective; secondly, a dynamic model of development in the state legal system; thirdly, the methodology and techniques of Public Policy; and, fourthly, it acknowledged an ultimate brake on explaining legal development in the welfare state.

The thesis has successfully deployed this analytical framework to discover new insights into the origins and significance of the post-war experience of legal aid and to explore the reasons behind the 'access to justice' response. This suggests that the framework may have a wider application in modelling the causes of legal developments in the contemporary welfare state and in assisting in identifying possible 'solutions' to its problems in access to law.

The Feasibility of Fair and Effective Access to Law

The thesis has shown that the Australian welfare state is "capable" of achieving fair and effective citizens' access to law. Neither the post-war legal aid scheme, nor the 'access to justice' response were designed as exhaustive coordinated national attempts. Thus, those responses cannot be said to have demonstrated the impracticability of achieving fair and effective citizens' access to law. Moreover, the 'new' welfare state retains the legitimacy, technology and administrative capacity to direct a sustained campaign to overcome the existing problems in access to the legal system. However, it is evident from the thesis that it is unlikely to do so. The 'old' welfare state, operating within the modern configurations of Australian law, neglected the legal problems of its citizens at a time when it was otherwise actively engaged in the 'institutional' protection of national social well-being. The 'new' welfare state has stepped away from these responsibilities. Its new principles of social governance and expectations of 'consumer-citizenship' make it an unlikely candidate to pursue systemic law reform and inject socially significant additional funds into the system of legal aid.

Thus, if Australian citizens are to achieve practicable forms of fair and effective access to law, they must first diversify their expectations. The ideal of universal fair and effective popular access to courts and lawyers was always a modern dream.

[1351] Attributed to Charles-Maurice de Talleyrand, quoted by Briand to Lloyed George during World War I: *The Concise Oxford Dictionary of Quotations*, (1964) at 225, para 5.

matched neither by historical experience nor administrative reality. Governments, policy makers and citizens must become more catholic in their taste for law, and must begin reminding each other of the historical and ever-present reality of the pluralism of the legal domain. This should not be an excuse for the legal system to avoid the many occasions when court-based, 'expert' facilitated procedural justice is appropriate, necessary and fair. It means that the legal system should - whenever possible – elevate existing and new forms of social ordering and dispute resolution which legal modernisation placed 'outside the law'. Bringing modern Australian law back into the fold of the legal system must be part of the process of moving towards fair and effective access to law.

On the other hand, the state and its powers are an undeniable reality. In Chapter Eight, we described the changed politics of the Australian central legal domain since the mid-1980s, and the legal transformations being 'engineered' by the 'new' welfare state. These have contributed to the demise of the modern configurations of Australian law. However, in the rhetoric of NPM and its adherents, the 'death' of those configurations, and the fading of 'modern Australian law' and its 'legal system' also provide those pursuing fair and effective access to law with 'new opportunities'. In a sense, these 'opportunities' are unwelcome, for they are based on new ideals of governance which challenge or deny the more comfortable assumptions of modernity. However, the changed politics of law in the Australian welfare state do provide real and identifiable opportunities for legal change. Change which cannot and need not ignore the state, but which should seek to use its pursuit of deregulation and freedom from 'law' to reclaim the popularity of law itself - in its many and multitudinous forms - on behalf of law's diverse interests and claimants. In reclaiming the sociability of law and in distributing responsibility for access to its other institutions, citizens may be better equipped to remind the 'new' welfare state of its responsibilities to provide social justice in the form of the improved material well-being which was the real achievement of the modern legal system for poorer and disadvantaged people.

Appendix A

AGREEMENT

between

THE COMMONWEALTH OF AUSTRALIA

and

THE STATE OF WESTERN AUSTRALIA

in relation to

The Provision of Legal Aid

(1977)

THIS AGREEMENT is made the *Twenty-first* day of *January* One thousand nine hundred and seventy-*eight* between

THE COMMONWEALTH OF AUSTRALIA (in this agreement called "the Commonwealth") of the one part, and
THE STATE OF WESTERN AUSTRALIA (in this agreement called "the State") of the other part.

WHEREAS :

(A) the Commonwealth and the State are desirous of ensuring that legal aid is available, both in matters relating to the Commonwealth and in matters relating to the State, to persons in Western Australia who are in need of assistance;

(B) the Commonwealth and the State are in agreement that such legal aid can most appropriately be provided by a statutory body, independent of government, established by the State and conducted and funded in accordance with arrangements made between the Commonwealth and the State;

(C) by the Legal Aid Commission Act, 1976-1977 the Parliament of the State has made provision for the establishment of a corporation to be known as the Legal Aid Commission of Western Australia and for the functions and duties of the Commission that is so established;

(D) section 68 of that Act provides that the State may from time to time enter into an agreement or arrangement with the Commonwealth for or with respect to -

(a) the moneys to be made available by the Commonwealth, or by the State and the Commonwealth, for the purposes of legal asistance;

(b) the priorities to be observed in the provision of legal assistance as between classes of persons or classes of matters, or both;

(c) the transfer to the staff of the Commission of persons who are Commonwealth employees within the meaning of section 77 of the Act;

(ca) the sharing of -

(i) the costs of establishing the Commission; and

(ii) operational costs incurred in the provision of legal assistance by the Commission;

(d) any matter incidental to a matter mentioned in paragraph (a), (b), (c) or (ca) of the section;

(E) by the Commowealth Legal Aid Commission Act 1977 the Parliament of the Commonwealth has made provision for the establishment of a Commission to be known as the Commonwealth Legal Aid Commission and for the functions and duties of the Commission that is so established;

(F) provision is also made by the said Commonwealth Legal Aid Commission Act 1977 for the Commonwealth to make arrangements with a State with respect to the transfer of certain persons employed by the Commonwealth to a legal aid commission of the State and for the implementation of arrangements so made;

(G) in order to give effect to the said agreements, provisions and proposals the Commonwealth and the State are desirous of entering into the agreements and arrangements hereinafter set forth:

NOW IT IS HEREBY AGREED as follows :

Interpretation

1.1 · In this agreement, except where the context otherwise requires or unless a contrary intention appears -

"appointed day" means the day appointed by the Commission pursuant to section 13 of the State Act as the day on which the Commission will commence to provide legal assistance in accordance with the State Act;

"Federal area" means the matters to which that expression relates as provided in paragraph (a) of clause 4.3 and as deemed by clause 4.4;

"legal aid" means legal services, including advice on matters of law, of the nature performed by a legal practitioner for a client;

"State area" means the matters to which that expression relates as provided in paragraph (b) of clause 4.3;

"the ALAO" means the Division of the Attorney-General's Department of the Commonwealth that is designated the Australian Legal Aid Office;

"the Commission" means the Legal Aid Commission of the State referred to in clause 2.1;

"the Commonwealth Act" means the Commonwealth Legal Aid Commission Act 1977;

"the Commonwealth Commission" means the statutory Commission of the Commonwealth that is established by the Commonwealth in accordance with clause 3.1;

"the State Act" means the Legal Aid Commission Act, 1976-1977 of the State; and

"year" means a year commencing on a first day of July.

1.2 In this agreement, except where a contrary intention appears -

(a) words or expressions that are defined in the State Act shall have, where appropriate to the context, the respective meanings attributed to them by the State Act;

(b) a reference to a clause is to the relevant clause of this agreement;

(c) the Schedule referred to is the Schedule to this agreement;

(d) where part of a year is referred to the reference shall be to the period less than a year which commences on the relevant 1st July or which ends on the relevant 30th June as the context requires.

State Commission

2.1 The State will establish and provide for the operation of a statutory Legal Aid Commission independent of government but responsible to the Attorney-General of the State.

2.2 The Commission shall be constituted by persons who are nominated by the State, the Commonwealth and the legal profession in Western Australia and by the person who is the Director of Legal Aid.

2.3 The Legal Aid Commission of Western Australia that is established by the State Act shall, unless other provision is made by the Parliament of the State consistently with clause 2.1, be the Commission referred to in that clause.

Commonwealth Commission

3.1 The Commonwealth will establish and provide for the operation of a statutory Commission for purposes that include ascertaining and keeping under review the extent of the need for legal assistance in Australia and in particular the need for legal assistance in respect of Commonwealth matters, including the making of recommendations concerning the provision of such legal assistance by legal aid commissions of States and Territories.

3.2 The Commonwealth Commission shall be constituted by persons who are nominated by the Commonwealth, the States of Australia, the Law Council of Australia, and welfare bodies or consumer bodies.

3.3 The Commonwealth Legal Aid Commission that is established in pursuance of the Commonwealth Act shall, unless other provision is made by the Parliament of the Commonwealth consistently with clause 3.1, be the Commission referred to in that clause.

Provision of Legal Aid

4.1 The provision in Western Australia of legal aid to which this agreement relates shall be the responsibility of the Commission and legal aid shall be provided by the Commission accordingly.

4.2 The Commission shall carry out its operations under the name "Legal Aid Commission of Western Australia" and shall for a period of twelve months after the appointed day indicate on its letterhead, in advertisements and on notices outside its offices that it incorporates the ALAO and the Legal Assistance Scheme.

4.3 The legal aid to which this agreement relates consists of legal aid on and from the appointed day to persons who are in need of assistance of that nature with respect to -

(a) matters relating to or arising under or out of Federal law (which matters are referred to in this agreement as the "Federal area"); and

(b) matters relating to or arising under or out of State law (which matters are referred to in this agreement as the "State area").

4.4 For the purposes of clauses 5.1, 5.2, 5.3, 8.1, 8.2, 8.3, 9.3 and 19.2 of this agreement the "Federal area" shall, without affecting the meaning in this agreement of "State area" under paragraph (b) of clause 4.3, be deemed to include -

(a) any matters relating to or arising under or out of State law, being matters in respect of which the persons seeking assistance are members or discharged members of the Defence Force or their dependents, migrants, persons in receipt of benefits under the Social Services legislation of the Commonwealth, Aboriginals or students, in respect of which and to the extent to which the Commonwealth agrees to make payments for the purpose of the provision by the Commission of legal aid; and

(b) any matters relating to or arising under or out of State law which the Attorney-General of the Commonwealth may from time to time designate.

4.5 The Commonwealth and the State will arrange for the legal aid services that are being provided in Western Australia at the date of this agreement under Part V of the Legal Contribution Trust Act, 1967 of the State to be brought within the scope of the responsibility of the Commission under clause 4.1 as at the appointed day or as soon as practicable thereafter.

4.6 Notwithstanding clause 4.1, the Commission may provide financial assistance to voluntary legal aid bodies in Western Australia in respect of the provision of legal aid subject to the proportions in which the financial assistance is to be provided having been determined by agreement between the Commonwealth and the State and to moneys having been appropriated for that purpose by the Parliaments of the Commonwealth and of the State.

Provision of Legal Aid in Federal Area

5.1 In the provision of legal aid in the Federal area the Commission shall be required to have regard to the recommendations of the Commonwealth Commission.

5.2 The recommendations of the Commonwealth Commission to which clause 5.1 relates are those in respect of legal aid in the Federal area and include recommendations that are made by the Commonwealth Commission in the performance of its functions as for the time being provided by the Commonwealth Act.

5.3 Notwithstanding anything contained in this agreement the Commission shall not be required to provide legal aid in the Federal area that involves expenditure by

the Commission in excess of the sum of the funds in respect of that aid that are provided or to be provided by the Commonwealth under this agreement and are contributed by and recovered or to be recovered from applicants for legal aid in the Federal area.

Liabilities Prior to Appointed Day

6.1 The Commonwealth and the State accept responsibility for providing the Commission with sufficient funds to meet the liabilities of their respective legal aid schemes that are outstanding immediately prior to the appointed day.

Establishment Costs

7.1 The costs of establishing the Commission shall be shared by the Commonwealth and the State in a manner that shall be agreed upon between the Commonwealth and the State.

Commonwealth Payments

8.1 In respect of the part of a year commencing on the appointed day, the Commonwealth will make payments to the State from time to time for the purpose of the provision by the Commission during that part of a year of legal aid in the Federal area.

8.2 In respect of a year after the part of a year referred to in clause 8.1 the Commonwealth will make payments to the State from time to time for the purpose of the provision by the Commission during the year of legal aid in the Federal area in accordance with a program and estimates of expenditure which have been prepared by the Commission and approved by the Commonwealth in accordance with the succeeding provisions of this agreement.

8.3 Subject to moneys for the purpose being appropriated by the Parliament of the Commonwealth, the payments by the Commonwealth under clauses 8.1 and 8.2 will not be less than the amount that is required to maintain during the part of the year or the year to which the payments relate a level of provision of legal aid in Western Australia in respect of the Federal area which, in terms of the legal services available to persons in need of assistance in respect of matters referred to in paragraph (a) of clause 4.3 and of matters in respect of persons referred to in paragraph (a) of clause 4.4, is equivalent to the level of legal aid that was provided by the ALAO during the twelve months immediately preceding the appointed day.

Submission of Programs and Estimates of Expenditure

9.1 The State will, when from time to time so requested in writing by the Commonwealth submit to the Commonwealth a program and estimates of expenditure in respect of the provision by the Commission of legal aid in the Federal area.

9.2 A program and estimates of expenditure referred to in clause 9.1 shall be prepared by the Commission and shall be in such form and shall relate to such period or periods as the Commonwealth requests and be submitted by such date or dates as the Commonwealth specifies in the request.

9.3 The program and estimates of expenditure shall cover all matters relevant to the provision of legal aid by the Commission in the Federal area, including -

(a) the delivery of legal services by salaried and private practitioners;

(b) the provision of legal advice through 'shop front' offices;

(c) the operation of regional offices;
(d) 'duty lawyer' services; and
(e) 'mobile lawyer' services.

and shall include the share of salaries and administrative costs of the Commission that are referable to the provision of legal aid in the Federal area.

9.4 In the preparation, including the revision, of programs and estimates of expenditure, the Commission will consult with the Commonwealth Commission.

Revision of Programs and Estimates of Expenditure

10.1 The State shall arrange for the preparation by the Commission of a revised program or revised estimates of expenditure -

(a) at any time when the Commonwealth so requests in writing and in accordance with a timetable specified by the Commonwealth; or

(b) if at any time the State wishes to make a change or changes in the program or in the estimates of expenditure,

and shall submit the revised program or the revised estimates of expenditure to the Commonwealth in accordance with the timetable or when a revised program or revised estimates incorporating the change or changes has been prepared.

Approval of Programs and Estimates

11.1 Programs and estimates of expenditure, including revised programs or estimates of expenditure, submitted under the preceding clauses shall be considered by the Commonwealth, which may propose to the State any variations the Commonwealth considers appropriate.

11.2 The State will furnish to the Commonwealth such information and material as may reasonably be requested by the Commonwealth for the purpose of considering programs or estimates of expenditure, including proposed variations, under clause 11.1.

11.3 The Commonwealth will inform the State that, or of the extent to which, the Commonwealth approves a program and estimates of expenditure or a revised program or estimates of expenditure submitted by the State and a program and estimates of expenditure so approved, or resulting from the approved revision, shall be the approved program and estimates of expenditure for the purposes of this agreement in respect of the period or periods to which the program and estimates of expenditure relate.

State Funding

12.1 Subject to moneys for the purpose being appropriated by the Parliament of the State, the State will provide to the extent required by the State Act the funds needed to meet expenditure by the Commission in respect of legal aid that is provided after the appointed day with respect to matters in the State area, other than matters that are deemed to be included in the Federal area under clause 4.4, after account has been taken of contributions by and costs recovered or to be recovered from applicants and statutory interest available in solicitors trust accounts and other trust accounts.

Transfer of ALAO Staff

13.1 The Commission will offer to each person who at the date of this agreement was, and on the date of offer is, an eligible person employed as a member of the staff of the Commission on and from the appointed day upon and subject to the terms and conditions set out in the Schedule.

13.2 For the purposes of clause 13.1, including the operation of the Schedule -

"eligible person" means a person who holds an office or who is performing duties in the ALAO in Western Australia and includes a person within that description who is for the time being on leave;

"offer" means an offer by the Commission in accordance with clause 13.1; and

"the date of offer" shall be a date arranged between the Director of the ALAO and the Commission for offers to be made under clause 13.1 which shall not be later than 28 days from the date of this agreement or earlier than twelve weeks before the appointed day.

13.3 An offer shall -

(a) set out particulars of the position on the staff of the Commission which is offered to the eligible person;

(b) contain adequate information concerning the terms and conditions of the employment which is offered;

(c) indicate the date of the appointed day as the date upon which the offer if it is accepted will take effect;

(d) specify a period of time, not being less than 28 days from the date of offer, within which the offer may be accepted; and

(e) provide that, where an eligible person is on leave or other authorized absence from duty on the date of offer, the period of time referred to in (d) shall commence when the eligible person receives the offer or returns from that leave or other absence, whichever is the earlier.

13.4 An eligible person who accepts an offer shall be employed as a member of the staff of the Commission as from the appointed day in the position to which the offer relates in accordance with the particulars set out in respect of the position and in accordance with the terms and conditions set out in the Schedule.

13.5 Where a member of the staff of the Commission -

(a) was an eligible person entitled under the Long Service Leave (Commonwealth Employees) Act 1976 (in this clause called "the Act") immediately before the appointed day to be paid in lieu of long service leave on ceasing to be employed in Government Service;

(b) has not been paid in lieu of long service leave in respect of that entitlement; and

(c) has exercised the election referred to in paragraph 10 of the Schedule to have long service leave entitlements determined otherwise than in accordance with the provisions of the Act,

the Commonwealth will, upon that person being granted the whole or part of the entitlement of that person to long service leave or being paid in lieu of that entitlement, to the extent that the entitlement is derived from Government

Service under the provisions of the Act, pay to the State the amount that would have been payable by the Commonwealth by virtue of the entitlement referred to in paragraph (a) above in respect of the period of leave that is granted or in respect of which payment is made.

Superannuation Payments and Arrangements

14.1 In respect of each person who is a member of the staff of the Commission and who for the time being continues to be or who has remained an eligible employee for the purposes of the Superannuation Act 1976, as amended, of the Commonwealth (in this clause called "the Act"), the State will -

(a) arrange for the contributions of that person under the Act to be deducted from payments of salary from time to time made to that person;

(b) pay to the Commonwealth amounts deducted under paragraph (a);

(c) make payments to the Commonwealth at such rate in relation to the salary for superannuation of that person as is from time to time determined by the Minister for Finance of the Commonwealth as the employer's contribution towards the superannuation benefits of that person under the Act; and

(d) arrange for the provision by the Commission to the relevant Commonwealth authorities of such information and documents as are from time to time requested for the administration and operation of the Act with respect to that person.

14.2 Payments made by the State to the Commonwealth under paragraph (c) of clause 14.1 shall for the purposes of this agreement be provided for in estimates of expenditure and included in expenditure of the Commission as an operating cost in respect of legal assistance in the Federal area.

14.3 Arrangements shall be made between appropriate Commonwealth and State authorities in relation to the manner in which payments are to be made by the State under clause 14.1 and for any other matters that require to be arranged with respect to the operation of that clause.

Further Arrangements

15.1 The Commonwealth and the State will negotiate and enter into arrangements between them for or with respect to the taking over and possession and use by the Commission of such office accommodation, furniture, records and equipment of the ALOA as is appropriate to the functions and needs of the Commission.

Manner of Provision of Legal Aid

16.1 The Commission may provide legal aid in a matter by making available the services of the Director of Legal Aid or the staff of the Commission or by arranging for the services of a private practitioner or practitioners to be made available wholly or partly at the expense of the Commission.

16.2 In the allocation of work between the Director and staff of the Commission and private practitioners regard shall be given to the desirability of enabling officers of the Commission to utilize and develop their expertise and maintain their professional standards by conducting litigation and doing other kinds of professional legal work.

Solicitor and Client Relationship

17.1 The State will take action to ensure that legislation is and continues to be in force by virtue of which the like privileges as those that arise from the relationship of client and solicitor acting in his professional capacity and in the course of his professional employment shall arise between a person who has applied for legal aid, or to whom legal aid is being provided, and the Director of Legal Aid or a practitioner who is a member of the staff of the Commission when the Director or that practitioner practises as, or performs any of the functions of a solicitor for the applicant or assisted person in accordance with this agreement.

Advances of Commonwealth Payments

18.1 Payments to be provided by the Commonwealth to the State under this agreement shall be made on request in writing by the State by way of advance for a specific purpose or purposes for which payments may be made in a sum or sums not exceeding in total the amount of the funds agreed to be advanced for the period, not being less than one month or more than three months, in respect of which the advance is made.

18.2 The State will ensure that an advance is expended only for the specific purpose or purposes for which the advance is made.

18.3 An advance or any part of an advance that is not expended during the period for which it is made shall, at the option of the Commonwealth, be repaid by the State to the Commonwealth or set off against subsequent advances made by the Commonwealth.

Provision of Statements and Statistics

19.1 The State will provide in a manner approved by the Commonwealth such statements of expenditure as the Commonwealth may reasonably require for the purposes of this agreement.

19.2 The Commission will keep records of the provision of legal aid in the Federal area and will as soon as possible after the end of each year furnish to the Commonwealth, in a form approved by the Commonwealth, a statement of the legal aid in that area that has been provided during the year.

19.3 The Commission will at such times as the Commonwealth Commission requests provide to the Commonwealth Commission such statistics and other information as the Commonwealth Commission may reasonably request.

Audits, Financial Statements and Certificates

20.1 The accounts, books, vouchers, documents and other records relating to the administration of the Fund by the Commission shall be subject to audit by the Auditor-General of the State.

20.2 As soon as possible after the end of each year, the State will submit in a form approved by the Minister for Finance of the Commonwealth a financial statement for that year which shall be accompanied by a report by the Auditor-General of the State on the audits and the financial statement indicating, inter alia -

(a) the correctness or otherwise of the financial statement;

(b) whether the financial statement is based on proper accounts and records and is in agreement with those accounts and records; and

(c) whether the expenditure of moneys is in accordance with this agreement,

and including reference to such other matters arising out of the audits and financial statement as the Auditor-General of the State considers should be reported to the ~~Commonwealth~~ Minister for Finance of the Commonwealth.

Operation and Termination of Agreement

21.1 The intention of the parties on entering into this agreement is that it will continue in operation ~~indefi~~nitely but the agreement is nevertheless subject to termination as hereinafter provided.

21.2 Either party may terminate this agreement upon or at any time after the expiration of the period of three (3) years from the appointed day by notice of termination in writing which has been given by the party to the other party and was expressed to take effect on a date specified in the notice, not being less than twelve months from the date on which the notice is given.

21.3 If this agreement is terminated -

(a) the assets of the Commission shall, after any requisite realization by sale or otherwise, be shared between the Commonwealth and the State in proportions which shall be agreed upon beween the Commonwealth and the State; and

(b) liabilities of the Commission at the date of termination shall be borne -

(i) by the Commonwealth as to all matters in respect of which the Commonwealth is liable pursuant to paragraph (a) of clause 4.3 and to clause 4.4;

(ii) by the State as to all matters in respect of which the State is liable pursuant to paragraph (b) of clause 4.3.

21.4 If this agreement is terminated by the Commonwealth under clause 21.2 and the State is adversely affected by that termination then, notwithstanding clause 21.3, the Commonwealth will pay to the State such sum of money as the Commonwealth and the State agree upon as adequate compensation for the State.

Commonwealth Legal Aid Service

22.1 Without prejudice to the operation of clause 4.1, the Commonwealth acknowledges that this agreement is made on the basis that the Commonwealth will not establish a Federal legal aid service in the State during the continuance of this agreement.

Notices

23.1 Notices under and for the purposes of this agreement may be signed -

(a) in the case of the Commonwealth, by or on behalf of the Secretary to the Attorney-General's Department of the Commonwealth;

(b) in the case of the State, by or on behalf of the Under Secretary for Law, Crown Law Department of the State.

23.2 The addresses for notices and other communications under and for the purposes of this agreement shall be -

(a) in the case of the Commonwealth -

The Secretary,
Attorney-General's Department,
Administrative Building,
PARKES. A.C.T. 2600

(b) in the case of the State -

The Under Secretary for Law,
Crown Law Department,
109 St. George's Terrace,
PERTH. W.A. 6000

SCHEDULE

Clause 13.1

Terms and Conditions to Transferred Staff

Definitions

1. In these terms and conditions -

(a) "transferred employee" means an eligible person who has accepted the offer of employment made to that person by the Commission and who is employed by the Commission accordingly;

(b) "remuneration" means salary or pay and includes such allowance as the Commonwealth and State agree should be regarded as having formed part of the salary or pay of the relevant transferred employee as an eligible officer but, except where expressly provided, does not include a higher duties allowance; and

(c) references to employment by or with the Commission shall, where the context permits, include appointment to and the holding for the time being of a full time statutory office of the State the function of which is to administer and provide legal assistance and the meaning of the expression "transferred employee" shall, if the case so requires, be extended accordingly.

State Terms and Conditions

2. Subject to these terms and conditions and, without detracting from the operation of these terms and conditions, to any law applying generally to employment by the State Government and its instrumentalities, the employment of a transferred employee by the Commission shall be upon terms and conditions that from time to time apply generally to staff employed under the Public Service Act of the State in the category of staff in which the transferred employee is for the time being employed.

Remuneration

3. A transferred employee shall, upon becoming employed by the Commission, be entitled to be paid remuneration at a rate not less than the rate at which remuneration is payable to the transferred employee as an eligible person immediately before the appointed day.

4. Subject to -

(a) any law relating to the reduction of the salaries of employees of the State generally; and

(b) any provisions of the terms and conditions of the State that are applicable under paragraph 2 and relate to the reduction of salary by reason of misconduct, inefficiency or incapacity, or excess officers,

if the rate of remuneration that is payable at any time to the transferred employee is less than the rate of remuneration that was payable to the transferred employee as an eligible person immediately before the appointed day, the transferred employee will be entitled to be paid by the Commission an allowance of an amount that is equivalent to that deficiency in rate.

Higher Duties

5. For the purposes of paragraph 3, the rate of remuneration that was payable to a transferred employee as an eligible person immediately before the appointed day shall, for so long as the allowance would have continued to be payable if the transferred employee had continued to be employed in the ALAO, be deemed to include any allowance for higher duties that was payable to the transferred employee immediately before the appointed day.

6. A transferred employee who as an eligible person was immediately before the appointed day entitled to a higher duties allowance shall continue to be entitled to that allowance during such time as the circumstances relating to the performance of those higher duties continue to exist and the transferred employee continues to be the appropriate person to perform those higher duties.

Increments

7. Where at any time a transferred employee would if the transferred employee had continued to be employed in the ALAO have become entitled to an increment of salary in

accordance with a scale of rates of salary that was at the appointed day applicable to that employment and with the conditions that were applicable to the payment of that increment, the salary of the transferred employee as an eligible person immediately before the appointed day for the purposes of paragraph 3 shall, as from the date on which the transferred employee would have become so entitled, be deemed to be increased by the amount of that increment.

Recreation Leave and Sick Leave

8. Where a transferred employee has, immediately before employment by the Commission, accrued an eligibility for the grant of a period of leave of absence for recreation or on account of illness, the transferred employee shall become eligible as at the appointed day for the grant of an equal period or equal periods of leave of absence, on either or each of those grounds as if that eligibility had arisen under the terms and conditions applicable to the transferred employee in respect of that employment by the Commission.

Transferred Employees on Current Leave

9. A transferred employee who immediately before the appointed day was on leave of absence which continued into or through the appointed day, shall be entitled to complete the period of that leave of absence for the purpose for which and subject to any conditions on which it was granted and these terms and conditions shall be applied and have effect with respect to the transferred employee notwithstanding that period of absence.

Long Service Leave

10. A transferred employee shall be entitled to a period or periods of long service leave in respect of employment by the Commission and payment in lieu of long service leave shall be made to a transferred employee in

respect of that employment in accordance with the provisions of the Long Service Leave (Commonwealth Employees) Act 1976 as in force immediately before the appointed day as if that employment were employment in the Australian Public Service unless within three months after the appointed day the transferred employee elects in writing for those benefits to be determined otherwise.

11. A transferred employee who makes an election referred to in paragraph 10 shall be entitled to bring into account for the purpose of long service leave and payment in lieu thereof the service prior to the appointed day that the eligible officer would have been entitled to have taken into account under the Long Service Leave (Commonwealth Employees) Act 1976 if the transferred employee had continued to have entitlements as provided in that Act.

Superannuation

12. A transferred employee who was an eligible employee for the purposes of the Superannuation Act 1976 of the Commonwealth immediately before the appointed day shall be entitled for a period of three months commencing on that day to elect, in writing, to contribute for benefits under the Superannuation and Family Benefits Act, 1938 of the State.

13. Unless a transferred employee makes the election to which he is entitled in accordance with paragraph 12, he shall, in respect of his employment with the Commission, continue to be an eligible employee upon and subject to the provisions of the said Superannuation Act 1976 as amended from time to time and to the Regulations for the time being in force thereunder and be exempt from liability to contribute for superannuation benefits otherwise than under that Act.

Parental Leave

14. A transferred employee shall be entitled to parental leave to the same extent and subject to the like conditions as leave of that nature is at the relevant time referred to in paragraph 15 available to persons employed in the Australian Public Service who were so employed on the appointed day and arrangements will be made by the State and the Commonwealth to ensure that benefits to that effect are so made available notwithstanding but consistently with the position of State employees generally with respect to such leave.

15. The relevant time for the purposes of paragraph 14 is -

(a) subject to sub-paragraph (b) - the appointed day; or

(b) if the Maternity Leave (Australian Government Employees) Act 1973 is amended in accordance with a Statement issued by the Minister Assisting the Prime Minister in Public Service Matters on 27 May 1977 - the day on which the Act is so amended.

Recognition of Service

16. Where the employment of a member of the staff of the Commission under clause 13.4 of this agreement is continuous with a continuous period of service under the Public Service Act 1922 of the Commonwealth, as amended, (including any employment deemed under that Act to have been continuous with service under that Act), that continuous period of service shall be recognized and taken into account by the Commission for the purposes of the experience and seniority of the member.

Probationary Service

17. A transferred employee who was on probation immediately before the appointed day shall be entitled to have the probationary service in the Australian Public Service brought into account for any probationary requirements of the State.

18. The reports relating to probationary service of a transferred employee with the Commonwealth or with the State shall be made available for the respective purposes of the Commission and the Commonwealth in accordance with arrangements for the exchange of reports that shall be made between the ALAO or the Commonwealth Commission and the Commission.

Notification of Vacancies

19. When the Commission decides to advertise a vacant position the Commonwealth Commission shall be informed of the decision in order that the vacancy may be brought to the attention of persons employed by the Commonwealth or by the Commonwealth Commission or by any State government or Commonwealth or State body which provides legal aid.

20. Any applications which the Commission receives from persons referred to in paragraph 19 will be considered by the Commission, which shall have regard to -

(a) aptitude for the discharge of those duties;

(b) the extent of relevant experience;

(c) training, including formal training;

(d) capacity for development; and

(e) relevant personal qualities,

but will retain the right to exercise its discretion in the selection of any person to fill the relevant vacancy.

Determination of Differences

21. In the event that in respect of the application of these terms and conditions with respect to a transferred employee, a difference arises as between the Commission and the transferred employee for the consideration and resolution of which official machinery is not for the time being available, the difference shall be determined by an adjudicator appointed by the Public Service Board of the State who is acceptable to both parties and who shall act as an expert and not as an arbitrator.

22. The adjudicator shall consider the matter in such manner as he or she considers fit and the determination upon the adjudication shall be accepted as being conclusive of the difference by both the transferred employee and the Commission.

IN WITNESS WHEREOF this agreement has been signed on behalf of the parties respectively as at the date first above written.

SIGNED by the Right Honourable JOHN MALCOLM FRASER, Prime Minister of the Commonwealth, in the presence of -

SIGNED by the Honourable SIR CHARLES WALTER MICHAEL COURT, Premier of Western Australia, in the presence of -

Attorney General

Perth.

12.1.78.

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