

# Contemporary Comments

## *A Background to the Current Legal Aid Funding Issues* \*

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### **Recent history of legal aid**

Since the Second World War, legal aid has been provided in NSW by the Federal and State Governments. The Public Solicitor's Office was established in the early 1940s as an Agency within the Attorney General's portfolio to provide legal aid in accordance with the provisions of the *Legal Assistance Act*. The Public Solicitor's Office provided a range of services by salaried solicitors in relation to criminal law and civil law matters. In the early '70s, the Law Society of NSW established the Legal Aid Scheme administered under the *Legal Practitioners (Legal Aid) Act*. That scheme focused on the provision of legal aid by private solicitors in relation to civil matters and to children for Childrens Court matters. The Commonwealth Government has provided legal aid in NSW since the early 1940s through the Legal Services Bureau. The Commonwealth's presence was considerably expanded with the establishment of the Australian Legal Aid Office in the early '70s to provide legal aid to 'federal people' and in relation to a series of Commonwealth cases, including family law.

In 1979 the NSW Government established the Legal Services Commission of NSW, now known as the Legal Aid Commission of New South Wales. The Commission commenced operations on 21 December 1979. Establishment of the Commission resulted in an amalgamation of the Public Solicitor's Office functions with those of the Law Society and both schemes were integrated and brought under the control of the Commission. From that point, legal aid was available to people in NSW from two sources, the Australian Legal Aid Office and the Legal Aid Commission, until negotiations between representatives of the Commonwealth and the State resulted in the amalgamation of these two major schemes on 3 April 1987, with both coming under the control of the Legal Aid Commission.

The amalgamation of State, Law Society and Commonwealth schemes in NSW occurred because it had been agreed that the establishment of a single office with responsibility for legal aid would achieve significant efficiencies and remove the confusion that existed in the community arising from the fact that similar services were available from two organisations which had overlapping responsibilities and functions.

Amalgamation produced single stop shopping with legal aid being available from one agency providing uniform services under common principles applying across the areas of Commonwealth and State law and being available subject to common means, merit tests and guidelines.

Amalgamation overcame the inconsistencies which characterised past regimes, and produced efficiencies and savings by rationalising administrative and support structures which characterised the old system. For example, it was not unusual for both agencies to have branches in the same areas/suburbs.

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## Structure of the commission

### *Independent and representative policy body*

The Boards of Legal Aid Commissions operating around Australia are normally comprised of representatives of stakeholders, governments, legal profession associations, community legal centres, consumer organisations. They draw on representative interests and views in the development of legal aid policies and are better placed to respond to community needs than, for example, a remote Federal Department. Policies are developed and decisions made by these Commissions on an independent basis whose deliberations are not controlled by government or the profession. Independent Legal Aid Commissions are not bound by Government policy decisions and often grant aid to contest government decisions on pensions, to assist accused people charged with criminal offences by the State or in areas such as environmental law where adverse decisions may have profound economic implications for Government policy.

A most important characteristic of the NSW structure was that the Commission could balance competing policies across areas of State and Commonwealth laws having regard to demands and information gathered from the community.

Under the funding agreement, monies were made available from Federal and State sources to the Commission to meet its operating expenses. Decisions in relation to the allocation of funds and priorities in relation to the delivery of legal aid services were made by the Board of the Commission on which the Commonwealth and State governments were both represented. The Commission had power, under the *Legal Aid Commission Act* 1979, to determine guidelines for legal aid and it did this independently of government. The *Legal Aid Commission Act* did impose certain duties on the Commission and other legal constraints existed. Nevertheless, the concept behind the structure was that an independent Commission representative of government and other interests would make policy decisions in relation to the allocation of funds from a common pool comprised of monies from various sources defined in the funding agreement.

## Funding agreement

The merger of Commonwealth and State functions in 1987 was based on a funding agreement executed between the Commonwealth of Australia and the State of NSW. That agreement made provision for funding the ongoing operations of the Legal Aid Commission. It was based on existing levels of financial commitment to legal aid by the Commonwealth and State governments. The Commonwealth assumed responsibility for providing 55 per cent of the operating costs of the Commission with the State providing the balance. State contributions to the funding of the Commission can be obtained from Consolidated Revenue or from the Statutory Interest Account (SIA) and/or the Solicitor's Trust Account Fund (STAF), administered and managed through the Law Society of NSW. The agreement made provision for increases in funding from the agreed base in accordance with movements in the Consumer Price Index and average weekly earnings and provision was made for parties to the agreement to supplement the operating budget of the Commission to fund special initiatives.

Table 1 shows the allocations to the core funding of the Legal Aid Commission from major sources for the last five years. The figures include allocations from STAF and also monies allocated above the requirements of the agreement.

Table 1 Allocations from Statutory Interest Account, Commonwealth and State Governments 1992 to 1996

SOURCE	1992 (\$,000s)	1993 (\$,000s)	1994 (\$,000s)	1995 (\$,000s)	1996 (\$,000s)
SIA/STAF	15259	13219	10808	10892	11057
Commonwealth	35818	37250	39140	39366	40431
State Government	18778	18996	19085	19066	24978

While the funding agreement made provision for increases in the operational budget of the Commission in accordance with inflationary moves, the agreement had been criticised because the costs of providing legal aid services has increased at a rate that has exceeded inflation. The value of money available to the Commission to support its operations had thus been eroded. This process was exacerbated because Commonwealth and State governments have expected the Commission to take responsibility for initiatives within existing budget allocations and reductions were made to allocations in line with general productivity savings applied at times to all departments within the Federal and State Governments. This is not to say that some initiatives of the Commission did not attract additional funding but rather that there was not a consistent record of providing additional funds to the Commission to allow it to fund Government initiatives which have called for expanded services.

#### ***Factors which impact on the budget***

There have been a number of matters which over the years have impacted upon the budget of the Legal Aid Commission. A common source of complaint by the Commission has been the cost of transcripts in criminal law cases which used to cost over \$1 million each year. In 1996, the NSW Government responded by giving the Commission relief from paying those costs in the same way that the NSW Director of Public Prosecutions is exempted from their payment. The Commission has for a number of years been asked to positively participate in Court Delay Reduction programs in the criminal jurisdictions of the Courts, especially the District Court of NSW. The Commission did not receive additional funding for these programs but was asked to meet the demands from within its existing budget allocations. In contrast, the NSW Director of Public Prosecutions has received supplementary funding.

In common with other States, the Commission has been required to meet the additional demands placed upon its services by the *Dietrich* decision and the *Re K* decision, especially in so far as the latter case related to the provision of separate representation to children in family law matters. Last year, the adequacy of the provision of legal aid by the Commission to *Milat* was challenged under the *Dietrich* decision in the Supreme Court of NSW. Additional demands have made the task of managing the Legal Aid Commission more difficult, especially as expectations of increased service have existed at times of budgetary constraint.

The Law Council of Australia in its Report called Legal Aid Funding in the '90s and the Access to Justice Advisory Committee Report noted numerous factors in the '90s which impacted on demand within the community for legal aid. In addition to those already mentioned, these included:

- a) growth in population;
- b) proliferation in legislation creating additional rights;

- c) depressed economic climate;
- d) increased crime rate;
- e) increases in government changes, such as filing fees;
- f) increasing interpreter fees;
- g) increasing expert witnesses costs;
- h) additional costs incurred because of case management and court delay reduction programs;
- i) increasing costs of adopting new technology; and
- j) operating costs of Commissioners have increased at a rate higher than inflation.

### **Services provided by the commission**

The Commission has funded a wide range of services to eligible people in NSW covering many different areas of law. In the financial year ended 1996 the Commission approved a total of 116,521 grants of legal aid. The main areas covered were criminal law and family law which together made up 92 per cent of the applications approved. General law areas which include civil law, administrative law, veterans advocacy and mental health made up the balance. In addition, the Legal Aid Helpline assisted 14,090 persons with a majority of work being in the general law and family law areas which made up 78 per cent of the total. Advice and minor assistance was provided to 47,407 persons. Family law comprised 45 per cent of this total, general law 38 per cent and criminal law only 17 per cent. The Commission provides its services through a network which includes its Head Office and 19 Branch Offices located in country and suburban areas of Sydney, Newcastle and Wollongong. The Commission has a substantial number of Branches in the Sydney Metropolitan areas.

In the same financial year, the Commission's expenditure was allocated in the following way: criminal law 46 per cent, family law 29 per cent, general law 19 per cent and community legal centres 6 per cent.

### **Providers of legal services**

Legal Aid services in NSW are delivered in three ways. First, the Legal Aid Commission employs approximately 500 full time staff, of whom 180 are solicitors who operate through a network of branch offices across the State. Solicitors employed by the Commission are involved in the provision of legal services directly to legally assisted people.

Second, the private legal profession provides a range of services to people across the State. Country local courts are serviced by duty solicitors from the private profession and private solicitors undertake the majority of family law and civil law matters on the basis of referrals from the Commission.

Community Legal Centres constitute the third major source of legal assistance to the community. Those centres are funded by the Commonwealth and State Governments through the Legal Aid Commission in accordance with an agreed funding program and criteria. In addition to providing a range of legal services, Community Legal Centres are engaged in legal education, legal policy development and reform work.

Table 2 describes the allocation of cases between Legal Aid Commission employees and private solicitors in family, civil and criminal law matters from 1990 to 1995.

Table 2 Number of Applications Approved by Law Type and Practitioner Type, NSW

YEAR	FAMILY LAW			CIVIL LAW			CRIMINAL LAW			TOTAL		
	In-house	Ref'd	Total	In-house	Ref'd	Total	In-house	Ref'd	Total	In-house	Ref'd	Total
1990-91	1651	8172	9823	795	1316	2111	33674	5864	39538	36120	15352	51472
1991-92	1514	7087	8601	936	1343	2279	34069	3938	38007	36519	12368	48887
1992-93	1084	6648	7732	889	1158	2047	33133	3951	37084	35106	11757	46863
1993-94	1013	6659	7672	2179	2759	4938	32156	2858	35014	35348	12276	47624
1994-95	1290	8187	9477	2740	2837	5577	26020	2924	28944	30050	13948	43998
*1995	683	3264	3947	1389	1277	2666	12454	1096	13550	14526	5637	20163

Source: Office of Legal Aid and Family Services.

\*1995 figures cover the period of July-December 1995 only.

## **Demand for legal aid services**

The increasing demand for legal aid services has been the subject of comment in many of the reports which are referred to in the Law Council of Australia's submission. Those reports have invariably concluded that additional funding is required by Legal Aid Commissions to enable them to meet the demands for its services. Little empirical research has been done in Australia in relation to demands for legal aid services. Some survey material was contained in the Henderson Poverty Inquiry reports and there was some research done into models to determine legal needs by the former Commonwealth Legal Aid Commission many years ago. The only comprehensive attempt to measure legal usage and needs was undertaken in NSW at the request of the Legal Aid Commission in 1991.

The Commission successfully proposed that the Australian Bureau of Statistics undertake this survey. The ABS Survey of Legal Usage and Needs is the most comprehensive of its kind undertaken in Australia and it gave rise to some interesting conclusions. In general terms, the survey produced the result that one in 20 people had experience of one of the defined legal events in the 12 months prior to the survey being conducted. However, nearly half of those who had one of the identified legal experiences did not choose to take any legal advice even though the defined legal events were serious in their nature and consequences. The data available from the Australian Bureau of Statistics survey has been published and it provides a fertile source of information about the need for legal services and their usage.

The July 1996 Report of National Legal Aid stated that there has been an increase in demand and supply for legal aid. From December 1990 to September 1995 there has been a 22 per cent increase in applications and a 29 per cent increase in grants to legal aid. The report noted that the Commission were funding grants of legal aid in new areas of law. The report analysed the increasing costs facing Commissions and concluded that \$65 million extra was required to enable legal aid to meet demands and compensate for declining revenues, because funding agreements have not kept up with inflation. The Law Council in the previous year called for an injection of an extra \$50 million to meet demands.

The Commonwealth Government's decision to review the funding agreements was made against a background of reports which had consistently advocated an increase in legal aid funding to meet additional demands.

## **Reduction in the availability of legal aid**

In the late 1980s and early 1990s ongoing pressures were placed on Legal Aid Commission budgets. The Commission was required, along with other government agencies, to do more with less funds. Both the Commonwealth and State governments imposed efficiency dividends on the Commission and initiatives were taken by governments especially in the criminal law area which impacted on the demand for legal aid services without the Commission's budget being properly supplemented. This practice led to governments eventually conceding the need for and introducing legal aid impact statements whenever initiatives were taken which might impact on the Commission's budget.

The Commission's response to tighter budget constraints was to control expenditures by limiting the availability of legal aid, particularly in the civil and family law programs, and by taking steps to increase revenue from contributions from clients. Changes were also made to the manner by which legal aid services were provided with more efficient procedures being introduced. Reductions in the availability of legal aid for family and civil law attracted comment from the previous Federal Government especially as there was

at the same time an increase in the level of legal aid granted under the criminal law program. This problem was also referred to in the Access to Justice Report and was probably the genesis of the argument that Commonwealth monies should be spent only on Federal cases rather than on subsidising State cases.

The Federal Government's present view has been predicated on the assertion that the Commonwealth has subsidised, under funding agreements, the provision of legal aid in State law matters, especially criminal law. It has argued that the subsidy must be removed and the State Government should take responsibility for funding State law legal aid. One difficulty with the argument is that figures demonstrating the extent of this alleged subsidy have not been made available in NSW.

Following the Commonwealth Government's decision to renegotiate the funding agreement and to foreshadow a reduction in Federal funding for the NSW Commission, decisions were made to rationalise the availability of legal aid. It was considered necessary to make changes before cuts were actually made because grants made in one financial year may attract expenditures in subsequent years. Rationalisations have been made to guidelines as they relate to criminal law and family law. Consequences of these reductions have already been pointed out and it has been estimated by the Commission that some 14,000 people in NSW will be deprived of legal aid services as a result. The process of rationalisation of legal aid will continue and the Commission is no doubt considering further reductions in the availability of legal aid following the actual cuts to its budget for 1997/98. The Commission may also need to reflect on some of the policy changes already made in the context of the budget outcome for 1997/98.

### ***Policy changes***

Proposed funding cuts forced the NSW Commission to take the following steps from 1 November 1996 to guard against future liabilities:

- Legal aid in victims compensation matters is no longer available.
- In family law matters a cap has been placed on expenditure of \$15,000 for each party where both parties are legally aided.
- Legal aid is no longer available for committals.
- A cap has been placed on expenditure on any one criminal trial of \$80,000 with an additional \$40,000 for each co-accused.
- Legal aid is no longer available for second criminal trials where the first trial resulted in a hung jury.

### ***Contributions policy changes***

The NSW Legal Aid Commission made the following changes to its contributions policy effective from 1 January 1997:

- The minimum initial contribution in criminal indictable matters increased from \$40 to \$75.
- An additional contribution of \$75 will be required for defended indictable matters and all grounds District Court and Indictable appeals. This compulsory contribution is in addition to any contribution based on income and assets.
- A compulsory \$50 contribution is required in defended Local Court criminal matters.

### ***Future policy changes***

The following cuts were under consideration before the Federal allocation was made known:

- Legal aid to no longer be available for:
  - tenants and residents of retirement villages for proceedings in the Residential Tenancies Tribunal;
  - representation in inquests;
  - discrimination claims in either the Equal Opportunity Tribunal or the Human Rights and Equal Opportunity Commission whether the claim is on the basis of race, age, sex or disability;
  - unfair dismissal matters before the Industrial Relations Court of Australia or the Industrial Relations Commission of NSW;
  - Appeals to the District Court from decisions of the Legal Court in Criminal matters;
  - Supreme Court Bail applications.
- Funding of appeals to the Court of Criminal Appeal and appeals in criminal cases to the High Court of Australia to be further restricted.
- A cap of \$40,000 to be placed in criminal trials with a cap of \$15,000 for each co-accused.
- The fees payable to the private legal profession for work done for legally assisted people to be reduced.

No doubt there are other options being considered by the Commission now that the Commonwealth Government's funding cuts have been settled for 1997/98.

### **Federal funding decision**

The Commonwealth Government has announced cuts to its allocation to the NSW Legal Aid Commission for 1997/98. The Commonwealth has advised that its allocation will be cut by \$12 million. It seems that NSW will bear the brunt of Federal cuts to legal aid as the total national cut for 1997/98 was reduced from \$33.1 million which was foreshadowed in October 1996 to \$15.2 million (which figure excludes Western Australia).

The State Government and the Trustees of the Law Society Solicitors' Trust Account Fund have both contributed an additional \$2 million to the Legal Aid Commission's budget for 1997/98. Further, it has been suggested that the Commonwealth in 1997/98 will allow the Commission to use a small proportion of the Commonwealth's allocation to supplement the provision of legal aid services for criminal law matters. However, it is not clear whether these initiatives will continue beyond this financial year. Accordingly, the Commission will need to make savings this financial year amounting to \$8 million and it is probable that further savings will need to be made in future years to reach the amount by which the Commonwealth Government has reduced its allocation to the NSW Legal Aid Commission (\$12 million). At the time of writing this paper, the Commission has a number of options under review which may become available for public discussion prior to the Legal Aid Conference.

Further, it is probable that the Commission will need to review the way in which legal aid services have been delivered. Rather than making cuts to numerous programs the Commission may achieve more significant savings by altering the manner in which legal aid services are provided to the community in this State.

One view is that cuts should be made evenly across the Legal Aid Commission's operational budget. It is not prudent to isolate the cuts to certain areas of the budget. To date,



cuts have been focused on reducing of services to members of the community. No doubt future cuts will focus on payments to the private legal profession and to the internal staffing structure of the Legal Aid Commission.

### ***Implications on structure***

It has been reported in the media that the Commonwealth will enter into an agreement with NSW that the provision of legal aid in Federal matters should be provided by the Commission from 1 July on an agency basis. At the time of preparing this paper, the terms of that agency agreement have not been made available. However, the Commission has advised that existing grants of legal aid made before 30 June 1997 will continue. They have informed the Law Society that legal aid thereafter will be provided for Commonwealth cases by the Commission on an agency basis. The Commission will no doubt provide legal aid for Federal matters utilising money available by the Commonwealth Government and in accordance with policies settled by the Commonwealth. The Commission's policy making role will be confined to State law matters and following the passage of the *Legal Aid Commission (Amendment) Act 1997*, the Commonwealth Government will no longer be represented on the Commission's Board of Directors. These developments will impact on the structure of the Commission and the development of policy in relation to Federal law matters will no longer be undertaken by an independent Commission. They may also result in separate accountability and reporting regimes being established and different guidelines being applied by the Commission's staff for Federal and State matters in areas such as criminal law. If this occurs, NSW will again experience some of the problems which plagued the system prior to the 1987 merger.

### **Reflections on a mission to Vietnam**

Against this background of cuts to legal aid, it was ironic to receive an invitation from the United Nations in May of this year to visit Vietnam for a period of 15 days to produce a report on the strengthening of the Vietnam Lawyers Association and the development of a legal aid system in that country. I completed that assignment and prepared a report which amongst other things has set out a three year plan for the introduction of a legal aid system based on testing five pilot centres located in key provincial areas. Vietnam is a country with \$74 million people, 80 per cent of whom live in rural areas. It is a poor country where the average wage is \$30 US per year. It has a booming economy which is growing at a rate of 10 per cent or more each year. In the early 1990s the Vietnamese Government introduced a series of important legislative reforms which have introduced a controlled market economy. These reforms were accompanied by the enactment of many laws that have created legal rights and obligations which previously did not exist.

The purpose of introducing a legal aid system in Vietnam is primarily to inform the community of the impact of the new rights and obligations as they relate to areas such as land law, preservation of the environment, family issues and commercial transactions. It is also considered that legal advice and representation should be made available to enable people to enforce their rights. Rather than rely on litigious processes preference has been expressed for traditional means of resolving disputes through mediation. To be involved in the development of this project on behalf of the United Nations was an honour and I was able to use the considerable experience acquired in Australia and elsewhere in relation to the provision of legal aid services.

The view has been widely expressed by many experts that the structure and means of funding legal aid in Australia may be a model which other countries should follow. It is

certainly a preferable structure to that existing in, for example, the United Kingdom where legal aid budgets are open ended and there is a limited independent mechanism (Legal Aid Board) for the establishment of legal aid policies. It would be a detrimental step for the present structure of delivering legal aid services in NSW to be dismantled because of a funding dispute based on arbitrary distinctions between Commonwealth and State law matters. It is also disappointing that, at a time when countries like Vietnam are embracing the need for the development of legal aid systems, a democratic country like Australia which boasts of its achievements in relation to human rights is weakening its legal aid system.

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