Federal Programs for Access to Justice under a Conservative Australian Government[*]

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Introduction

Achieving access to justice has long been regarded as essential to policies for social reform. In 1973 when the Labor Government introduced the Australian Legal Aid Office with the view of providing means tested legal aid, it was noted by the then Attorney-General, Lionel Murphy, that 'whatever law reform projects a Government introduces and no matter how perfect a set of laws it may derive, those laws are useless unless the citizen is able to pursue them through the courts, irrespective of financial means' (Hocking 1997:174).

In the absence of a constitutionally enshrined or federally legislated Bill of Rights in Australia, access to justice as a 'right' is largely dependent on a number of factors including law reform, policy development and administration, budgetary allocations, and the development of the common law. This paper analyses some of the broader administrative and law reform directions taken to ensure access to justice. It does so through a comparison of the previous and current federal Government policies in relation to access to justice, including an analysis of Federal budget cuts undertaken since 1996.

This paper is not a statistical or quantitative study of access to justice. However, it should be noted that quantitative indicators and research methodology on access to justice have been developed in a Queensland project (Cunningham & Wright 1996). Nor does this paper seek to address the theoretical literature on access to justice. For example, Cappelletti (1991:282-296) has described the access to justice movement as moving through three 'waves'. The 'first wave' involves overcoming the 'economic obstacle' where people have little access to information or to representation. The 'second wave' involves the 'organisational obstacle' where individuals lack adequate information or power to mount litigation against powerful collective entities or 'mass-wrongdoers'. This involves the need to address group rights and social rights through (for example) specialised governmental agencies. The 'third wave' concerns the development of alternative dispute resolution (ADR) as a way

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of providing for the effective protection of rights. The scope of our article does not enable a detailed analysis of these issues. [1] The primary focus of our paper is straightforward – it takes the Access to Justice Report (1994) as a benchmark and compares the approaches to access to justice by the former federal Labor Government with the federal conservative coalition led by Prime Minister John Howard.

In the last decade there has been a plethora of federal and state reports on access to justice issues.[2] In particular these reports have concentrated on barriers to the accessibility of the legal or justice system for specific members of the community including women, Indigenous peoples and people of non English speaking background. The recurrent themes identified in these reports which restrict access to justice include discrimination; language difficulties; lack of knowledge and appropriate information on the law, support services and avenues of redress; inadequate provision and use of translators and interpreters; cultural alienation; unfamiliarity with the system; distrust of the justice system; agencies' failure to consider needs; agencies' lack of training on cross cultural and gender awareness issues; and, inadequate legal training for interpreters. Other factors which restrict access to justice include broader structural barriers related to class, gender and ethnicity, as well as disability and physical isolation (Stubbs et al 1996:4). Access to justice and formal equality at law cannot be considered in isolation from the service providers, community based agencies and specific support services that have been established to overcome barriers to accessing justice. People who do not know their rights or do not know they have an avenue to complain, are not able to enforce their rights. The development of programs or services with adequate funding are vital to improving access.

In October 1993, under a Labor Government, the then Attorney General, Mr Michael Lavarch and the Minister for Justice, Mr Duncan Kerr commenced a major review of Australia's justice system. They established an Access to Justice Advisory Committee and required them to 'consider ways in which the legal system could be reformed in order to enhance access to justice and make the legal system fairer, more efficient and more effective' (Access to Justice 1994:v). In May 1994, the Access to Justice Advisory Committee brought out an action plan for improving access to justice. Arguably, the report provides the most comprehensive discussion of access to justice issues in Australian history. The Committee noted that to achieve access to justice a number of objectives must be fulfilled. These included that all Australians, regardless of means, should have equality of access to legal services or effective dispute resolution mechanisms, national equity and equality before the law regardless of race, ethnic origins, gender or disability. The Access to Justice Report identified a range of actions needed to improve access to the law including judicial education, funding of legal aid, community legal services and courts charters to serve community needs.

The former Labor Government responded to the Access to Justice Advisory Committee's recommendations by producing the Justice Statement in May 1995. The former Attorney-General, Mr Michael Lavarch noted that 'access to justice is the right of every Australian. It is an essential part of our democratic society' (Justice Statement 1995). The Justice Statement was wide ranging and brought together diverse areas that impact on the justice system.

1 For a critique of ADR see Astor (1991) and Abel (1982).

2 Royal Commission into Aboriginal Deaths in Custody (1991); Quarter Way to Equal: A Report on Barriers to Access to Legal Services for Migrant Women (1994); Equality Before The Law: Justice For Women (1994); Multiculturalism and the Law (1992); Access to Administrative Review by Members of the Australia's Ethnic Communities (1991); State of the Nation (1995); Report of the National Inquiry into Racist Violence in Australia, Human Rights and Equal Opportunity Commission (1991); Gender Bias and the Judiciary (1994); Seen and Heard: Priority for Children in the Legal Process (1997).

It provided a national strategy and most importantly, funding commitments for improving access to justice.

Legal Sources For Protection Of Rights And Access To Justice

Before proceeding to discuss Federal Government budget cuts in the area of access to justice, we first turn to legal sources which may assist in the protection of rights and access to justice. In this context we briefly consider a number of common law developments which are significant in the area of rights analysis, including the right to a fair trial, implied rights in the Constitution and access to international law.

Access to Legal Representation or A Right to Fair Trial - The Dietrich Decision

The judgment in *Dietrich v R* (1992) 109 ALR 385 raises interesting issues to do with fairness of trial, and its implications for the legal aid system and cost of justice. The majority held that the right to a fair trial is a fundamental part of the criminal justice system (Zdenkowski 1994:141). However, the *Dietrich* decision does not legally grant legal aid. The High Court in *Dietrich* unanimously rejected a legal right to counsel or legal representation (Zdenkowski 1994:138). However, it may mean that if aid were not given to a person charged with a serious criminal offence who is unable to afford legal counsel, the case may be adjourned indefinitely.

After *Dietrich*, the policy options for government appear to be either to increase legal aid funding (which is unlikely since the budget cuts); maintain current funding and divert resources from other areas such as civil areas; allow some trials to be indefinitely adjourned; or legislate to remove or restrict the impact of *Dietrich* (Zdenkowski 1994:152). The most likely options are diverting resources from other areas such as civil matters and legislating to restrict the impact of *Dietrich*. The reallocating of legal aid funds from civil to criminal cases would impact adversely on women because many civil cases involve domestic violence orders under state laws. The Australian Law Reform Commission has also noted that women are less likely to be able to afford legal services than men. According to the Commission, in the context of the *Dietrich* decision, the direction of legal aid funding away from family law matters to criminal matters would have the potential to create a barrier to women's access to justice (Equality before the Law 1994:97). The situation is not improved with cuts to the Family Court and Family Court counselling services or registries as set out in Table 1. The manner by which States deal with shrinking budgets will also undermine national equity. The Second Report from the Senate Inquiries on Legal Aid concluded with concerns on the establishment of separate State based legal aid agencies as fragmenting the legal aid services and compromising the aim of national equity and uniform access to justice (Inquiry into the Australian Legal Aid System, Second Report 1997:xiii).

Common Law as a Source of Rights

The majority in the *Dietrich* case held that the right to a fair trial existed at common law.[3] Common law protection of rights are usually phrased negatively. They do not entail positive remedies. Common law rights may restrain someone or a government agency from an action, but it is more difficult to require a positive action, especially if government resources are needed. Freedoms or immunities at common law are also liable to abrogation by legislation. If there is contrary legislation, the common law right is superseded. *Dietrich*'s right to a fair trial leading to a stay in the proceedings did not lead to the absolute right to legal

3 Only two justices, Deane and Gaudron JJ thought the right to a fair trial in relation to federal offences, is implied in the Constitution (Hope 1996:179).

representation. The right to a fair trial also would not necessarily lead to the conception of other positive rights such as a right to provide interpreting services or compensation for lengthy pre trial custody and wrongful conviction (Hope 1996:196).

Enforcing Human Rights: The Brandy Decision.

In operating to protect individual rights, the common law can also be restrained by the doctrine of separation of powers and Parliamentary sovereignty. The High Court in *Brandy v Human Rights and Equal Opportunities Commission and Ors* (1995) 69 ALJR 191, unanimously held that certain sections of the *Racial Discrimination Act 1975 (Cth)* were invalid under Chapter III of the Commonwealth Constitution. The judges concluded that the registration of a determination by the Commission and its enforcement as though it were a Federal Court order, constituted an invalid exercise of judicial power. The High Court found that the Commission does not constitute a court under Chapter III of the Constitution and therefore the sections of the Act invalidly invested judicial power in the Commission. As a result, the Human Rights and Equal Opportunity Commission (HREOC) is virtually powerless to enforce its own determinations. At the moment, in order to enforce HREOC determinations, a party has to seek an order in the Federal Court through a fresh hearing. The enforcement proceedings are not an appeal as such but require the court to be satisfied as to the alleged unlawful conduct of the respondent (Henderson 1995:587).

The *Brandy* case illustrates the separation of powers doctrine may not reflect the demands of the modern legal, political and social system. HREOC released a statement after the *Brandy* decision which listed four principles in human rights which they considered as crucial in any future proceedings. The four principles are equity in dealing with cases and in access to the Commission's processes; accessibility including keeping processes low cost; the availability of specialist knowledge; and enforceability (Henderson 1995:589). Following from the *Brandy* decision, the determination and enforcement function is to be with the Federal Court, exercised by judicial registrars mainly from the Federal Court's industrial jurisdiction (Crekye 1997:18). This would do away with most of the powers of the specialist commissioners. The then President of the HREOC, Sir Ronald Wilson, has warned that transferring the determination functions to the Federal Court may have negative results of increased costs and more legalistic judicial proceedings.[4] This would undermine the aims of providing tribunals and hearing bodies that are simple, quick, inexpensive and accessible, and deter the disadvantaged from exercising their rights.

Access to International law

Australia is bound internationally by the provisions of various treaties to which it is a party, such as the International Covenant of Civil and Political Rights (ICCPR). However, a treaty needs to be incorporated into Australian domestic law by an Act of Parliament. Otherwise, the provisions of the treaty have no binding force in Australian courts. As far as human rights treaties are concerned, only those scheduled to the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)* will likely raise issues for day to day consideration by administrative decision makers. In *Dietrich*, Justice Deane referred to the international context by noting Ireland, India, Canada, the United States and the European Community (through the European Court of Human Rights) regarding the right of a person to a fair trial in criminal cases as a fundamental human right. However, Mason CJ and McHugh J stated that these international instruments are not part of Australian domestic law in the absence of specific legislation implementing their terms.[5] Indirectly, international law or treaties

4 In an address to the Legal Aid Conference, Perth, 16 August 1996.

5 *Dietrich v R* (1992) 109 ALR 385 at 391.

can play a part in the Australian domestic law by firstly, resolving ambiguities or filling gaps in the common law as discussed in *Dietrich*; or secondly, under the administrative law principle of legitimate expectations discussed below in the *Teoh* decision.

Administrative Law Principle of 'Legitimate Expectations' and International Law - The Teoh Decision

International law may assist to protect rights through the common law doctrine of legitimate expectations for procedural fairness. The High Court's judgment in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353 highlights a number of legal and political developments in this field. Mr Teoh entered Australia on a temporary entry permit and married an Australian citizen who already had 4 children. Teoh and his wife had 3 more children. He was convicted of heroin importation offences. His application for permanent residence was denied. The court held that there had been a breach of procedural fairness. The decision maker had not given notice to Teoh that they were not intending to make their administrative decisions in accordance with the UN Convention on the Rights of the Child. The case has developed the law on 'legitimate expectations' and provided discussion on underlying issues such as the use of treaties and international law in the interpretation of statutes and the development of the common law. The case also points to the significance of treaties ratification, implementation processes and the roles of the Executive and the Parliament (Twomey 1995:348). *Teoh* used the similarities between the representation made in a publicly issued Government policy and the representation made publicly by the Executive when entering into a treaty (Twomey 1995:353). The judges noted that legitimate expectations are not based on laws but on procedural rights of fairness (*Teoh* at 365).

Mason CJ and Deane J pointed out that a legitimate expectation does not bind the decision maker otherwise the treaty would be incorporated into domestic law by the back door. The court in *Teoh* decided that in the absence of contrary statutory or executive indications, administrative decision makers should act in consistency with the Convention on the Rights of the Child and treat the best interests of the child as the primary consideration. In a joint judgment, Mason CJ and Deane J considered if a statute were ambiguous, the courts should interpret it in a way that is consistent with Australia's international obligations. However, legitimate expectation could be overruled by legislation as could any area of the common law. One such piece of legislation could be the *Administrative Decisions (Effect of International Instruments) Bill* 1997 if passed. To address the impact of *Teoh*, the *Administrative Decisions (Effect of International Instruments) Bill* was first introduced into the Parliament in the latter part of 1995 by the former Labor Government. If passed by Parliament, the Bill (1997) would overrule the doctrine of legitimate expectation for procedural fairness arising from international obligations and limit the consideration of international instruments ratified by Government in guiding the development of common law.

Current Commitments On Access To Justice

In the absence of guaranteed constitutional protection of rights, the importance of considering the relationship between formal rights at law and the development of social policy designed to improve access to justice becomes more critical.

In March 1996, the Conservative Coalition won the federal election. The Howard Conservative Government, not surprisingly, had a different approach to law and justice issues, including a more formalistic understanding of equality before the law. While a new Government can be expected to pursue new policies, the Access to Justice Advisory

Committee's recommendations still provided the most considered discussion in the area of access to justice. For this reason we have used the 1995 Justice Statement with its various reforms and budget allocations as a benchmark on access to justice. The Justice Statement introduced by the previous Labor Government in May 1995 specifically set aside $160 million for policies and programs designed to ensure access to justice.[6] Although it is difficult to derive an overall figure, it appears that cuts by the current Coalition Government in the area of access to justice (including, but not confined to Justice Statement programs) have amounted to $320 million.[7]

The Howard Government has only continued with programs that have already been determined with recurrent funding allocated under the Justice Statement in 1995/6 and 1996/7. The rest of the programs or strategies in the Justice Statement which were not formally determined with allocated funds were discontinued. It is not possible to mention all the areas and recommended strategies contained in the Justice Statement. We have referred to some selected areas that have been affected or are likely to be affected since 1996. These include areas such as legal aid, human rights, family law, and access to and reform of courts and tribunals. Table 1 provides an indication of the former and present governments' levels of commitment to improving access to justice within the last two years, and an indication of potential funding in the future.

Legal Aid Cuts

Federal Government cuts to the provision of legal aid in Australia have caused probably the greatest concern because of the wide ranging negative impact the cuts have on the ability to achieve access and equity in the legal system. The Australian section of the International Commission of Jurists noted that:

> [it]...regrets the decision of the Federal Government to reduce funding the legal aid system by more than $100 million over three years... that the reduction in funds will reduce the rights and ability of the financially and socially disadvantaged people to get access to justice, the right of the accused people to a fair trial and consequently Australia's ability to perform its international human rights obligations.[8]

There had been a partnership between the Commonwealth and the States in the provision of legal aid since the 1970s. The funding arrangements had been formalised since 1987 by agreements under which the Commonwealth provided 55% of the core funding for legal aid in each State. As from 1 July 1997, the Commonwealth government has ended the previous legal aid agreements with the States and reduced funding by at least $33 million a year (Reynolds 1997:23). As shown in Table 1, the Senate Hansard records indicate at least a cut of $75 million over 3 years from July 1997.[9]

The New South Wales Legal Aid Commission estimated the cuts would result in 30,000 fewer people being assisted in that State alone each year (Reynolds 1997:23). It was also estimated that there would be significant reductions in people offered legal aid in community legal centres due to the legal aid cuts. A drop of 70,000 people from 300,000 offered

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6 House Hansard (Parliamentary records), Mr Quick, Member for Franklin, Australian Labor Party, 30 August 1995, starting at 879.

7 Senate Hansard (Parliamentary records), Senator Bolkus, South Australia, Australian Labor Party, 27 November 1996, starting at 6146.

8 From House Hansard (Parliamentary records), Mr Laurie Ferguson, Member for Reid, Australian Labor Party, 6 February 1997, starting at 295.

9 Senate Hansard (Parliamentary records), Senator Jacinta Collins, Victoria, Australian Labor Party, 4 September 1997, starting at 6194 and Senator Lundy, Australian Capital Territory, Australian Labor Party, 19 March 1997, starting at 1752.

assistance in community legal centres in New South Wales was predicted.[10] Nationally, it has been estimated that 130,000 of the 435,000 people who use legal aid each year would lose access as a result of the cuts.[11] Irrespective of the precise accuracy of these figures, it is clear that significant numbers of people who were previously eligible for legal aid will now miss out on assistance.

There have been two recent Senate inquiries into Legal Aid with the tabling of the First Report by the Senate Legal and Constitutional References Committee in March 1997 and the Second Report in June 1997. The Second Report displayed comparative percentages of the expenditure on legal aid and the proportion of population eligible for legal aid. In 1993/4, the National Legal Aid Statistical Yearbook estimated that after means and other tests, only 18% of Australians were eligible for legal representation from Legal Aid Commissions in the early 1990s, compared with the eligibility of 32% in Canada, 48% in United Kingdom, 68% in the Netherlands and 90% in Sweden (Inquiry into the Australian Legal Aid System, Second Report 1997: 24). At the moment, less than 15% of Australians have access to legal aid primarily because only the poorest can qualify by way of the means and assets test. For someone to qualify for full legal aid, they usually have to earn less than $128 per week, as well as meet any merits test requirements.[12]

The Senate Hansard Parliamentary records[13] mentioned Justice Kirby of the High Court as referring to studies [14] which show Australia, by world standards, was already a low spending country in legal assistance *before* the legal aid cuts. Australia spends only about $13 per person per year on legal assistance. By contrast, New Zealand spends $16, the Netherlands spends $22 and the United Kingdom spends $65 per person per year. If Australia spent an amount per head of population on legal aid that was similar to the United Kingdom, $1,200 million would be spent instead of the current $240 million (Regan 1997:227).

The then President of the Law Council of Australia, Mr Peter Short stated in his evidence to the Senate Legal and Constitutional References Committee on 29 January 1997:

> The Law Council and, I think, society as a whole generally accept that a government should balance its budget and has to reach priorities. In a nutshell we are saying that, by cutting legal aid, the government has reached a wrong priority. We say that in any civilised society equality before the law is one of the hallmarks of successful government. Equality before the law means that people who are attacked or under threat by a legal system must feel comfortable that society is providing them with an equal opportunity to answer and relieve themselves of that burden. It is a positive obligation of a civilised society to provide that minimum level of legal assistance (Inquiry into the Australian Legal Aid System, First Report 1997:8).

Prior to the election in March 1996, the Coalition in their Law and Justice Policy had stated categorically that they would maintain funding to legal aid, as well as match and extend Labor's access to justice measures. 'A Liberal and National government will maintain current levels of legal aid funding' and 'A Liberal and National Government will match and extend Labor's commitment to access to justice measures' (Law and Justice Policy 1996:8,11). As indicated in Table 1 there have been significant funding cuts within the pro-

10 House Hansard (Parliamentary records), Mr Hollis, Member for Throsby, Australian Labor Party, 24 March 1997, starting at 2816.

11 Senate Hansard (Parliamentary records), Senator Bolkus, South Australia, Australian Labor Party, 27 November 1996, starting at 6133.

12 See footnote 11.

13 Senate Hansard (Parliamentary records), Senator Panizza, Western Australia, Liberal Party, 7 November 1996, starting at 5314.

14 Legal Aid in Australia 1993/4 Statistical Yearbook, Legal Aid and Family Services, 1995, Canberra, AGPS.

vision of legal aid and without replacement of programs, services or strategies that have suffered budget cuts.

The new principle adopted by the Commonwealth is that it should only fund matters arising under federal laws. The biggest impact in cuts to legal aid will be reflected under State law, matters such as reduced funding of domestic violence services, reduction of legal aid to children, reduced tenancy advice services to retirement village residents and nursing homes, reduced assistance in consumer credit, debt matters, and anti discrimination cases. The National Women's Justice Coalition indicated about 100,000 women would be directly affected in matters under State law for domestic violence, criminal injury or victims compensation, de facto property settlements, discrimination under state laws, credit and consumer rights and tenancy issues.[15] About 30% of legal aid recipients have been women[16] as over 30,000 women apply for domestic violence restraining orders in Australia each year.[17]

No National Disbursement Costs Fund

Legal aid has traditionally provided assistance to the most needy but there are many others who are not eligible for legal aid and who still cannot afford private legal representation. In order to assist people in these groups and the people in the middle income range, the National Disbursements Assistance Fund was one of the initiatives under the previous Government's Justice Statement. Disbursement costs such as evidence from expert witnesses or court filing fees can be expensive and can be barriers to access to justice. The Justice Statement committed funding of $10.5 million over 3 years to establish a national disbursements assistance fund to meet up front costs of litigation where lawyers are acting on a contingency or pro bono basis (Justice Statement 1995: 105-106). The disbursements and administrative fee were to be repaid only if the client won the case. The idea was for the repaid costs and the administration fee to be returned to the fund for sustaining itself after the initial period of funding. The Fund would only assist people in cases where there were good prospects of success. The current Government's Expenditure Review Committee did not support the Fund and it has not proceeded.[18]

Cuts to Courts Budget and Family Court registries / circuits

Parliamentary records show that there has been a cut of $3.5 million in the budget to courts in 1996/7 with the loss of Justice Statement funding.[19] Forward estimates indicate a further cut of $10 million in 1997/8 to the courts' budget. As presented in the Table 1, on first reading, it would seem that additional funding to marriage and relationship preparation reflects the Coalition's commitment to supporting the family. However, on closer reading, this additional funding has been negated by the big cuts to adolescent mediation, community based mediation, Family Court counselling registries and circuit services. As shown in Table 1, cuts to Family Court budgets resulted in 30% reduction of judicial circuits and the closing of some registries, especially in rural or regional areas.

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15 Senate Hansard (Parliamentary records), Senator Bolkus, South Australia, Australian Labor Party, 27 November 1996, starting at 6146.

16 See footnote 15.

17 Senate Hansard (Parliamentary records), Senator Lundy, Australian Capital Territory, Australian Labor Party, 18 March 1997, starting at 1752.

18 Information and correspondence from the Commonwealth Attorney General's Department, Finance and Corporate Support Section, 14 October 1997.

19 Senate Hansard (Parliamentary records), Senator Bolkus, South Australia, Australian Labor Party, 10 December 1996, starting at 7056.

Cuts to Judicial Cross Cultural Training and Interpreters' Training

In 1994, 23% of Australians were overseas-born with the majority of these from a non English speaking background. Although most overseas-born Australians were born in United Kingdom, New Zealand and European countries, countries such as China, Philippines, Malaysia, Hong Kong, Vietnam and Lebanon have also become more significant source countries. There are at least 100 different languages spoken in addition to Indigenous ones. Australia's immigrants have come from more than 170 countries of origin (State of the Nation 1995:33, 42). The demographic profile of Australia then demands that judicial education, the Australian justice system and socio-legal policy address the needs of the significant proportion of the population that come from a non English speaking background (Stubbs et al 1996:2).

The need for cross cultural training for the judiciary on Indigenous issues, and the problems arising from the lack of Aboriginal interpreters continues to be raised as a critical issue in various reports that have followed the Royal Commission into Aboriginal Deaths in Custody (National Report, 1991). Indeed, it has been suggested that the failure to ensure adequate provision of interpreters leads to significant miscarriages of justice (Cunneen and McDonald 1997).

Table 1 contains information from the Federal Attorney General's Department and the Senate Estimates Committees Hansard (Parliamentary records) on the cuts to interpreters training programs and professional development programs for judges, court and tribunal members on cross cultural awareness and on how to use interpreters. The table indicates that there are currently no specific cross cultural training funds for judges, court and tribunal staff. There has been a 50% cut in overall professional development for the Administrative Appeals Tribunal. In terms of judicial education and cross cultural awareness, the Australian Institute of Judicial Administration had a project with several stages, initially funded by the former Office of Multicultural Affairs before it closed down. However, no indication as to further funding of this project has been referred to in the 1997/8 budget.[20] The subsequent stages of the project would have resulted in the piloting of a program on cultural awareness in consultation with the judiciary and ethnic communities, with the development of a package of course materials and other materials such as bench books.[21] Furthermore, funding for training programs for interpreters in ethnic and Aboriginal communities to work in the legal system have been terminated.

Under the previous Justice Statement, $2.7 million were to be provided over four years to develop training programs for interpreters in Aboriginal languages, including a two year national pilot program of training for ethnic language interpreters in the legal system. The information from the Parliamentary Hansard records and the Attorney General's Department shown in Table 1, reveal that the current Government has reduced the court interpreters component to a one off program of $127,000 with the production of a video and handbook.[22] The resources have been produced but no funding for actual training nor implementation have been provided. The Aboriginal languages interpreters training program has been terminated with a cut of $891,000 over four years. Funding for the program was discontinued at the end of 1996/7.[23]

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20 Information and correspondence from the Commonwealth Attorney General's Department, Courts, Tribunals and Administrative Law Branch, 12 November 1997.

21 Correspondence from the Australian Institute of Judicial Administration President, the Hon Justice N J Buckley, 17 October 1996.

22 Senate Estimates Committee Hansard, 19 September 1997.

The budget cuts to cross cultural training and interpreters were reflective not only of the view of the need to reduce government expenditure, they also indicated a particular view of the nature of access, equity and equality before the law. Equality before the law has been conceptualised in terms of 'sameness' - a formal approach to equality which imposes notions of identical treatment for everyone. One consequence is that legal institutions are not seen as needing to address diverse social and cultural needs nor change to accommodate difference.

Access And Accountability

Human Rights Monitoring and Accountability

The following UN observations on Australia highlight the significant role that the executive government has, both domestically and internationally, in relation to human rights and access to justice. The Committee on the Elimination of Discrimination against Women concluded its 17th session on 25 July, 1997. The Australian Government was commended for its past initiatives to promote the human rights of women nationally and internationally. However, the Committee was concerned with the Government's shift in commitment to the human rights of women and the achievement of gender equality. The Committee was alarmed by the policy changes that had slowed down or reversed Australia's progress in achieving gender equality (Committee on Elimination of Discrimination Against Women 1997:8-9).

The CEDAW committee:

> [E]xpressed its concern that at a time of fiscal constraint, resources for programmes and policies benefiting women or aimed at overcoming discrimination, such as in health, in the provision of legal aid services, of training and awareness programmes for health workers, judicial, professional and others on violence against women, might be subjected to disproportionate budget cuts.[24]

The Committee on the Rights of the Child recently raised its concerns about Australia's human rights performance at its 16th session in October, 1997. According to the Round Up Reports, the Committee called for steps to be taken by Australia to raise the standards of health and education of disadvantaged groups, particularly Aboriginal, Torres Strait Islanders, new migrants and children living in rural or remote areas. Another recommendation by the Committee, was that legislation and policy reform be introduced to guarantee that children of asylum seekers and refugees be reunited with their parents in a speedy manner. The UN Committee's other principal concerns were that, although the Convention had been declared a relevant instrument under the *Human Rights and Equal Opportunity Act*, this did not enable HREOC to refer to the Convention when considering complaints and it did not give rise to legitimate expectations that an administrative decision would be made in accordance with the Convention's requirements due to contrary statements put out by the executive government. Other concerns relate to Australia's non implementation of the Convention's article 1 on non discrimination and article 12 on respect for the views of the child. The Committee was concerned with Australian state legislation that permitted police to remove children from public places and prevented young people congregating. This was considered by the Committee as an infringement of children's civil rights and the right to assembly. The Committee was alarmed by the unjustified disproportionately high percent-

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23 Information and correspondence from Commonwealth Attorney General's Department, Courts, Tribunal and Administrative Law Branch, 12 November 1997.

24 From Senate Hansard (Parliamentary records), Senator Reynolds, Queensland, Australian Labor Party, 3 September 1997, starting at 6053.

age of Aboriginal children in the juvenile justice system and their high rate of bail refusal (Committee on the Rights of the Child 1997:1-4).

The above criticisms from the UN Committees need to be considered in the context of budget cuts and the proposed restructuring of HREOC which will make it more difficult to address the UN recommendations. As indicated in Table 1, budget cuts to HREOC will amount to a 40% cut over four years and the loss of a similar proportion of staff.[25]

Access to Administrative Review and Accountability

In pre election policies, the Coalition stated that 'administrative law exists to enhance administrative justice. It is a crucial means by which the Government and the bureaucracy are directly accountable to individuals affected by their actions' (Law and Justice Policy 1996:27). However, directions to reduce the review rights by courts and tribunals, the reduction of specialist functions of independent bodies to investigate, conciliate and handle complaints may weaken the links in holding the government and the bureaucracy accountable. The Federal Cabinet has agreed in principle, to amalgamate the Administrative Appeals Tribunal, the Social Security Appeals Tribunal, the Veterans' Review Board, the Immigration Review Tribunal and the Refugee Review Tribunal into a single Administrative Review Tribunal.[26] At the time of preparing the paper, an interdepartmental committee is preparing an implementation strategy and considering the recommendations from the Administrative Review Council (ARC) report Better Decisions: Review of Commonwealth Merits Review Tribunals (1995).

The ARC report recommended a new single administrative body comprising seven divisions (welfare rights, veterans' payments, migration, commercial and major taxation, small taxation claims, security and a general division). The loss of separate specialist tribunals may lead to a more formal, legalistic and inaccessible tribunal system (Johnston 1996; Disney 1996). The Welfare Rights Centre regards the amalgamation of the tribunals into a super tribunal as 'an unwarranted and undesirable compromise' (Welfare Rights Centre 1997). Recent media reports suggest that the merged tribunals will be placed under departmental control. According to the President of the Law Council of Australia, the new system will lead to a reduction in independence of the review system and the loss of access to legal representation for complainants (Kingston 1998:7).

The restructuring of merit review of administrative decisions is commencing within the migration jurisdiction. *Migration Legislation Amendment Bill (No 4) 1997* went to the Senate Legal and Constitutional Legislation Committee for consideration in October 1997. Among other changes, the Bill proposes to merge the current internal review mechanism, Migration Internal Review Office (MIRO) with the Immigration Review Tribunal (IRT) into a new external review body called the Migration Review Tribunal (MRT). The minority report in dissent raised concerns which impact on access to justice including the limiting of community access to the tribunals with fewer Migration Review Tribunal (MRT) registries and potential loss of independence of the MRT (Minority Report 1997: 43-44).

The proposed restructuring of the Commonwealth administrative tribunals, along with the restructuring of the complaints handling and enforcement process of HREOC, the privatisation and contracting out of government services, plus the proposed legislative restrictions on judicial review rights, all create major upheavals for the Commonwealth

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25 Senate Hansard (Parliamentary records), Senator Chris Evans, Western Australia, Liberal Party, 28 August 1997, starting at 5865 and 18 August 1997, starting at 5865.

26 Press Release, 'Reform of Merits Tribunals', Attorney General and Minister for Justice, 20 March 1997.

framework of administrative law. In the context discussed earlier, with Federal cuts in the overall area of access to justice and administration of programs, the changes may have the potential to marginalise administrative remedies and downgrade the complaints handling agencies which have been key watchdogs of government accountability (Crekye 1997:13).

Tensions within the executive and between the judiciary

One of the means by which the common law courts protect individuals against government excesses has been the development of procedural fairness through the principle of reasonable or legitimate expectation (*Teoh*). However the use of private or privative clauses in legislation to exclude judicial review of government decisions highlights the government's attempt to reduce intervention by the judiciary. Exclusion of government decisions from judicial review represents a significant reduction in access to justice.

The government apparently perceives judicial review as an impediment to public administration, such as in the area of migration. This commenced with the *Migration Reform Act 1992 (Cth)* in 1994 which took away the grounds of judicial review of unreasonableness, relevancy and bad faith (Crekye 1997:14). Legislative moves to limit the grounds of review is still taking place with the current *Migration Legislation Amendment Bill (No 5) 1997*, further restricting review rights to both the Federal and High Court. A broadly worded privative clause at new section 474 aims to restrict High Court and Federal Court review to only 'exceptional cases'. The proposed legislation will restrict judicial review and consequently the development of the common law and the higher jurisdictions having a final authoritative ruling on issues of law in refugee and migration matters. The likely reduction of review tiers in the proposed restructuring, along with the restriction on judicial review will reduce accountability in government decision making. If approved, the privative clause in migration legislation may give rise to legislating privative clauses and eliminating judicial review in other areas. This would limit the access to formal legal rights such as judicial review and the access to the development of authoritative ruling on issues of law for a common law country. According to a minority report of the Senate Legal and Constitutional Legislation Committee which opposed the *Migration Legislation Amendment Bill*, access to judicial review, whether by Australian citizens or not, is fundamental to the rule of law in Australia (Minority Report 1997:55).

Numerous public tensions have also arisen between government and its 'independent' review bodies, and between government and the judiciary. These tensions further highlight issues of government accountability and the ability of review bodies to give independent advice which may not be to the liking of the executive government. One case in point is the work by the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children conducted by HREOC. The inquiry found that Indigenous children had been forcibly taken from their families and communities and the policies under which such removals occurred fell within the accepted definition of genocide (Bringing Them Home 1997). A program of reparations including a formal national apology and compensation have been refused by Commonwealth Government. Instead, HREOC as an organisation has been financially decimated by the government. Under the new structure the Aboriginal and Torres Strait Islander Social Justice Commissioner's position will merge with that of the Race Discrimination Commissioner. Accusations have also been made of interference from the Attorney General in suppressing submissions and restricting evidence of the Australian Law Reform Commission in relation to amendments to Native Title because the Commission's advice differs from the preferred government position.[27] The Australian Law Reform

27 House Hansard (Parliamentary records), 29 September, 1 and 2 October 1997

Commission casts doubts on the validity of the proposed native title amendments because they are potentially unconstitutional and racially discriminatory. All this, along with the proposed removal of judicial review rights in the migration or refugee jurisdiction, reveal the current government's direction to limit dissent and to reduce access to accountability mechanisms in the area of social justice and human rights.

The Australian High Court has itself been subject to constant political attack because of decisions, particularly in regard to native title, which are seen as contrary to the government's preferred position. The Deputy Prime Minister, Mr Fischer has spoken of the plan to appoint 'Capital C Conservatives' to the High Court (Kingston 1997: 4). Attacks by government ministers on decisions by the High Court, and the public threat to appoint High Court judges on the basis of their political persuasion, have resulted in judges attempting to protect the integrity of the Court - these have included former Chief Justices Sir Anthony Mason and Sir Gerard Brennan, and Justice Michael Kirby. There is a real fear that these attacks have undermined judicial independence and the rule of law in Australia (Kingston 1997:4).

Conclusion: Equality In The Marketplace

Good administration and access to justice require public access to information on government; lawfully made decisions; reasons for decisions; available and accessible remedies or relief for wrong decisions; and a review process which provides procedural fairness (Shaw 1996:158). This requires g.overnment to take a pro-active role in promoting access and bridging barriers with adequate funding, programs or services to implement appropriate policies or strategies. Instead, the current government direction is for services to be tendered and contracted out. One implication is that the administrative law structure, such as the Ombudsman and the Freedom of Information Act system, may need to be extended to deal with complaints by service recipients about services provided by private contractors (Bromley 1997:42). Access to legal and administrative remedies under these conditions need to be *increased* rather than restricted.

Trends to privatisation and 'user pays' in the provision of government services are also extending to legal aid delivery. In Victoria, there is a compulsory contribution for people granted legal aid and franchising is being piloted (Noone 1997:27). The privatisation of government services and fee for service principles reflect the influence of economic rationalism. As far back as 1989, concerns were raised by the then Chief Justice of the High Court, Sir Anthony Mason, that 'the prevailing climate of economic rationalism and managerial efficiency [is one in which] the intrinsic virtue of justice to the individual does not figure as the paramount goal' (Mason 1989:122).

The 'reforms' being considered are market-driven and deregulatory. However, the 'market' is motivated by vested interests, is profit driven, and is without responsibility for social policy on access and equity (Germov 1995:168). Full cost recovery, privatisation, user pays all assume that individuals are comparably (dis)advantaged players of a level playing field (Ethnic Youth Issues Network 1996:1). Concepts of fairness, equity, access and social, human consequences are not figured into the model of full cost recovery. The New South Wales Attorney General, Mr Jeff Shaw, noted that the,

> prevailing climate of economic rationalism tends to exacerbate concerns about the protection of human rights. The doctrinaire application of economic theory to government decision making without regard to wider human rights considerations brings into question the appropriate nature and level of governmental accountability for decisions and actions which affect individual interests (Shaw 1996:158).

Instead, the current federal government supports 'small' government with a minimalist role in social justice policies or programs, and has played an active role in maximising funding cuts to the administration of access to justice. The only reform being considered is in freeing up the market through the government hand of (de)regulation.

The economic rationalist's world view is also reflected in the 'sameness' concept of equality. It reflects a specific version of society and individuality which celebrates individual autonomy and advocates this through a legal system based on individual rights (Minow 1997:65). The examples of funding cuts outlined in this article not only reflect the economic rationalist rhetoric of cost cutting efficiency, but also an ideological view of the nature of equality. The Conservative Government is committed to a formal concept of equality based on 'sameness'. This version of equality fails to make institutions accommodate difference and ignores the economic or social contexts of justice. It only views things as equal if they are the same as the position of the well off, the decision maker, the one with power to define. It does not question or challenge the standard or yardstick of treating everyone the same.

There are many examples of the policy implications of the formal 'sameness' approach to equality. For instance, it underlies the restructuring of HREOC in terms of subsuming the roles of the current six specialist commissioners and reflects the inability of the Government to accommodate difference. The Howard Government has also decided to rename HREOC as Human Rights and Responsibilities Commission, dropping the equal opportunity aspect.[28] The renaming reflects a view of equality as a level playing field, with the individual players taking equal or reciprocating responsibilities and burdens, rather than perceiving equality as a distributive principle that ensures equality of outcomes. The 'sameness' approach fails to acknowledge the power inequities in human rights matters.

The effects of these approaches to equality can be seen in the defunding of particular advocacy groups, which themselves play such a fundamental role in achieving access to justice. For example, there are a number of organisations specifically working with ethnic minority women in Australia such as the Association on Non English Speaking Background Women of Australia (ANESBWA), the Immigrant Women's Speakout Association (IWS) of New South Wales and the Canterbury Bankstown Migrant Resource Centre. There was a failure to recognise that specific services such as ANESBWA or IWS are more appropriate in meeting the needs of ethnic women facing intersectional issues of race and gender. Like the HREOC example, one can argue that there is a growing failure by the government to recognise the legitimacy of specialist services to accommodate difference. It can be argued that there is a hierarchical relationship of privileging formal equality or equality before the law *over* substantive equality and equality in outcome.

The primary aim of this article has been to highlight that principles of equity, access, rights and participation have been attacked under the Howard Government. Over the last few years there has been reduced access to resources or services to promote enforcement of rights as a result of closing family court registries, limiting court circuits, cutting legal aid, defunding community organisations dealing with intersectional or specialist issues, reducing judicial training on cross cultural issues, terminating interpreters' training projects, and reducing independent merit review bodies.

In the absence of any explicit provisions in the Australian Constitution to protect human rights and access to justice, the role of the government is vital in terms of supporting access, equity and equality before the law. A national approach is needed to shift the concept of justice based on meeting selective 'need' or as an increasingly private, individualised matter to

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28 Human Rights Legislation Amendment Bill (No. 2) 1998

one based on the 'right' to access. As observed by a former House of Representatives member:

> What we are seeing from the government at the moment... is a very mechanical and unenthusiastic lip service being paid to human rights and equal opportunity. The cuts to legal aid amounting to $120 million are part of that. The cuts to HREOC of some 40 per cent, add to it. The reduction to funding, too, to a great many community organisations which protect and support minority groups is also part of that.[29]

The current Australian government policy has had the effect of undermining principles of the rule of law and restricting access to justice rather than promoting these principles. In early 1996, in a speech given to the Australian Institute of Judicial Administration in Wellington, the then Chief Justice of the High Court of Australia, Sir Gerard Brennan said,

> 'It is not an overstatement to say that the system of administering justice is in crisis. Ordinary people cannot afford to enforce their rights or to litigate to protect their immunities. To that extent, the coercive force of the law is undermined'.[30]

Table 1: Access to Justice: Before and After

	Previous government (Labor)	**Current government (Coalition)**
Access to justice policy and funding	Justice Statement (May 1995) $160m over 4 years.	Pre-election Law and Justice Policy (Feb 1996). No funding details.
Legal Aid		
Legal aid (overall funding)	Additional $68.7m over 4 years. Over $140m each year to legal aid commissions and community legal centres and mediation; additional ongoing fund of $2.1m to be matched by States, Territories.	Cut of $40m each year to $120m over 3 years including cuts to Justice Statement funds. Cut of $33m a year excluding Justice Statement cut.
Legal aid: civil, family law	Additional $16.8m over 4 years.	No additional funding.
Legal aid: legal advice	Additional $6.9m over 4 years for advice that is not means tested.	Not supported, nil funding.

29 House Hansard (Parliamentary records), Dr Lawrence, former Member for Fremantle, Western Australia, Australian Labor Party, 19 June 1997, starting at 5837.

30 Cited in Senate Hansard (Parliamentary records), Senator Bolkus.

Community legal centres	Additional $13.9m over 4 years — 9 new centres in high growth outer urban, rural, regional areas, network of environmental lawyers, specialist services for children and youth, specialist litigation advocates, national human rights and discrimination law centre.	Maintained funding in 1996/97, no additional funds — national human rights and discrimination law centre scrapped.
National disbursements assistance fund	$10.5m over 3 years to establish fund.	Not supported, nil funding.
Legal expenses insurance schemes	No details on amount	Not supported, nil funding.
Australian Legal Assistance Board national approach	$16.8m over 4 years for delivery of civil, family law services	Not supported, nil funding.
Commonwealth test case scheme — including Commonwealth and State or common law	$2.9m over 4 years.	Cut of $2.3m over 4 years. Limited to Commonwealth matters.
Educational teaching resources on civics education, legal system	$22m over 4 years to develop resources for schools and community.	Not supported, nil funding.
National Women's Justice / Women and Law Strategy		
National network of women's legal centres	$17m over 4 years to establish a network. New centres in regions, additional funding to existing centres	Maintained funding to 1997/98.
Specialist services for Aboriginal and Torres Strait Islander women in women's legal centres	Additional $5m over 4 years.	No details on specific funding.
Outreach legal services - women in rural remote areas. Appropriate legal service assistance for women of non-English speaking background	No details on amount — part of Justice Statement.	No specific funding.

National outreach and development fund for legal information resources on family law matters, violence against women, discrimination, employment	$500,000 to establish fund	Not continued. Resource kit only for family relationships services program as part of Family Violence Research and Intervention Project.
Human Rights		
Establish national human rights and discrimination law centre	No details on amount under Justice Statement	Not supported, nil funding.
Human Rights and Equal Opportunity Commission	On average, $19m budget.	1996/97 - $.5m cut. 1997/98 — 8% cut. 1998/99 — 27% cut. Cut of 40% or cut of $30.2m over 4 years. To be restructured and renamed as Human Rights and Responsibilities Commission — a president, 3 deputy presidents (1 for sex discrimination and equal opportunity; 1 for race and Aboriginal/Torres Strait Islander/Social Justice; 1 for general human rights and disability.
Resourcing Disability Standards	$1.7m over 3 years.	Cut to $1.2m over 4 years
Aboriginal and Torres Strait Islander Social Justice Commissioner	Additional $1.3m over 4 years.	No additional funding.
Family Disputes		
Family and relationship counselling	$15m for 1995/96.	Funding maintained.
Marriage/relationship education courses and measures to extend access to family relationship support services for people in regional/rural areas and for people of NESB	Increased funding of $12.3m with additional $4m over 4 years.	Increased additional funding to $12m over 3 years

Adolescent mediation and family therapy services in rural/regional areas	Additional $2.9m over 4 years for adolescent mediation and $16.8m over 4 years to increase community mediators.	$2m cut. No services to regions earmarked under Justice Statement.
Financial counselling/community based family mediation	Financial counselling — additional $1.3m in first year, $1.7m in following years.	Mediation cut by $1.5m in the first year and increasing cuts in other years.
Expand Family Court counselling and circuit services — upgrade/ establish registries in regional areas	Additional $9.7m over 4 years to increase services and promote awareness . $3.8m over 4 years for permanent counselling registries in regional areas.	30% reduction of judicial circuits. $19.5m cut over 3 years. Charging fees for voluntary counselling accessed through Family Court. Some counselling registries closed, others under threat.
Family consultant liaison officers to support Aboriginal communities	Nearly $2m over 4 years	Reduction in proposed new services.
Training for staff in Commonwealth funded agencies on gender and violence	Part of $2.4 over 4 years	No detailed information on specialised training.
Courts / Tribunals and Access		
Professional development programs for Family Court judges, AAT members, court/tribunal staff on gender, cross cultural issues, on use of interpreters	$2.7m over 4 years	No cross cultural training funds. $271,000 cut in professional development. 50% cut in professional development for AAT.
Charters of access and service for Federal Court, Family Court, Administrative Appeals Tribunal (AAT)	$700,000 over 2 years.	Cut of $185,000 for charter. Project discontinued.
Australian Institute of Judicial Administration — cross cultural training projects	Nearly $300,000 allocated in 1995/96.	Project discontinued.

National pilot program of training for ethnic language interpreters in legal system. Training programs for interpreters in Aboriginal languages	Ethnic language interpreters training - 2 year program — as part of $1.1m over 4 years — part of Justice Statement. Training for Aboriginal languages interpreters - $1.1m over 4 years.	Court interpreters component only partially implemented for ethnic languages. Reduced to one-off program. Terminated — funding for training Aboriginal languages interpreters program discontinued at end of 1996/97.

Table 1 Sources of information: Attorney-General's Department — Commonwealth Attorney-General's Department, (Finance and Corporate Support Section) 14 October 1997 and (Courts, Tribunals and Administrative Law Branch) 12 November 1997. Various Senate, Estimates Committees and Parliament House Hansard records. Justice Statement, Commonwealth Attorney-General's Department, May 1995. Coalition's Pre-election Law and Justice Policy, February 1996.

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