POVERTY LAW PRACTICE: THE ABORIGINAL LEGAL SERVICE IN NEW SOUTH WALES

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I

Assessment of the Aboriginal Legal Service (A.L.S.) cannot be accomplished through statistics alone, particularly so because they are only sufficiently comprehensive to merit an old conclusion: Aborigines are over-represented in arrest, conviction and institutional numbers for crimes of status and frustration.

The A.L.S. was organised around a single issue in a particular location: police brutality (or more correctly, selective enforcement of the letter of the law, often with justification) in the Aboriginal enclave of Redfern in Sydney. Early support was charitable, and control was by persons in the legal profession.

In four years issues have changed little. The central problem remains the endless criminal statistics; but there is an increasing array of statistics on housing, education, employment and health which are all equally as dismal. The organisation has undergone major facelifts: the Service has spread to all the States and the Northern Territory under Federal funding, to fulfil an election promise to represent all Aborigines in all courts; and in New South Wales at least, control has effectively passed to Aborigines.

Legal aid in any form raises significant issues for the legal profession. An ethnically oriented service is particularly distressing, for its mere existence says something about relative inequality in Australian society, and about the lack of coverage of previously existing legal aid services. The proper role for lawyers is at stake. Here then is an accounting of the Aboriginal Legal Service in New South Wales.

II

The first A.L.S. office opened for business in Redfern on 26 July, 1971, and employed a staff of three: a white solicitor, and Aboriginal field officer and secretary.[1] This has been the minimum complement as additional offices have opened in country areas.[2] The optimum staff envisaged for each office (dependant upon caseload) is two solicitors, two field officers, a secretary and

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[1] In his definitive statement *Discrimination Against Aborigines By or Under Commonwealth and State Laws*, presented to the Standing Committee on Constitutional and Legal Affairs, Hansard Report (Senate) 10 (18 Aug., 1972) at 13-18, the first President and principal founder of the A.L.S., Prof. (now N.S.W. Supreme Court Justice) J. H. Wootten Q.C., describes the history of the A.L.S. from 1970 to Aug., 1972. (Hereinafter cited as Wootten, *Statement*.) See also R. Chisholm, *The Aboriginal Legal Service*, 4 Justice 26 (May, 1971).

[2] *Infra* n. 35.

a receptionist. The first Council (the 'governing body of the Association')[3] contained a predominance of distinguished persons from the academic and practising profession. Out of twenty members, nine were Aborigines; the eleven whites included the Dean of the New South Wales Law School (President Wootten) and two other Queen's Counsel (the President and another member of the Bar Council); three practising solicitors (one on the Law Society Council); and Professors of Psychiatry, Social Work and Law at the University of New South Wales.[4]

The daily operation of the Service was under the supervision of the Chairman of a Management Committee (another predominantly white professional body containing up to ten members responsible to the Council) and the Secretary of the Council. The Management Committee held periodic meetings, which would not necessarily coincide with those of the Council.[5]

Initially the Service relied upon the goodwill of the private members of its Legal Panel for the acceptance of cases on referral, since no funds were available for the payment of fees. The first federal grant, from what was then the Office of Aboriginal Affairs, arrived in April, 1971, permitting the employment of the first Redfern staff of three; but the office work still remained principally one of referral. The few Aborigines in country areas who sought legal assistance took their cases to the local solicitor known to do occasional charitable work.[6]

The first President described the fledgling Legal Service as:

> strictly a service organisation, designed to place legal skills at the service of Aborigines while they are a depressed section of the community. *We do not seek to tell Aborigines what to do, or presume to offer solutions to the wider social and political problems involved in Aboriginal advancement.*[7]

A separate Legal Service for Aborigines was necessary to 'make that special effort . . . to break down the barriers of alienation and distrust that stand between Aborigines and the justice in which we like to take pride.'[8]

As if to emphasise the narrow interests and most obvious problems facing the inner-city residents of Redfern in 1970, the A.L.S. Constitution, in describing thirteen objects of the Association, makes six specific references to Aboriginal relationships with criminal justice administration ('police, judicial, corrective and other relevant services'), including two references to the problems of release pending trial (obtaining release, securing employment and assisting familial dependants). These problems are very real and have been

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[3] *Constitution of the A.L.S.* (11 Oct., 1970) §5.

[4] Letter from Pres. Wootten to country solicitors, Jan.-Feb., 1972. See also Wootten, *Statement* at 16. The A.L.S. Constitution required only 1/3 of the Council and 1 of the officers be Aboriginal.

[5] *Constitution of the A.L.S., supra* n. 3, at §6.

[6] Wootten, *Statement* at 17. For a history of the development of federal administration in Aboriginal affairs, see C. M. Tatz, "*Book III, A Case Study in Social Administration: Aboriginal Affairs,*" in *Administrative Studies (Public & Social Policies)* 1974 ed., Dept. of Politics, U. New England. See also *Report of the Auditor-General upon the Dept. of Aboriginal Affairs* 1 Weekly Hansard (H. of Rep.) 22 (5 March, 1974) 1.

[7] Wootten, *Statement* at 18. (Emphasis added.)

[8] *Id.* Alienation and frustration continues unabated, and may in fact be a product of the institutions attempting to ameliorate present conditions. See C. M. Tatz, *Aborigines: Political Options and Strategies*, presented to the Australian Institute of Aboriginal Studies, Biannual Conference (23-24 May, 1974).

documented by several researchers.[9] The impact of criminal justice administration is also documented for the Redfern area of Sydney by the New South Wales Directorate of Aboriginal Welfare, commenting upon a statistical report prepared by the New South Wales Bureau of Crime Statistics and Research.[10] The Bureau found that 'Aborigines incurred sixteen times more convictions than might have been expected on a population basis'. They also had a 'relatively high percentage of summary offences (especially unseemly words and vagrancy) and very few larceny offences.' The Directorate of Aboriginal Welfare concluded:

> If these statistics suggest anything, it is that they reflect the *frustration, resentment and despair* which derive from the Aboriginal community's deprived socio-economic position, and which dispose some members of it towards minor forms of anti-social behaviour. The figures may also reflect *zealous surveillance and apprehension by the relevant authorities.*[11]

III

At a national conference of Aboriginal Legal Services on 9 April, 1973, in implementation of the Federal Government's policy of providing legal representation in the courts for all Aborigines at public expense,[12] the Federal Attorney-General's Department announced guidelines (and appropriate funding) for the reimbursement of private practitioners taking cases on referral, to 80% of fees and 100% of disbursements.[13] The decision to reimburse for private fees, and the funding of a private staff, now provided Aborigines with a choice of counsel, overcoming an objection to salaried services often raised by the private profession.

Other guidelines were proposed and debated at the conference; they may

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[9] C. M. Tatz, *Aboriginal Administration in the Northern Territory of Australia* (Mar., 1964) (unpublished Ph.D. thesis, A.N.U.) at 220-62 (criminal law); E. Eggleston, *Aborigines and the Administration of Justice* (1970) (unpublished Ph.D. thesis, Monash U.) (criminal law in Victoria, S. Australia, W. Australia); J. E. Lemaire, *The Application of Some Aspects of European Law to Aboriginal Natives of Central Australia* (1971) (unpublished LL.M. thesis, Sydney U.) (criminal law); C. D. Rowley, *Outcasts in White Australia* (1970) at 352-61; P. Tobin (now a solicitor with A.L.S.), *Fringe Dwelling Rural Aborigines and the Law in N.S.W.*, Abschol, Sydney (1969, mimeo). The Eggleston thesis and police/Aboriginal relations are discussed by Wootten, *Statement* at 25-29.

[10] N.S.W. Directorate of Aboriginal Welfare, *Policies and Programs for Aborigines in N.S.W.* (undated) at 10-11 (hereinafter cited as N.S.W. Directorate, *Policies.*); Dept. of Attorney-General and of Justice, Bureau of Crime Statistics and Research, *Statistical Report 11: Petty Sessions 1972* at 40-45. While the entire caseload in more than 250 petty sessions courts in N.S.W. during 1972 was analysed for the bulk of the report, statistics relating to nationality/ethnic origin were only gleaned from the Sydney Central Court of Petty Sessions for the period 8 Feb.-8 May, 1973. A more recent account of police/Aboriginal difficulties in Redfern is provided by the Minister representing the Minister for Aboriginal Affairs, *Answer to Question No. 1242*, 24 Weekly Hansard (H. of Rep.) 4467 (6 Dec., 1973). It involved the wholesale arrest of Aboriginals outside the hotel frequented by them in Redfern.

Will liaison for understanding between police and Aboriginals lessen statistical confrontation? The Sydney Assistant Police Commissioner claimed reductions of 75% in 'Aboriginal offences' in the Redfern area after two months of meetings with black leaders. *The Australian*, 24 May, 1974, at 4. In Walgett on 24 June, 1974, a special magistrate will have convened an inquiry into alleged police assault of 2 Aboriginals, prior negotiation either having been unsuccessful or impossible. *Infra* n. 68.

[11] N.S.W. Directorate, *Policies* at 10-11. (Emphasis added).

[12] Dept. of Aboriginal Affairs, *Submission: Policies and Programs in Aboriginal Affairs*, Senate Standing Committee on the Environment, Hansard Report 1033 (13 June, 1973) at 1038, 1041.

[13] Dept. of the Attorney-General, *Australian Legal Aid Review Committee Report* (Feb. 1974) at 18-19 (hereinafter cited as *Turner Report*). Reimbursement of disbursements had been a standing offer since the first grant, but frequently was not claimed by practitioners on the Legal Panel.

now be considered as binding conditions of grants to the Legal Service. Guidelines significant to the scope of services offered are as follows:

> Legal assistance to Aboriginals is to be available for:
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> a. representation in courts and tribunals throughout Australia when the Aboriginal has grounds for such representation;
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> b. advice on matters in which the Aboriginal has or is likely to have a direct interest, whether personally or as a member of a group;
>
> c. assistance in non-contentious matters where this is likely to be of direct benefit to the Aboriginal.
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> Restrictions:
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> a. Legal assistance, other than to ascertain if the Aboriginal has reasonable prospects of success, shall not be available in respect of proceedings by way of appeal if in the view of the Service no good purpose would be served by prosecuting or taking part in the appeal;
>
> b. actions to be taken on behalf of an Aboriginal community or substantial group will be considered on an individual basis by the Australian Government following an approach by the Service.[14]

Note that with the exception of law reform-type cases, where discretion lies with the Government, the guidelines merely restate ordinary professional judgement.[15]

IV

Implementation of Government policy of representation for all Aboriginals, by payment of fees on referral, has effectively locked the New South Wales Legal Service into an open-door policy and the consequent magnitude of criminal defence work. Minimal expansion of the roles of employed solicitors, especially in country areas (four for the whole of New South Wales outside the Sydney metropolitan area) has contributed to the need for heavy reliance on outside (private) counsel. The result was recognised in a mid-1973 submission by the main office in Redfern to the Federal Department of Aboriginal Affairs:

> Had the Government provided its own machinery to fulfil this promise, the A.L.S. would have been relieved of the expensive part of its operation, and could have carried out on a voluntary basis a range of educational and reform-oriented activities in the legal field.[16]

That criminal cases have dominated the caseload is borne out by the few statistics available.[17] This emphasis was willingly undertaken by the Service, since

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[14] *Turner Report* at 19.

[15] Mr. G. M. Wheeler, representative of the Attorney-General at the April, 1973, conference, stated that under guideline '5b' he specifically had in mind the 'Gove-type case' as requiring Government approval, where costs could exceed $200,000 and litigation last over six months. He was referring to *Milirrpum* v. *Nabalco* (1971) 17 F.L.R. 141 (N. Terr. Sup. Ct.). Transcript of the *Conference on Aboriginal Legal Affairs*, 9 April, 1973 (Canberra, Dept. of Aboriginal Affairs) at 38.

[16] Submission to Federal Government on 1973-1974 Budget (1973) at 1.

[17] A barrister was retained for 5 months of the 1973-1974 budget period (in addition to 2 salaried solicitors) for the sole purpose of doing the work of an in-house public defender. *Id.* at 4.

The earliest breakdown of criminal/civil cases is by Wooten, *Statement* at 15:

Aug. 1971-Feb. 1972: 240/140.

Aug. 1972: 'between 40% and 50% of new matters' were civil.

A.L.S. *Quarterly Reports* to the Dept. of Aboriginal Affairs:

July-Sep. 1973: 256/51 (advice, non-contentious cases and community organisation work not included).

Oct.-Dec. 1973: 406/65 (advice and non-contentious cases not included).

> a legal service for Aborigines can be provided effectively only by an organisation which is identified with Aborigines rather than with the Government or the legal profession.

However in December, 1973, the current President of the Service, Paul Coe, considering alternative caseload patterns, admitted that the A.L.S. was 'fully occupied with representation on daily matters.'[18]

I hesitate to suggest that the A.L.S. is not performing a valid community service by keeping Aborigines out of gaol and otherwise disentangled from the criminal justice system as presently administered. In particular criminal and quasi-criminal (juvenile) cases of community significance, the A.L.S. salaried solicitor may be the only adequate representative of Aboriginal interests.[19] But the criminal caseload, considering the unknown magnitude of unmet need and the endless process that it represents, may be the 'bottomless pit of ever increasing costs of providing legal aid' feared by the Federal Attorney-General.[20] A 1972 study of the extent of legal representation and its effect on outcome concluded that persons in the New South Wales Courts of Petty Sessions who were represented had a six and one-half times better chance of securing outright judgment in their favour; and conversely, that the unrepresented were three times more likely to be sent to prison.[21] In the 8 February-8 May, 1973, Central Court of Petty Sessions, Sydney, a more limited sample revealed the percentage of legal representation for native-born Australians (excluding Aborigines) at 46.9%, and for Aborigines at 30.4%.[22]

The original Constitution of the A.L.S. contemplated co-operation with 'public and private legal aid services with a view to ensuring that Aborigines derive full benefit from such services.' The April 1973, guidelines of the Attorney-General express the same intention. There are no statistics on the number of cases referred to the available legal aid schemes in New South Wales. However, a December, 1973, *Report of the N.S.W. A.L.S.* to the Department of Aboriginal Affairs states that the Public Defender no longer accepted any referral cases for trials from the A.L.S.[23]

Apart from the adequacy of such representation for Aborigines, the other legal aid schemes are not always real alternatives: the Federal Attorney-General has recognised that there are major gaps in Law Society and Legal Aid Committee schemes. The gap is especially glaring in New South Wales under the Public Defender programme, which only operates in indictable offences and only at the District Court level and above. (An exception: Aid is provided in Petty Sessions when the defendant has pleaded guilty and been committed for

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[18] *The Sydney Morning Herald*, 27 Dec., 1973, at 7.

[19] *Infra* n. 34.

[20] *Ministerial Statement on Legal Aid*, 26 Weekly Hansard (Senate) 2800 (13 Dec., 1973); *Turner Report* at 3-7. The 'bottomless pit' has been reached in another area that can plague legal aid: a Federal grant to the N.S.W. Law Society in Jan., 1974 for legal aid in divorce and family law matters, was exhausted by May because of the large number of divorce applications received. *The Armidale Express*, 29 May, 1974, at 9.

[21] Survey of petty sessions cases during the first 6 months of 1972. T. Vinson & R. Homel, *Legal Representation and Outcome*, 47 A.L.J. 132 at 133.

[22] *Statistical Report 11: Petty Sessions 1972*, *supra* n. 10, at 45.

[23] Report presented to the national *Conference of Aboriginal Legal Services*, 3-4 Dec., 1973 (Canberra, Dept. of Aboriginal Affairs).

Quarterly Reports of the A.L.S. do show the following amounts for 'Fees paid to outside lawyers:

July-Sep. 1973: Criminal cases—$22,140. Civil cases—$1,010.
Non-contentious, before tribunals, and advice—$126,

Oct.-Dec. 1973: Criminal cases—$21,944.36. Civil cases—$1,674.44,
Non-contentious and advice—$513.87.

sentence.) In other words, there is no formal source of legal aid in summary offences in courts of Petty Sessions other than the A.L.S.[24] In fact, A.L.S. solicitors, often constituting the only legal aid in country towns, when in court, and when able, have entered pleas and requested adjournments for non-Aboriginal defendants.

In civil matters the Public Solicitor will handle proceedings in the Supreme and District Courts, and in certain specified matters in Petty Sessions; where a means test cannot be met, another scheme is operated by the Law Society, requiring applicants to approach their 'own solicitor' or the Society. There is a minimum 'contribution' by the applicant of $50. Applicable proceedings are those in the Supreme Court (except matrimonial jurisdiction), the District Court (except under Federal legislation) and various appeals to higher courts.[25]

While these schemes seem complete to certain limits, they all suffer from problems of location (offices are at most in Sydney and environs; panels of solicitors upon which the Public Solicitor can draw have not been established in country towns); and several do not provide incentive for commitment in representation (solicitors and barristers must work gratuitously, only recovering fees if successful).[26] A Law Society Referral Centre is superfluous for Aborigines unless the A.L.S. is reimbursing counsels' fees, for otherwise the less than desirable client is dependent upon charitable goodwill from whoever will take his case.

The Executive Director of the New South Wales Law Foundation has described the pattern of legal aid in the State as 'band-aid assistance . . . where a dozen or so different bodies are attempting to cure a complex condition, often with in-built limitations which result in unplanned, unco-ordinated and inadequate overall service.' The State Attorney-General's Department has published *A Guide to Legal Aid in New South Wales;* 'it is distributed to all members of the legal profession but, apparently, is not distributed freely to the public, community organisations, or social workers.'[27]

The Australian Legal Aid Office, a national legal aid plan proposed by the Federal Attorney-General, will eventually duplicate for Aborigines the services of the A.L.S., through a pattern of salaried solicitors in regional, 'neighbourhood' offices having power of referral to private practitioners and other legal aid schemes. The Attorney-General has found a dual advantage in such a pattern of offices (applicable also to the A.L.S.):

(a) It is the view of the Government that legal assistance to socially

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[24] *Turner Report* at 3, 39. The report details the provisions of every legal aid scheme in Australia. See also R. Cranston & D. Adams, *Legal Aid in Australia*, 46 A.L.J. 508 (Oct., 1972); S. Armstrong, *An Assessment of Legal Aid in N.S.W.* (1970) (Commonwealth Commission of Enquiry into Poverty: Commissioner for Law & Poverty); N.S.W. Dept. of the A.-G. and of Justice, *A Guide to Legal Aid in N.S.W.* (2 ed. 1972). The (N.S.W.) Legal Aid (Misc. Provisions) Bill, 1974, §3(e) would remove the restriction on the Public Defender of only providing aid for indictable offences, and make aid available when the accused is charged with, or appealing against, a summary offence, but not apparently at trial or sentencing for a summary offence. A means test of insufficiency to provide for himself would apply to applicants. A Commissioner for Legal Aid Services would become responsible for the Public Defender and Public Solicitor schemes. The Law Society would operate advice and referral centres, and the client's contribution would become optional.

[25] The Public Solicitor operates under the Legal Assistance Act, 1943, and the Law Society scheme under the Legal Practitioners (Legal Aid) Act, 1970. *Turner Report* at 41-44.

[26] The Law Society of N.S.W., Community Law Committee, *Blueprint for Legal Referral Centres* (undated) at Enclosure 4/1-4/13.

[27] T. Purcell, *Legal Needs in Today's Society: Implications of Recent Legal Aid Trends in the U.S., Canada and Britain* (1972) at 88.

disadvantaged persons *can most effectively be provided through a salaried legal service.*

(b) The role of the [Australian Legal Aid] Office will be complementary to the role of the private practitioner and, indeed, be an advantage to him in *providing continuity and proper preparation of legal aid matters referred.*[28]

The legal profession, through the annual conference of Australian Law Societies on 20, 21 April, 1974, registered a difference of opinion on the best means of providing legal aid. The Societies reached agreement on the following points, *inter alia:*

(a) Government assistance was essential [and should be directed to] assisting well-established professional bodies . . . ;

(b) The profession was able to supply the necesary abilities and skills to maintain a full range of legal services wherever required . . . ;

(c) It also preserved the essential personal relationship between solicitor and client and the confidentiality of the client's affairs;

(d) As far as practicable aid should be provided by the practising profession rather than by a government service. This would ensure, among other things, that a person would be free to engage a solicitor of his own choosing.[29]

In answer to these points: (a) and (b) Petty Sessions statistics reveal that at least in that court the profession has not yet met the need for representation.[30] (c) Having observed closely three country offices and one city office of the A.L.S., I found professional standards as high as in any practice. Cases appear in Quarterly Reports to Canberra as only the most superficial statistics; and any circulation of facts among professional staff does not exceed that exchanged in an ordinary firm. However, it is a fact in the Aboriginal community that individual encounters with criminal justice administration, and civil matters as well, are widely reported and intimately shared by group members. It is a factor, as Rowley has observed, 'symptomatic of insecurity', and must be accepted by the Legal Services practitioner.[31] (d) On the choice of solicitor under the A.L.S. scheme: Aborigines already have the choice of an A.L.S. salaried solicitor or direct approach to private firms, who are reimbursed up to 80% of normal fees. The Australian Legal Aid Office will provide an additional choice: the Government does not propose to amalgamate the A.L.S. with the new Federal plan.[32]

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[28] *Ministerial Statement on Legal Aid,* in *Turner Report* at 4, 5. (Emphasis added.)

[29] Law Society of N.S.W., *News Release: Solicitors Seek Closer Government Liaison on Legal Aid* (20 April, 1974).

[30] *Supra* n. 22.

[31] Rowley *supra* n. 9 at 191. *Cf.* Amer. Bar Assoc., *Proposed Formal Opinion 334,* 60 A.B.A.J. 329, 331 (Mar. 1974):

> It must be recognised that an indigent person who seeks assistance from a legal services office has an attorney-client relationship with its staff of attorneys like that of a client who retains a law firm for a fee. It is the firm, not the individual lawyer, who is retained. In fact, several different lawyers may work upon different aspects of the case, and certainly it is to be expected that the lawyers will consult with each other upon various questions where they may seek or be able to give assistance.

[32] Minister representing the Minister for Aboriginal Affairs, *Answer to Question No. 25,* 2 Weekly Hansard (H. of Rep.) 408 (13 Mar., 1974). The Attorney-General's Legal Aid Review Committee recommends against establishment 'of a legal aid organisation that would control all legal aid services.' *Turner Report* at 13.

On the matter of duplication of services: the Australian Legal Aid Office has opened only two offices in New South Wales to date, both in Sydney and neither in the Redfern area. Where reliance can be placed upon the Public Defender, the Public Solicitor and the Australian Legal Aid Office (limited to Sydney and environs, as already noted), further steps should be taken to relieve the burden now placed upon A.L.S. solicitors—or their numbers should be increased.

In country areas private practitioners, even when mobilised through the Law Society Referral Office, are not a satisfactory alternative for the Aboriginal client, at least in cases of community significance. In probably all country towns with a courthouse and a firm of solicitors, a few of the latter have been representing Aborigines regularly, on a charitable basis before April, 1973, and on a nearly charitable basis afterwards (frequently not claiming their full entitlement of 80% of fees). In one country town visited, without an office of the A.L.S., two solicitors undertook the bulk of Aboriginal cases: mostly summary offences, minor assaults and petty theft. Both were opposed to completely free services for Aborigines, although both billed the A.L.S. for less than the amount of work performed. One of these solicitors said that private practitioners are so overburdened with work that Aboriginal cases could only be treated as they appear at the door, with little time for legal research. This confirms the Attorney-General's observation that a salaried service can provide expertise in areas of 'poverty' law not customary to the ordinary private practice (such as practice before the innumerable administrative/regulatory agencies that affect the lives of the poor and near poor).

The other country solicitor interviewed had taken more Aboriginal cases than any other in his town. In commenting upon his clients, he objected to their crudeness of speech and manner, to their demanding attitude, and to their lack of gratitude shown for the time he was taking away from his regular clients. This conflict of interests between middle and lower class clients may very well be a violation of professional ethics, and reinforcement for the argument in favour of a salaried service of at least objective if not sympathetic lawyers.[33] Of course there are still country towns where only private solicitors are available. Pending expansion of the A.L.S., potential conflicts of interest must be tolerated. Awareness of them, however, may reduce their effect.

The A.L.S. solicitor enjoys a unique position in his client community which assures loyalty to interests as expected of the private practitioner, and perhaps more so: Aborigines are extremely skeptical of the 'law' suddenly working for them. Thus, failure by the solicitor is unacceptable. For example, in one country town shortly after the A.L.S. opened for business, four children (ages 10 to 15) appeared before the local magistrate sitting as a Children's

[33] There is no intention to generalise about this particular attitude but rather about constraining influences stemming from handling cases of vastly different interests. But my example is not isolated. In a letter from Paul Coe, Pres. A.L.S., to Sen. Cavanagh, Minister for Aboriginal Affairs, 26 Feb., 1974, on the subject 'Expansion of Legal Service in N.S.W.', a representative of the A.L.S. is reported to have visited one area of the State and noted 'widespread dissatisfaction because the Legal Service has failed to open an office. *Local solicitors are not regarded favourably, and do not extend themselves on behalf of Aboriginal clients.*' (Emphasis added.)

See R. C. Teece (Pres. of the N.S.W. Bar Assoc., 1936-1947; Lecturer in Legal Ethics and sometime Dean, Faculty of Law, U. Sydney), *The Law and Conduct of the Legal Profession in N.S.W.* (2 ed. 1963) at 56:

> [If] a lawyer is already under an obligation to one person inconsistent with complete devotion to the cause of another who seeks his services, he either must refuse employment or make the position clear to both persons concerned.

Court (under the Child Welfare Act, 1939) for petty theft. Relatively minor damage had been done, and the children had readily admitted their previous escapades to the police. The court ordered the children sent to an institution in Sydney for thirty days for physical and mental surveys by staff psychologists.

The psychologists' reports recommended probation in each case. On reappearance before a relieving magistrate, the children were sentenced to institutional committal—the carefully prepared reports had been ignored. (Possible maximum length of sentence was to age 18, even though the practice is for internal institutional review after the first six months.) The A.L.S. solicitor's reputation was on the line. Appeals were quickly lodged on all grounds, and Queen's Counsel was briefed. The cases were advanced on the District Court calendar after personal request to the Minister for Justice. The final decision of the District Court was that the appeals were dismissed, but the sentences were varied to probation for two years, with compensation to the victims. In the meantime the children had spent nearly two months in custody, including for two of them eight days in the local gaol.

The options under the Child Welfare Act for bail, parental custody and probation had all been ignored in the lower court. Whether the magistrate acted out of a sense of duty to protect community property interests, as a warning to other children, or out of desire to remove the children from poor home conditions (there was no evidence of this before the court), institutionalisation would have deeply disturbed the entire Aboriginal community. It is doubtful if requests for appeal to the Public Defender would have met the test of 'reasonable grounds' when objective judgment may have compelled agreement with the committing magistrate. A private solicitor may have been in similar agreement.[34]

V

In April and May, 1974, at a series of state-wide staff meetings,[35] the Constitution of the A.L.S. was amended and control effectively passed to an Aboriginal-dominated state Council containing two representatives from each country office.[36] This revolution in control occurred in part because the heavy

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[34] The case example is reported in *The Sunday Telegraph*, 10 Mar., 1974, at 3; and 24 Mar., 1974, at 9. Remaining to be considered are the cases of all the children presently institutionalised. Query: whether habeas corpus is a proper remedy for review, unless the appropriate authorities can demonstrate (1) that previous committals were effected with attention to procedural fairness, and (2) earlier committals were not punishment for circumstances beyond the control of the children?

[35] Offices with solicitors had been opened in Brewarrina, Moree, Grafton and Nowra since Sept., 1973; a Cowra office employed one field officer. The Submission to the Federal Government on the 1973-1974 Budget (1973) assessed areas requiring offices as follows:

> The concentration of Aborigines in the north west (Bourke, Brewarrina, Walgett, Moree and adjacent areas), and their social and economic condition, justify the establishment of two full-time offices in the region, and the same is probably true for the North Coast/New England area. The whole south, centre and west of the State however present problems of less obvious solution. The Aboriginal population is so widely dispersed and lacking in large permanent concentrations that it is a question that we will need to test by experiment whether it would best be served by regional offices or by centralising communication and administration in Sydney, with highly mobile salaried officers. A further complication is the seasonal concentration of Aborigines in areas such as Wee Waa and Griffith, under conditions likely to promote conflict with the law.

In a letter from Paul Coe, Pres., *supra* n. 33, three other areas of need were recognised: the Housing Commission settlement in Mt. Druitt (an 'outer Western suburb of Sydney') and requests from Newcastle and Armidale for referral centres.

[36] The final composition was 14 representatives from country towns, 6 from the city, and 4 city solicitors.

presence of white professionals had lightened, and leadership from some sector was necessary; and in part because expansion to country areas to fulfil demands placed upon the Service had stretched administrative control to the limits, compelling country representatives to become involved in administration for their own financial survival. An additional factor was government concern for the quality of spending in Aboriginal affairs in general, which eventually affected closer scrutiny of funds supplied to the various Legal Services.[37] Anti-climatically, a *Report of the Auditor-General upon the Department of Aboriginal Affairs* was tabled in Federal Parliament. Concerning the Legal Services the Report recommends, *inter alia,* (a) conditioned grants for capital and administrative expenditure; (b) *more detailed reporting* (budgets and financial statements) to the Department of Aboriginal Affairs; and (c) the creation of a National Co-ordinating Committee for A.L.S. with responsibilities relating to budgets and financial statements.[38]

As part of the reorganisation in New South Wales, area Management Committees located in towns with A.L.S. offices were given greater control over funds allotted to them by the Council, with power to hire temporary employees. Ultimate direction, co-ordination, allocation of funds, and relationships with the Federal and State governments remains with the Council.[39]

VI

The locus of control in the Legal Services raises important ethical questions for the profession, namely, whether the exercise of independent professional judgment is impinged, and whether client confidences can be preserved?[40]

Greater participation by the various Aboriginal communities in the running of the Service through the Management Committees is now being encouraged. It is a meaningful step in control of their own affairs, after years of government monopoly. The A.L.S. in fact has the largest 'grass-roots" network of any organisation run by and for Aborigines. However, professional difficulty arises should Management Committees attempt to instruct solicitors in the handling of individual cases. At the December, 1973, national conference of Aboriginal Legal Services, the issue was raised by a barrister from the Queensland A.L.S., with a solution applicable to any retained counsel: when instructions violate professional duties to the client and/or the court, the lawyer must withdraw from the case and if necessary resign from the employing organisation. Areas of expertise can be delineated, however, between the lawyer and the Management Committee, before this final solution of resignation is invoked. Aboriginal control through Management Committees can be limited to questions of policy, such as types of services to be provided to the community, without infringing professional judgment, provided that policy is

[37] From a 'Proposal for reorganisation of the A.L.S.', presented to the staff conference, 6-7 April, 1974.

[38] *Report of the Auditor-General, supra* n. 6, at 14-15. After examination of the *Report*, the Joint Committee of Public Accounts was to hold a public inquiry 'into the whole financial administration of the Dept. of Aboriginal Affairs,' at 24.

[39] Amendments to the *Constitution of the A.L.S.*, adopted at an Extraordinary General Meeting of the N.S.W. A.L.S., 10-12 May, 1974.

[40] Community control was anathema to the lawyers in the Navajo Legal Services Program (D.N.A.), and in the result detracted from the power of the tribe, since the Program had a separate political base for independent decision-making, and was accomplishing more than, and had a larger payroll than, the tribe. M. E. Price, *Lawyers on the Reservation: Some Implications for the Legal Profession* (1969) Law & Soc. Order (Ariz. St. L.J.) 161, 178-79. Similar stresses were developing at the time of the A.L.S. reorganisation in May, 1974.

announced before a particular case is undertaken. The only difficulty becomes recognition by the solicitor that Aborigines really do know what is best for themselves on the level of broad community objectives.[41]

An ethical problem arises when control of legal aid services is sought by a central organisation; in the case of the A.L.S. in New South Wales, either by the State Council, a National Co-ordinating Committee or a Federal department. Discussion has taken place at the various conferences for creation of a National Committee for A.L.S., but fears have been expressed about potentially excessive Federal intervention in State and local administration. At the December, 1973, Federal conference a National Co-ordinating Committee proposal was opposed by the New South Wales delegation.[42] Yet at the time of restructuring in April and May, 1974, the New South Wales staff had begun to realise that escape from the lock-step pattern of criminal representation would require an investigation of issues on a state-wide basis. A collection-and-dissemination-of-information function would have to be performed by a central body. (In the end it was decided to eventually hire a lawyer and necessary staff for the sole purpose of research with an issue-orientation.)

When control is sought for a superior authority, the professional issues raised are (a) whether the exercise of independent professional judgment can be maintained, and (b) whether the client's confidences are preserved. (a) If broad policies are stated before cases are undertaken, as in the case of control by Management Committees, judgment in individual cases is not impaired. It would constitute interference where the superior authority was 'some remote body attempting to restrict the activities of [the legal service office] for reasons unrelated to its very functioning or the adequacies of its facilities. . . .'[43] (b) To preserve client confidentiality, the amount of information that the superior authority may require staff counsel to 'disclose . . . about their clients and cases [is that which] is reasonably necessary to determine whether the [superior authority's] policies are being carried out without violating attorney-client confidences.[44]

Placing matters in the hands of Aborigines raises an especially difficult issue for white professionals, namely, maintenance of efficiency in operation. One researcher describes the A.L.S. as having twin objectives: self-determination and the provision of legal services, which are potentially antagonistic. Resolution is sought in the demarcation of functions as described *supra*,

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[41] For discussion of the issue of control see E. Eggleston, Aboriginal Legal Services, *supra* n. 9 at 16-18. For guidelines on control see Amer. Bar Assoc., *Proposed Formal Opinion 334, supra* n. 31, at 332:

> [The] governing body of a legal aid society may broadly limit the categories of legal services its attorneys may undertake for a client. . . . There are 3 important qualifications. . . . First, in the absence of such affirmative action by the board, no such limitation exists. Second, the action of the board must be a broad limitation upon the scope of services established prior to the acceptance by the staff attorney or representation of any particular client, and preferably made known to its public and staff in advance like any other limitation. . . . And finally, once that representation has been accepted, . . . nothing can be permitted to interfere with that representation to the full extent permitted by law and the disciplinary rules. . . .

[42] In response to the Auditor-General's recommendation of a National Co-ordinating Committee, the Dept. of Aboriginal Affairs replied that it will conduct an examination for possible 'restructuring . . . to consider the establishment of a central secretariat to co-ordinate the activities of the Services', and that 'detailed guidelines for operation, expenditure, etc., will be laid down,' *Report of the Auditor-General, supra* n. 6.

[43] *Proposed Formal Opinion 334, supra* n. 31, at 331.

[44] *Id.* at 333.

between policy-making by Aborigines and administration by lawyers.[45] In offices where patterns of function are already blurred, what is needed is on-the-job training of staff and closer supervision of paraprofessionals by the solicitor.

Paraprofessionals can be usefully employed to relieve the burdens placed upon the solicitor. The danger lies in the use of untrained people unable to identify the relative legality of individual cases. Among Aborigines the use of black field officers has been a necessity to provide entrée for the white solicitor into the black community. (There is reason to believe that field officers from other ethnic communities would provide similar services.) But these field officers become quickly disillusioned and/or bored when not given sufficient legal training to play a meaningful role in daily law office matters. Field officers are also under nearly unbearable strain from the demands placed upon them by the Aboriginal community which they are incapable of satisfying; and the territory they are expected to cover would break the best travelling salesman.

In addition to some form of training, two steps are necessary to enable field officers to perform as paraprofessionals: (a) the privilege of confidentiality between solicitor and client must be extended to include the field officer (lawyer/client confidentiality is violated no more than in the private firm where clerks and secretaries under supervision participate in privileged information according to the requisites of their positions); and (b) the paraprofessional must be accorded appropriate recognition by officialdom, permitting him entrance to corrective institutions and the right to speak on behalf of clients to opposing parties and government officials.[46]

In two of the country offices the solicitor has involved his field officer in step-by-step analysis of court procedure and dealings with other government officials. However, both were newly opened offices with small caseload, yielding time for such close attention to staff. The secretarial staff is still neglected; one secretary interviewed refused to defend the solicitor and instead pleaded ignorance of his work. Generally secretarial staff lacked direction in activity.[47]

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[45] E. Eggleston, Aboriginal Legal Services, *supra* n. 9. As reported by Dr. Eggleston, the American legal services for Indians are now in the hands of Indian policy-making committees. First hand report is that in the California Indian Legal Service (C.I.L.S.), begun in 1968, the Indian leaders demanded the best lawyers available and used white staff until trained Indian field workers and secretaries could be obtained. Indians began to graduate from the law schools in significant numbers in 1971-1973; only recently have they outnumbered employed white attorneys. The Native American Rights Fund (N.A.R.F.) of Colorado was a breakaway group from C.I.L.S., forming a national supporting law firm to provide expert assistance in complex constitutional test cases to any local legal service office requesting it. N.A.R.F. is entirely under an Indian board of directors, and 5 of its 12 lawyers are Indians. However, circumstances peculiar to the American situation have produced legal service offices considered in their locale to be the equivalent of the best private firms: there was a conscious decision to limit caseload intake to match available (but small) resources. (This was in part facilitated by an enabling statute preventing the undertaking of criminal defence cases except where significant civil rights issues are at stake. 42 U.S. Code Ann. §2809(3).) And government and private funding sources were very demanding of proof of accomplishment in reporting and practice, in order to justify continued funding. Also the surrendering of white control occurred *after* the services had established an infrastructure and pattern of community service. Interview with D. M. Rosenfelt (former staff attorney with C.I.L.S. and N.A.R.F.; Assoc. Prof., Gonzaga Law School), in Sydney, 14 May, 1974.

[46] *Conference of Aboriginal Legal Services*, *supra* n. 23, at 103-6. The delegates were thinking principally in terms of access to corrective institutions, but should the scope of the caseload be expanded, similar paraprofessional status would be necessary in approaching administrative agency officials in the 3 levels of government.

[47] See the discussion on training and the role of paraprofessionals by R. W. McMenamin, *Dawn of the Age of the Legal Assistant*, 59 A.B.A.J. 222 (Feb., 1974).

Formal training for field officers and secretaries has been proposed from time to time by staff members themselves but has not yet been implemented.

There are two practical problems involved in Aboriginal control: firstly, the hiring of personnel has substantial political consequence in the black community, making their removal from office virtually impossible and exaggerating normal office tensions. This can be variously accounted for: the few salaried positions available represent a quantum leap from unemployment or seasonal work for some; the positions filled are respected positions, bringing the employee within the mysterious aura accorded the legal profession by the poor and near poor; and the positions ratify with title and salary persons who were already leaders in the community but who lacked recognition outside the 'asylum' society of reserves and ghetto.[48]

The second practical problem of Aboriginal control is the nearly chaotic state of organisational meetings, with epithets hurled at members and subgroups within the Aboriginal community. As explanation I prefer Rowley's insight:

> These divisions illustrate how resentment may be discharged within the group itself. Disunity results from attempts to adjust to overwhelming social forces. There is not a reasonable degree of social autonomy, nor sufficient control of property, nor economic opportunity, to make such autonomy possible except as a basis for future dissidence.[49]

In other words, the normal processes of social change have been frustrated:

> It is probable that the Aboriginals are reacting in their caste situation precisely as would any group of human beings, similarly placed by their history in contact with the whites, and by the continued existence of a racial barrier to upward social mobility in the predominant society. Such reactions confirm the stereotype Aboriginal of the white in-group, and are explained as something inherently Aboriginal.[50]

Unfortunately this quality of 'Aboriginality' is occasionally relied upon within the A.L.S. as an excuse for failures by the staff arising from unfamiliarity with, and impotence in the face of, the dominant institutions of social control—police, courts, administrative agency officials, law office complexities.

In spite of these problems in Aboriginal control, it must be acknowledged that impetus for reorganisation of the New South Wales A.L.S., recognition of the ineffectiveness of the organisation as long as criminal defence work dominates the caseload, recognition of the need for formal training for the staff, and the suggestion that special counsel be hired for the purpose of contemplation of, and research into, broader issue capable of test-case litigation, are all ideas which originated from the Aboriginal staff members of the Service, or from community representatives.

VII

Assuming that the A.L.S. either hires specialists to investigate the possi-

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[48] For an account of Aboriginal society see K, R. McConnochie, *Realities of Race* (1973) at 78-91. Rowley notes that selection of would-be leaders by government authority may be tantamount to the 'kiss of death' to ambition, Rowley, *supra* n. 9, at 428. An interesting corollary of leadership confirmation by the A.L.S. is the appearance of active families within Aboriginal society. There is an immediate comparison with leading families in white society; but unfortunately the prominent Aboriginal family has attracted the charge of nepotism. It is not worth heeding.

[49] Rowley, *supra* n. 9, at 236.

[50] C. D. Rowley, "Causation in Relation to Aboriginal Affairs", in *Aborigines in the Economy* (I. G. Sharp & C. M. Tatz ed. 1966), at 351-52.

bilities of law-reform type cases, or limits its present criminal defence obligations, directing scarce resources to best possible use, what sort of work will be undertaken? Comparisons to the American civil rights litigants are inappropriate pending the enactment of the necessary legislation. Yet it is difficult to believe that a program for the use of law for the interests of a particular class of clientele must fail because of different political and constitutional structures.[51] One of the leading writers on professional ethics in New South Wales says that:

> To assist a client in finding a loophole in the law is a different matter. There is no rule of professional conduct that forbids a lawyer to search for defects in legislation, and to advise his client how to make dispositions of property or arrange his affairs in such a way as to avoid a burden or a restriction which it is the policy of the legislature to approve.[52]

If such be permissible tactics of tax avoidance for the middle and upper classes, what are the limits of creativity in relation to the poor? In another place the same writer says that 'By entering the legal profession a lawyer undertakes faithfully to maintain the existing law and to assist in its enforcement.'[53] Yet he would concur with the succinct American ethical canon, that 'A lawyer should represent a client zealously within the bounds of the law.'[54]

The thrust of representation of poor people in the American experience may have been based upon a decision that courts were a means of redress when legislatures and executive branches had failed to respond. The Anglo-Australian legal tradition does not admit to the resolution of sociological issues in the courtroom[55]—whether due to the practical question of what a court will take judicial notice of (what facts are 'constitutional facts'), or in the broader historical context, because Australia has not experienced the social turmoil known to America, so that issues of political and social moment have not been presented for adjudication.[56] However, if it is a proper definition of law that 'it is the order and security provided by the State that makes possible all that is best and highest in our civilisation . . .',[57] then the frustration, alienation and withdrawal of a minority would be best resolved through present (legal) institutions rather than in violence or the threat of violence.[58]

Will law-reform type litigation be acceptable to Aboriginal clients? This is an important question in an era of Aboriginal control of the A.L.S. The answer will lie in the ability of white lawyers to recognise the most pressing issues in a given Aboriginal community. For example, a burning issue among at least two members of the New South Wales Bar is to challenge a jury system which assures that any defendant, regardless of age, sex or ethnic origin, will have as his or her peers twelve white middle-aged men. Beyond challenge to the array, active discrimination in preparation of the jury list

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[51] T. Purcell, *supra* n. 27, at 92-93.
[52] R. C. Teece, *supra* n. 33, at 28.
[53] *Id.* at 26.
[54] Canon 7 of the Amer. Bar Assoc., *Code of Professional Responsibility* (1971) at 24. R. C. Teece, *supra* n. 33 at 59-64,
[55] T. Purcell, *supra* n. 27.
[56] S. H. Kadish, *Judicial Review in the High Court and the U.S. Supreme Court, Part II*, 2 Melb. U.L.Rev. 127, 140, 160-62 (Nov., 1959).
[57] With fairness the quotation must be completed: '. . . even those who fare worst in our existing social order enjoy a security the value of which can be fully appreciated only when we compare it with the lot of those whose misfortune it was to live in periods of collapsing social order.' R. C. Teece, *The Law and Conduct of the Legal Profession in N.S.W.*, *supra* n. 33, at 27.
[58] See C. M. Tatz, *Aborigines: Political Options and Strategies*, *supra* n. 8.

will have to be shown. Alternatively it will be necessary to persuade Aborigines of the need to register and vote (evidence of eligibility for the list) and then to be ready to apepar at an annual Special Petty Sessions held for the purpose of amending and correcting the list.[59] For a group of people inured to the summary offences cycle of arrest and bail, who then fail to appear assuming that the bail was their fine, the obfuscation and irrelevance of the jury challenge will be difficult to overcome.[60]

The burning issues are closer to immediate needs. Probably the most urgent need is for guidance through the maze of administrative agencies which regulate the daily lives of the poor, an area hitherto considered non-legal by private practitioners working with Aborigines.

In 1970 Professor Colin Tatz described how the attributes of political development of states could be applied to indigenous minorities within politically developed states. The last stage in political development is 'involvement of the entire population in political life.' 'Accelerated power-sharing' could however cause a 'demand-conversion' crisis, resolvable through adjustments in law and legal institutions. Fringe-dwelling Aborigines in New South Wales are suffering from this crisis, one of frustration of 'rising expectations' (another nation-state concept). One kind of adjustment is rationalisation in the face of ambiguity—or guidance through the maze of regulatory agencies affecting the daily lives of fringe-dwellers: the Housing Commission, the Social Services office, the police (who distribute emergency food rations), the Federal Department of Aboriginal Affairs, the New South Wales Directorate of Aboriginal Welfare, the Aboriginal Advisory Council, the National Aboriginal Consultative Committee, the Aboriginal Land Trust, the City Council, the Public Health inspector—to name a few having jurisdiction over one reserve and its residents.[61]

VIII

There is a movement afoot to reverse the pattern of administrative ambiguity, and it will redefine the role of the poverty lawyer in New South Wales. With the arrival of the financial scandal over past development projects,[62] the new requirement for recipients of Federal grants for Aboriginal enterprise is Aboriginal community desire and involvement. This is translated into a viable Aboriginal organisation. After years of anthropological and sociological research, an organisation will at last be formed with a visible purpose and goal: an incorporated Aboriginal housing (education, health, small business development, etc.) society, with legal personality requiring notice by government departments more accustomed to faceless black clients. The housing society may decide to renovate reserve housing or to enter the construction business and employ Aborigine to build their own homes. White professionals (accountant, architect, solicitor, construction supervisor) will be called upon for their services on a fee basis. The A.L.S. lawyer must provide guidance at each stage of development, in addition to the formal procedure of

[59] Interview with M. Ramage, barrister, in Moree, 4 Mar., 1974. Challenge to the array under the (N.S.W.) Jury Act, 1912, is discussed by G. Graham, barrister, in the forthcoming book *Aborigines, Human Rights and the Law* (Proceedings of the I.C.J. conference, June, 1973) (G. Nettheim ed. Sept.. 1974, ANZ Book Co.), at the Second Session, 'Aborigines and the Administration of Justice.'

[60] Interview with J, Curtis, A.L.S. solicitor, in Grafton, 3 May, 1974.

[61] C. M. Tatz, *Law and Political Development*, 42 Austn. Q. 33, 34-35 (Dec., 1970).

[62] *Supra* n. 38.

registration of the company. To date, companies (as found in Moree, Redfern and other areas) have followed customary format, with a board of directors and executive officers. More imaginative formulations may be possible, conforming to the cultural needs of the members:

> Here, as in other respects, the lawyer for the Indian [read 'Aboriginal'] poor must be as resourceful as the lawyer for the wealthy. Lawyers for the rich have devised schemes to allow a culture to continue: the spendthrift trust, the personal holding company, the foundation . . .—all designed to allow a group of people to live in the style to which it has grown accustomed, hindered as little as possible by the incursions of change in the society at large. Moreover, the rich often have taken the perspective that their way of life should be available not only for them, but for generations to come as well. . . . The Indians ask no less of their lawyers.[63]

For example, the Alaska Legal Services Program, in recognition of the communal life style of native members, devised a development corporation in which all but personal property will eventually be held in trust.[64] In Aboriginal fringe society there is a distrust of individual community members gaining status ahead of the group. A company formed by the A.L.S. in Sydney for use in a country town has an annual election of five directors, but permits them to elect a chairman 'from time to time' and for as long a period as they wish. This is a step in the right direction.[65] Consideration should be given to communal title which does away with the need for the fictional third person legal personality (the corporation or the trust) and expands the common law concept of tenancies in common and by the entireties.

Other problems cry out for imaginative solutions, and in particular cases they are being supplied. After the cotton-chipping season in Wee Waa this year, approximately 100 itinerant workers attempted to stay in the labour camps on Crown land of which the Namoi Shire Council is trustee. Only recently the Council had completed construction of toilets, showers, access road and electrical outlets under a $250,000 Federal grant to provide for the workers during the chipping season. The Council issued an eviction order. After a month of court delays, the area A.L.S. solicitor obtained an interlocutory injunction against enforcement of the order, lasting one week. (The court had been told that it could take two months for the workers to find alternative accommodation.) By the time the injunction had expired, the chief plaintiff and most of the residents had moved. The facilities were turned off on 10 May.[66] There is a history of local government versus itinerant Aboriginal labour.[67] Confrontations prior to Wee Waa this year were notable for the absence of (a) any legal remedy attempted at all, or (b) any prompt judicial remedy sought.

An innovative approach is being taken in the matter of abuse of police

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[63] M. E. Price, *supra* n. 40, at 197-98. For an account of innovative cases undertaken by the Navajo Legal Services Program, see T. Purcell, *supra* n. 27, at Appendix, 'D.N.A. (Navajo) Program'. at 4-6, 15-17.

[64] M. E. Price, *supra* n. 40.

[65] *Articles of Association of Orangejur Ltd.*, art. 39. See a description of the Redfern housing proect in 4 New Dawn (magazine of the N.S.W. Dept. of Youth & Community Services) 1-4 (Feb., 1974).

[66] *The Australian*, 30 Mar., 1974, at 3; 2 April, 1974, at 5. *The Northern Daily Leader*, 30 Mar., 1974, at 1. Interview with N. Mackerras, A.L.S. solicitor, in Sydney, 11 May, 1974.

[67] Rowley, *supra* n. 9, at 250-60.

discretion in arrests for summary offences in one country town. In June, 1974, two policemen will have appeared before a special investigating magistrate to answer nine summonses taken out by six Aborigines, alleging assault, use of unseemly words, offensive behaviour (the latter two themselves are summary offences) and trespass.[68] These criminal charges may supply grounds for common law tort claims, and may prove more fruitful than negotiation.[69]

In spite of the fact that the only major case for land rights was lost,[70] there is reason to believe that it is of limited value as precedent, and that there may be grounds for common law recognition of rights in land.[71] Other suggestions on land rights: what is needed is an initial tactical success; a more careful choice of plaintiffs; a more modest defendant than an overseas mining company; more modest claims, such as for customary land use rights—hunting and fishing, for example—rather than for outright proprietary interest; a linking of Aboriginal with environmental claims—for example, the influx of tourists to Ayers Rock not only pollutes the surrounding land but also disturbs sacred sites; and investigation of formal and informal land grants to particular Aborigines and Aboriginal families.[72]

Cases found repeatedly in the files of A.L.S. solicitors include: the hire-purchase case, usually entailing representation of the judgment-debtor in attachment or garnishment proceedings—this situation never appears at an earlier stage, when there may be valid defences to enforced collection under the contract of sale, such as fraud, misrepresentation or breach of warranties. Query: does the mere entering into a contract imply tortious conduct where the buyer is obviously ignorant of terminology and the seller knows of the buyer's impecunious circumstances? There is a total solution: the lawyer assists in forming a co-operative society for Aborigines, which not only loans money at reduced interest rates but also assists in family financial planning.

Another case frequently appearing is the refusal or discontinuance of social service payments—'the whole social service pattern just seems to be a hurdle race designed to weed out the people who aren't very good at clerical work and time keeping and other middle class virtue.'[73] This governmental dependency is the very existence of numerous Aborigines, probably out of proportion to their percentage of the population. Hitherto lawyers have not considered welfare benefits of legal consequence, even though they are fully prepared to devise ways of protecting and increasing the incomes of their middle class clients. Administrators of social service programmes are similarly unprepared for a legalisation of welfare problems—a recent directive of the Minister for Social Services, designed to curb abusive use of client records by outsiders such as police and government debt-collecting agencies, requires that

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[68] *The Australian*, 30 Mar., 1974, at 10C; interview with P. Tobin, A.L.S. solicitor, in Sydney, 13 May, 1974.

[69] *Supra* n. 10. Cf. G. R. Robertson & J. C. Carrick, *The Trials of Nancy Young*, 42 Aust. Q. 34 (June, 1970), which asks why an Aboriginal mother was not advised to sue a hospital and doctor for malpractice after she was pardoned for the manslaughter of her daughter, who had been treated and released by the hospital while suffering from malnutrition.

[70] *Milirrpum* v. *Nabalco*, (1971) 17 F.L.R. 141.

[71] J. Hookey, *The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands?*, 5 Fed.L.Rev. 85 (1972). See also A. B. Pittock, "Aboriginal Land Rights," in F. S. Stevens, ed., 2 *Racism: The Australian Experience* 188 (1972).

[72] J. Hookey, speaking to the Third Session on 'Land Rights', *Aborigines, Human Rights and the Law, supra* n. 59.

[73] J. H. Wootten, speaking to the Second Session on 'Aborigines and the Administration of Justice', *Aborigines, Human Rights and the Law, supra* n. 59.

welfare clientele speak for themselves when making inquiries about their cases.[74] Apparently the poor are not entitled to the privilege of legal representation in this area. There is a corollary: since the poor must speak for themselves across the counter, employees will not be disturbed by inquiries from knowledgeable counsel.[75]

IX

There is concern in the Federal Department of Aboriginal Affairs that some Legal Service offices 'go beyond legal aid into other areas such as social welfare.'[76] To a degree this 'extra-legal' aid has centered on the criminal process and encompasses anything from staying up late with a client in an alcoholic haze over his family-money-employment problems to the establishment of half-way houses for, *inter alia,* an alternative to gaol in drunkenness and other summary offences.[77] The social service, housing and employment problems are also looked upon by the Department as non-legal. For the lawyer to enter this area, yet alone to suggest the possibilities for aggressive representation in such cases, is described as the lawyer interjecting his own sociological viewpoint, an exercise of private moral judgment tending to 'lawlessness.' We are reminded as an ethical consideration that there is a distinct difference between encouraging a 'breach of the law' (a consequence of a private moral judgment) and 'finding a loophole in the law' (an acceptable professional objective, consonant with a general 'duty to the law').[78]

Practically speaking then, the lawyer may be ethnically compelled to exercise an open-door policy. In the event, all of the problems heretofore described would be brought to him but for two factors not prevalent among his middle class clients: a reluctance by Aborigines to take *any* problem to a lawyer, and ignorance of the existence of any legal problems at all in the face of the overwhelming administrative/regulatory burden. Both of these inhibiting factors can be overcome by use of (a) educative advertising, and (b) acceptance that the problems are very much legal, so much so that social workers are incapable of complete understanding of the complex administrative framework, lacking as they do the investigative tools and overbreadth of view acquired through legal training. They also lack the standing necessary to act as agent of the client.

That the legal aid lawyer necessarily provides total services (indicative of a failure on the part of established social services) is more widely recognised and believable since governmental offices can often only provide over-the-counter form-filling functions. A recent report prepared for the Appellate Divisions of the First and Second Departments of the New York Supreme Court concluded that

> lawyers representing indigent defendants should be prepared to supervise a startling array of extralegal services and information, including 'housing information, job counseling, family counseling, psychiatric aid, and medical

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[74] *The Australian,* 22 Nov., 1973, at 4.

[75] On social welfare matters see R. Sackville, *Social Welfare for Fatherless Families in Australia: Some Legal Issues,* Part I, 46 A.L.J. 607, Part II, 47 A.L.J. 5; R. Sackville, *Social Welfare in Australia: the Constitutional Framework,* 5 Fed.L.Rev. 248 (1973).

[76] *Conference on Aboriginal Legal Services, supra* n. 23, at 3.

[77] Agreement in favour of hostels was general at the last Federal Legal Services conference. *Id.* at 83-84.

[78] R. C. Teece, *The Law and Conduct of the Legal Profession in N.S.W., supra* n. 33, at 26-27.

> advisory rehabilitation. *These everincreasing demands on the time and skills of advocates place a burden on the profession, but at the same time they reflect confidence in the lawyer's role in moulding a more just society.*[79]

What are the limits of legal education through advertising? By statutory regulation:

> A solicitor shall not directly or indirectly apply for or seek instructions for professional business or do or permit in the carrying on of his practice any act or thing which can reasonably be regarded as touting or as calculated to attract business unfairly.[80]

Adult legal education courses have been proposed, but none have been implemented on a wide scale. The A.L.S. presently advertises principally by word of mouth through its Aboriginal field officers. They perform the dual role of public relations and opening new files in the field on the basis of initial statements taken. Regional Management Committees convene to discuss broad policy and, hopefully, recurring legal problems and means of solution. They also advertise by word of mouth. But because of sparseness of coverage, caused by a paucity of personnel, and the absence of a concerted publicity campaign, many Aborigines still go unrepresented, having no desire to call on country practitioners (who may not choose to provide free aid, on occasion for reasons of personal judgment on the merits of the accused/plaintiff and his case).

A Law Society folder describes the publicity appropriate for a legal referral centre as including newspaper advertising, posters, pamphlets, and the 'art of successful public relation.'[81] More to the point is the question whether legal aid lawyers may advise indigents of their rights in particular situations, which information may then lead to litigation on their behalf. An American Bar Association Committee on Professional Ethics resolves the question as follows:

> Unless within the 'legal aid office' exception, a legal aid lawyer is not permitted to accept employment resulting from advice volunteered by him to an indigent that the indigent should have legal counsel or should take certain legal action. . . . A staff attorney in a legal services office may not request or advise indigents to initiate litigation where they do not independently desire to do so; but there is nothing to prevent such an attorney from serving a legal services office which makes known through appropriate publicity to indigents with legitimate claims that services are available to assert such claims on their behalf, with the incidental benefit of accomplishing law reform.[82]

Perhaps the distinction drawn between legal aid office lawyers and other lawyers serving the same clientele provides another argument for having salaried legal services.

X

Professor Tatz has successfully applied the principles of political development of states to political development of indigent minorities in politically developed states. This has provided the useful nomenclature of ambiguities in

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[79] I. R. Kaufman (C.J., U.S. Ct. App., 2d Cir.), *The Court Needs a Friend in Court*, 60 A.B.A.J. 175. (Emphasis added.)

[80] (N.S.W.) Legal Practitioners Act, 1898, Reg. 29(2).

[81] Law Society of N.S.W., Community Law Committee, *Blueprint for Legal Referral Centres*, *supra* n. 26, at 5-6, and Enclosure 3, 'A guide to public relations.'

[82] Amer. Bar Assoc., *Proposed Formal Opinion 334*, *supra* n. 31, at 330.

government functions.[83] It is also useful to relate the skills of a lawyer desirable in the political, economic and social processes of a developing country to those required in the process of self-determination for an indigent minority:[84] The poverty lawyer is first a policy-maker, not in the sense of a final decision-maker, but in the sense of offering policy options to Aboriginal organisations, drawing upon his knowledge of administrative structures to give his opinion on the feasibility of possible alternatives. As implementer, he can translate chosen policies into the requisite forms. This is especially necessary in communities where the adult leaders are products of a depressed generation, with a high level of illiteracy. The poverty lawyer is a 'social engineer', prodding existing government administrative structures to function where legislative design is complete but operation has become arthritic, and advising new ones which fill previous voids (the A.L.S. surprisingly is not regularly consulted by the National Aboriginal Consultative Committee nor by the New South Wales Aboriginal Land Trust and Advisory Council—one would expect these groups to retain the A.L.S. as house counsel, since they each fill advisory functions for government ministers). Lastly, the poverty lawyer is a 'crisis manager', reacting with a variety of tools before proceeding to litigation (counseling, negotiating, consoling in the absence of solution), and frequently at hours of the night when more conventional offices are closed.

There is a place in this design for the A.L.S., which can only be hesitatingly performed while its caseload is dominated by criminal defence work on too small a staff and budget. Assuming that resources remain unchanged, there is an immediate need for negotiation with the private profession and present legal aid schemes to accept greater shares of the 'everyday' matters. This may be impossible in country areas where there is no legal aid scheme and the private practitioner is preoccupied with his present clientele. In those areas the A.L.S. must handle everyday matters, but it could do so with perhaps greater efficiency through staff training and implementation of the *Turner Report's* recommendation of a flying legal aid service. In both country and city offices there is a need for back-filling, to educate the Aboriginal community if it is to have an effective era of control. A concerted educative advertising campaign must be undertaken, explaining the new community services which hopefully will be offered. Should increased funding become available (greater efforts at justification of the need would be helpful), special counsel must be hired to redirect efforts towards an issue-orientation according to community needs and wishes, perhaps drawing upon the experiences of legal aid programmes abroad. This may develop into a special litigation unit which could collect information from all of the state A.L.S.'s and assist New South Wales regional offices when called upon. Finally, the resources of the law schools, as recommended by the *Turner Report*, must be integrated into both the litigation unit and the front-line offices, providing a varied outlet for youthful energies in vacation periods and eventually for credit towards the law degree.

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[83] *Supra* n. 61.

[84] Adapted from S. Lowenstein, *Lawyers, Legal Education, and Development: an Examination of the Process of Reform in Chile* (1970, Internat'l Legal Centre, N.Y.) at 65-74.