

Legal Services and Neo-Liberalism in an Unequal Legal Order

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In 1975 the landmark 'Law and Poverty in Australia' report (Sackville 1975a) sought to ensure substantive rather than formal equality before the law for all Australians. A fundamental aspect of its proposals was an extensive and innovative legal aid system with expanded public funding, with greater assistance in both conventional and new areas of legal need seen as a key in overcoming social disadvantage. By the 21st Century, the focus had shifted further away from the goal of substantive legal equality for all to the principle goal of cost efficiency. This paper details and analyses aspects of the historical shift from viewing legal needs as an issue of state welfare to a neo-liberal mode of governance in this sphere of policy, and the divided responses to these changes.¹ It also considers the results for legal representation in criminal matters and the legal needs of indigenous Australians.

The Rise and Fall of Welfarism in Legal Services

In the 1960s and 1970s, legal aid was reconceived as a 'right' of liberal citizenship. At that time, the previous measures of mostly private, professional-controlled schemes were subjected to scathing criticisms. In those schemes, poor resources, tight guidelines, notions of merit, charity and reasonableness prevailed to narrow client access, with an individual focus of assistance in conventional areas of high demand. This critique was principally due to the activity of a new critical segment of lawyers but it significantly overlapped with the major expansion of public welfare systems in the 1960s and early 1970s.

Australian activists in this area were influenced by the key achievements of the United States legal services movement and intense lobbying for reform in Britain. Resulting events reflected the new significance of lawyer radicalism and the emergence of new types and styles of lawyering as a challenge to the various law societies that had traditionally represented the private profession. The first

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¹ This paper is based on the author's own research on legal services and legal aid policy. This has been ongoing since the early 1980s. Sources of information include press, general library and archival records from 1970-2007. Additionally, this paper draws on insights from interviews conducted by the author in 1985 and 1986 with key players in the original 1970s development and debates about legal aid, legal services, professional regulation, education and restructuring in Australia. Interviewees included Justice Lionel Murphy, Robert Ellicott, Joe Harkins, Susan Armstrong, Julian Disney, Allan Nicoll, Julian Gardner, Peter Duncan, Ken Kershaw and Mark Richardson. For a fuller account see Tomsen (1992) and Noone and Tomsen (2006).

Aboriginal Legal Service was founded at Redfern in Sydney in 1970. In 1972, radical lawyers, law students and youth workers founded the Fitzroy Legal Service in Melbourne as the first non-Aboriginal 'community legal centre' in Australia.

Legal aid developments in the 1970s and early 1980s occurred against the backdrop of a new international focus on 'unmet legal needs' and efforts to expand access to legal services as a form of welfare right owed to a broad number of poor and disadvantaged people. The serious local study of unmet legal needs began with the work of the Law and Poverty Inquiry in 1972 (Sackville 1975a). This and other new research critiqued the general lack of public access to legal advice and representation, and the narrow work patterns of the established profession in favour of privileged groups. The Law and Poverty Report sought to ensure substantive rather than formal equality before the law and it stressed the need for an extended system with greater public funding to combat social disadvantage.

Public involvement in legal services underwent a rapid change with the election of a pro-welfare Commonwealth Labor Government in 1972. This period was a brief heyday for social democratic initiatives, with the welfare state and universalistic provisions broadly viewed as contributing to community building or social capital. The hurried establishment of the Australian Legal Aid Office (ALAO) in 1973 by Attorney-General, Lionel Murphy, and its brief rapid growth extended this view of welfare into the legal arena and the rapid enlargement of the public legal aid sector. This occurred alongside the expanded support for new community legal centres (CLCs) and Aboriginal legal services (ALSs), which took pride in their greater level of autonomy.

The ideals and rhetoric of legal aid as a welfare right for the poor and disadvantaged together with the expected development of new areas of law and advocacy excited groups of young idealistic lawyers. It led to a heightened politicisation of legal aid in these years with a short-lived but heated period of internal conflict among groups of lawyers over these and related changes to the delivery of legal services. Expanded public services first met with hostility and even talk of an impending nationalisation of the legal profession: extreme views about the ALAO in the 1970s were evident in the High Court challenge launched by the Law Institute of Victoria in 1975, and also shaped some of the professional response to key public inquiries and debate about a draft Commonwealth legal aid bill in the Whitlam years. These views were not typical of the whole profession but were nonetheless held by a significant element of its leadership (Nicoll, A. Interview 15 November 1985; Harkins, J. Interview 17 October 1986). For example, the High Court

challenge was originally proposed by lawyers from elite firms who contrasted 'the future of an independent and decent legal profession versus Marxist-socialist type state control of our profession' (Tomsen and Noone 2006, p. 92). Murphy viewed this level of opposition as a reflection of 'Neanderthal' attitudes to legal services and a strong bond between the profession's elite leadership and opposition parties (Murphy, Justice L. Interview 13 March 1986).

This opposition did not fit with the orthodox forms of ALAO legal work and the high rate of referrals to the private profession. Concern that the ALAO and its 'radical' overtones might undermine traditional practice were much exaggerated. To a limited extent the Fitzroy, Redfern and later, the expanding network of CLCs and, more obviously, the ALS did mobilise local communities and take a less professionalised form (Gardner, J. Interview 15 November 1985). The ALS also had a more overtly political agenda in that it represented a significantly disadvantaged minority group that was notably troubled with police and legal problems.

The prospects for a continuous expansion of public legal aid services ended by the mid-1970s with a shifting of responsibility to state governments. Nevertheless, subsequent events and political conflicts did not give full control to the traditional leadership of the profession and the results of the new shift to neo-conservatism in welfare policy and legal aid management were unexpected. It was very significant that, in critical discussions of the planned role and composition of state commissions in the late 1970s, Prime Minister Fraser's Attorney-General, Robert Ellicott, opposed duplication of the expensive UK-style *judicare* scheme for Australia. A 'post-welfare' neo-liberal phase of policy and administration in Australian legal aid broadly covers the period stretching from the mid-1980s to the present. This was characterised by a profound shift from conflict among lawyer groups to a contest between alliances of lawyers against sectors of the state committed to cut or contain funding, against the backdrop of determined moves towards fiscal restraint in public services and a more modest social democratic vision for Labor under the Hawke and Keating governments.

These outcomes were further reflected in the major changes that took place in the structure and organisation of legal aid in and after the 1990s. These changes confirmed the shift away from the welfarist model of state delivery. The managerialist neo-liberal Labor style of the early 1990s was either matched or exceeded at state level in ways that seriously impacted on legal aid. Both New South Wales (under Premier Greiner) and Victoria (under Premier Kennett) appeared as the front-runners in this trend, but state Labor administrations also increasingly shared this approach. They all commonly began to emphasise fiscal constraint and some adopted a more narrow

form of political control that locked out all external lobby groups from the membership of state legal aid bodies. In the late 1970s and early 1980s, the various state level debates reflected a greater internal professional division over the legal aid issue and the rise of a broader legal aid sector of salaried lawyers, welfare, community groups and CLCs, that had a notable, but eventually declining, influence over policy.

The new political scenario promoted a quick mellowing of attitudes with a wider and shared opposition to government funding cuts (Armstrong, S. Interview 21 March 1986). Conflict between rival groups of lawyers was much reduced in the Hawke, Keating and Howard years in order to fight the common enemy of financial restraint and managerialism in legal aid administration. There was a brief period of optimism at the national level in the 1980s with the advent of a second Labor administration, though in the middle of that decade the primacy of funding issues and funding constraint took real hold. Issues of containment of costs around private referrals and family law prevailed, resulting in new agreements to restrict spending and significant cuts in 1987-1988. Thus, ironically, a Labor administration now presided over a more managerialist approach, which was highly focused on cutting costs and moving away from legal aid as a form of general right to enhance substantive legal equality.

In fact, this period provided one of several examples of the appropriation of progressive terminology for other ends in legal aid policy. The Keating administration emphasised a new broader 'access to justice' approach that conceived access as more than just legal aid from lawyers and suggested a need for deeper changes in the structure and regulation of the profession to enhance competitiveness. This was against a backdrop of less serious interest in issues of unmet need, rising levels of refusal of assistance and uneven eligibility across Australia. This trend was part of the general international pattern in the 1980s and 1990s (Johnson 1999; Kilwein 1999; Moorhead and Pleasence 2003). As some commentators have noted:

'In one society after another legal aid was...increasingly targeted at the poor, and increasingly restricted to serious criminal cases. In some important respects, eligibility provisions in the late 1990s bore a striking resemblance to those of the charitable schemes prior to World War 11' (Regan et al. 1999, p. 1).

By 1994, the national Access to Justice Committee suggested that legal aid services alone could not significantly address the inequalities in law in the context of providing an explanation for the emphasis on fiscal restraint (Access to Justice

Advisory Committee 1994). The 1995 Justice Statement cautiously promised more funds but it became irrelevant with the election of a new Liberal-Coalition government in 1996 and the major cuts that followed (Noone and Tomsen 2006, p. 165).

The Dominance of Neo-Liberalism

The Howard cuts and reforms of 1996 (including a 22 per cent funding cut and real drops in levels of representation) appear as another, albeit major, wave in this neo-liberal tide. These reflected perceptions that: the Commonwealth had yet to reduce its financial and political pressure from legal aid; it had little control over how its legal aid funding was spent; and the commissions' scheme had failed to resolve this. The radical solution was a switch to the government preferred 'purchaser' model, which emulated aspects of the spreading practice of private tendering by public bodies, to only fund legal aid in Commonwealth matters and to impose strict spending limits or ceilings on particular cases (Fleming 2000). This further irritated various state governments that acted to remove Commonwealth representation on their various legal aid commissions and it forced a pragmatic alliance of all parties against the Commonwealth.

All of the changes in the second Labor and Howard years ran in tandem with diminishing community and professional influence. Although there was some expanding representation on national legal aid bodies in the 1980s, for all lawyer groups this representation effectively disappeared by the late Keating years. Furthermore, this shift happened at both Commonwealth and state levels. The further corporatisation of some state commissions - with a narrow representation favouring management expertise rather than 'stakeholders'- reflected a similar disregard for notions of a broader representation of diverse interests that were heavily stressed by legal aid lobbyists in the 1970s and early 1980s. The overall focus had shifted further away from the goal of substantive legal equality for all to the principal goal of cost efficiency (Australian Law Reform Commission 2000).

In this recent past, the alienation of law societies and private lawyers at both Commonwealth and state levels has ensued. Commonwealth pressure on lawyers to engage in more pro bono work as part of a broader 'social coalition' has run in tandem with the exclusion of interested groups from any formal policy voice and without much critical reflection on the drawbacks on this form of legal aid delivery. At the state level, new developments of panels of preferred legal aid suppliers and a

modest switch to in-house lawyering and less client choice have led to an apparent 'flight' of private lawyers from the legal aid system. This trend was not reversed by a further injection of funds in 2000 that was specifically intended to address it

Despite these changes, the CLCs have fared unexpectedly well and achieved some measure of political legitimacy. This is principally because they are now viewed by politicians and bureaucrats as inexpensive, as a useful training mechanism for students and young lawyers and as an appropriate conduit for pro bono activity. However, new funding arrangements that reify dollar competition and efficiency above committed and innovative service may now rapidly erode their original alternative goals. The ALSs/ATSILs have, by contrast, remained controversial and are presently targeted for significant restructuring due to a greater public expense for cases and clients covered, and at a time of an overt public xenophobia that resents the 'special' dedication of government services to minority groups (see, for example, Clendinnen 6/7/2004, p. 11 and Randal 2006).

Thirty four years after the establishment of a now-defunct national service, Australian legal aid is still minimal, piecemeal and often anomalous. Assistance is not easily available to ordinary working class people but rather, is limited to the most impoverished and disadvantaged who meet tight tests and guidelines. The general dominance of economic rationalist and anti-welfare views among politicians, bureaucrats, media commentators and middle class voters may limit the scale of legal aid in the foreseeable future. This is despite ongoing and unresolved problems of unmet need in a variety of areas. There are limited prospects for the evolution of a broader system outside of the wider political re-ignition of a shared consensus about the need for substantive public welfare and more support in such fields as health, education and access to law.

The Australian legal aid system can still be accurately described as a mixed model. The providers of legal aid include private practitioners, salaried staff and community legal centres. But the type and proportion of work performed by these providers is changing. The numbers of grants of aid and referrals going to the private profession has declined as the number of duty lawyer cases has increased and as community legal centres perform more individual casework. The development of preferred supplier panels means that the number of practitioners available to provide legal aid services will become further limited. There is greater availability of simple advice and information through the use of various technologies and consistency in eligibility requirements in the provision of family law matters across Australia. Yet the Australian legal aid system is becoming

increasingly limited in the individual legal assistance and representation it offers people due to declining real levels of funding. Individual casework is confined predominantly to family and criminal matters. In the latter area, basic access for serious cases has been protected by judicial opinions and case outcomes such as *Dietrich v The Queen* (1992). Nevertheless, the overall rationale for legal aid has not been clearly articulated but is generally implicit in policy and work practices. Except for some developments from the brief welfarist phase and some of the ongoing activities of alternative services, the underlying rationale for legal aid continues to be 'safety net' support for the most poor and marginal clients.

The various annual reports of the eight legal aid commissions and the evidence presented to the Senate Inquiry and the Australian Law Reform Commission suggest that most legal aid commissions are now running with more focus on 'managerial tasks' (Noone and Tomsen 2006, pp. 182-183 and p. 197). Much of the change that has occurred within legal aid commissions has been undertaken in the name of greater efficiency and effectiveness, but a negative consequence of the various changes is the development of increased differences between the various state legal aid schemes. There is no longer a national imperative to seek a unified and equitable approach to the provision of legal aid across the states. This can significantly exacerbate local differences in styles of work. The distribution of work between in-house staff and the private profession varies considerably between the states and according to type of matter. In Queensland and Victoria in 2003/2004, 70 per cent of all matters were referred to private practitioners, whereas in the ACT, TAS, WA and SA, referrals amounted to 55 to 60 per cent of all matters and only 30 per cent in the NT went to private lawyers (National Legal Aid *Practitioner Type* 2006). In NSW a high level of in-house work and low overall referral rate reflect the long history of salaried legal aid dating back to the 1940s and acceptance that this will produce greater cost efficiencies.

The renegotiation of Commonwealth/State agreements has resulted in a system that is becoming more fragmented and iniquitous between states. While the Commonwealth remains only interested in 'Commonwealth matters', there will be growing inconsistency among the states in issues like eligibility and types of legal assistance available. In the early 1970s, the Law and Poverty Report found grave deficiencies in the existing legal aid system that included a 'serious lack of co-ordination between the various legal aid schemes' (Sackville 1974, p.164). A person in need of legal help, who now faced a choice between legal aid commissions, legal centres, law society assistance and pro bono schemes, with their different eligibility

criteria and areas of work covered, might draw the same conclusion (Senate Legal and Constitutional References Committee 2004, pp. 16-25).

In the 1970s the discussion surrounding the aim of improving the poor's opportunity for equality before the law was enthusiastic but naive. The rhetoric focused on the utilisation of the legal system to bring about significant improvements for the poor. This was to be done by increasing this group's access to lawyers and seeking to change relevant areas of substantive law including credit and tenancy. This approach underestimated the real difficulties in implementing substantive equality (Armstrong, S. Interview 21 March 1986; Disney, J. Interview 7 September 1984). Although there is now greater awareness of the complex issues involved in achieving equality before the law, the more recent official discussion about access to justice has moved so narrowly towards issues of efficiency and management and the Commonwealth government appears resigned to the persistence of widespread legal inequality. This mirrors more widespread changes in liberal governance and a dominating focus on the application of competition policies.

In retrospect, legal aid did give an impetus to the erosion of the traditional ideal of an independent and self-regulating profession. This happened firstly through criticisms of a lack of public accountability in profession-controlled legal aid schemes. The legal aid sector objected to the extent of law society control and this led to a contest to define and articulate the community or public interest. A more serious threat then came from neo-liberal critiques of market monopolies that block free competition between practitioners and occupational rivals. It is ironic that the Australian legal profession demonstrated its most ardent opposition to state intervention in this sphere in relation to welfarist-style developments in the 1970s. Since then it has struggled to counter a less benign pattern of neo-liberal management and regulation of legal aid activity, which has serious implications for the innovativeness and availability of services and the ongoing involvement of a broad range of practitioners.

Yet the profession is now larger, richer and more powerful in the final outcome of this long and uneven phase of engagement. This is especially so due to its more immediate links to the expanding forms of corporate capital that the neo-liberal state enhances and promotes. For the private profession as a whole, legal aid has become less significant as either a threat or a solution to the wider professional problem of finding new areas and new clients as professional numbers expand. In the 1990s and after, a rapid growth of the private economy and a new corporate demand for legal services that has reshaped work away from individual clients has overtaken much of

this concern and legal work has boomed in the company, administrative, regulatory, finance, trade practices, intellectual property, environmental and media law fields (Lamb and Litrich 2007). This has resulted in a far more instrumental and less ideological professional response to public legal aid.

By the 1990s in Australia, the legal aid system had become a seemingly less important public subsidy of the private legal market via the historical settling of the salaried/judicare division in favour of a local 'mixed model'. Legal aid is still important in relation to the public image of the profession, but for a majority of private lawyers it is a less relevant concern in relation to practice issues and the generation of income. In recent years, there has not been the sort of serious internal rifts in policy debates about legal services and professional reform that the UK profession experienced between barristers and solicitors (Abel 2003).

Conclusion: Neo-Liberalism, Inequality and Unmet Needs

The final result of the 1980s, 1990s and current drift to new management styles was a re-imposition of state control over legal aid driven by concern with financial control and accountability. In its attempt to control its own costs, the Commonwealth has vacated the field to such an extent that it is the state governments that are now left with the greater day-to-day control over legal aid though along with more concerns about funding. National Legal Aid estimates that, in 2005/2006, total national government funds equalled \$319 million (National Legal Aid *About National Legal Aid* 2006). Of this, \$147 million was provided by the Commonwealth, \$172 million by State and Territory governments, and a further \$90 million came from interest, contributions and fees. This reflects a slow upwards growth. However, in real terms, 2003/2004 funding was \$27 million less than the 1996/1997 figure (Senate Legal and Constitutional References Committee June 2004, para 2.8-2.10). In the 2004/05 budget, the Commonwealth government allocated \$599 million over the next four years to provide legal aid for Commonwealth matters in each State and Territory (Attorney General's Department 2004). State funding has increased most significantly in NSW and Victoria. Overall, this has resulted in a less ambitious legal aid system than had been imagined in the 1970s, with a small but stable salaried sector and significant levels of real activity. In 2005/6, overall $\frac{3}{4}$ million people were served by the legal aid system; 269,613 received legal advice, 71,495 received duty lawyer services, and another 158,624 people were represented before courts and tribunals (National Legal Aid *About National Legal Aid* 2006). This system may fare

well in international comparisons, but this is partly because of the wide extent of retreat from commitment to substantive legal equality in the other industrialised nations.

This rise of neo-liberal governance and its emphasis on administrative rationality has had another unexpected outcome. Paradoxically, measures of narrow state regulation via managerialist techniques have grown just as the state reduces its commitment to public welfare systems. This suggests the success of a new managerialist strata that is more closely aligned to the class interests of big capital and (despite its avowed disrespect for them) is frequently concentrated in public bureaucracies as it espouses cuts to public programs and the virtues of free markets (Connell 2002; Pusey 1991). Despite some earlier signs, there is no reason to believe that legal aid lawyers from the 1970s and 1980s were at the forefront of an emerging new class of radicalised professionals that would eschew neo-liberalism and come to defend public welfare in a united and effective way (Tomsen 1984). In fact, the divided response of lawyers to both welfarist and neo-liberal legal aid reforms is a clear example of the deep rupture concerning responses to public bureaucracies and private markets that now characterises the professional middle class of industrialised nations.

Furthermore, positive contemporary accounts of competition policy reform as a further wave of the access to justice movement downplay the opposition between anti-welfarist neo-liberal ideology and its broader effects, and the political commitment to public funding of services for a wide range of disadvantaged citizens (Parker 1994). In 1990 Weisbrot had already noted the early dangers of the market ideology of deregulation for the overall state commitment to legal aid (Weisbrot 1990, p. 165). Despite the ubiquity of post-welfare notions of self-reliant citizenship, observers should not suspend awareness about the class context of the delivery of different legal services or develop a naïve faith in the potential of the private market to deliver substantial aid for the disadvantaged. Changes to competition-market reform in the UK were generally promoted by the Thatcher government in an earlier attempt to extricate itself out of responsibilities for welfare (Patterson 1996). Globally, Australia's radically restructured neo-liberal system may yet become a well-publicised model that politicians and policy makers in other nations that are reshaping their own systems simply respect and emulate due to its focus on fiscal restraint. Local developments in legal aid and deregulation often bear a striking similarity to far-reaching changes introduced in the United Kingdom under the previous Conservative and current Labour governments (Hanlon 1999; Abel 2003).

Legal aid lawyers have provided substantial assistance of real benefit to many recipients. The view that these professionals only service induced needs certainly cannot account for the fact that both traditional and contemporary legal aid organisations have been inundated with public calls for help unless they apply narrow eligibility requirements, or else reproduce an attitude to clients that was once described as 'positively repugnant' (Hazard 1969, p. 702). Furthermore, the general demand for public legal assistance in the industrialised world remains massive and mostly unmet. A critique of the spread of legal discourse in the growth of legal aid services, and the professional interest in these, should not lead to a denial of the real benefits of expanded assistance for many client groups. These include the poor, Indigenous Australians, previously unrepresented juveniles and many defendants accused of serious crimes. It is vital that critical commentaries on legal aid are not co-opted by attacks on welfare services as necessarily promoting dependency, and in so doing wholly discard the language of unmet needs and legal rights.

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