

LEGAL AID

A return to the sixties?

MARY ANNE NOONE reports on the latest changes to legal aid schemes in Australia.

The Australian legal aid system changed dramatically on 1 July 1997. The partnership arrangement between the Commonwealth and State Governments for the provision of legal assistance to the poor and disadvantaged which has been in place in most States since 1979 has gone. As well, the method of funding legal aid is altering. The Commonwealth Government precipitated this change with the announcement in June 1996 that its State funding agreements would end on 30 June 1997. Additionally, the Commonwealth announced funding cuts of around 22% in the August 1996 budget. When these changes are overlaid on a system already in crisis because of ever declining funding,¹ the likely outcome is a return to the levels of inequity in access to justice which motivated the development of legal aid in Australia in the early 1970s. Some of the recent developments/regressions are outlined briefly below.

Prior to 1972, there was no national legal aid system in Australia. There were State-based *judicare* systems run by the private profession as well as some salaried services in New South Wales, Victoria and Queensland. There was no consistency or equity in policy or practice across the States in the provision of legal services to the poor.

In 1973, Attorney-General Lionel Murphy said about the opening of the Australian Legal Aid Office:

The Government has taken action because it believes that one of the basic causes of the inequality of citizens before the law is the absence of adequate and comprehensive legal aid arrangements throughout Australia ... the ultimate object of the government is that legal aid be readily and equally available to citizens everywhere in Australia and that aid be extended for advice and assistance of litigation as well as for litigation in all legal categories and in all courts.²

During the period 1972-1979, the Australian legal aid system underwent substantial change from a fragmented State-based system to one where the Commonwealth Government sought to take the lead and establish a national system (Australian Legal Aid Office), and then to an arrangement where the States had responsibility but funding was shared between the States and Commonwealth Governments.³ By the end of 1979, State-based legal aid commissions, each having a Commonwealth nominee or nominees on the Board of Commissioners, were legislatively established in all but two of the States and Territories.⁴

During the first half of the 1980s, Commonwealth funding for legal aid continued to increase. In 1987 the Common-

wealth negotiated funding agreements with the States which generally provided for the Commonwealth to provide 55% of funding and the States 45%. It is these agreements that were terminated in June 1997.

In 1990, the National Legal Aid Advisory Committee described the national legal aid infrastructure as a partnership between governments, legal aid commissions, community legal centres and private practitioners. The Committee also recommended that the Commonwealth Government continue to provide policy leadership in planning, funding and managing national legal aid programs.⁵ The need for a national approach to legal aid policy was accepted by both the Commonwealth and State legal aid commissions as illustrated by the establishment of National Legal Aid (the directors of legal aid commissions) and the National Legal Aid Board.

The changes that have recently occurred clearly mark the end of this partnership and an adoption by the Commonwealth of a very different approach to legal aid policy and practice. In announcing the funding cuts and an end to the funding agreements, the Commonwealth signalled a clear withdrawal from any co-operative approach to the provision of legal aid. Instead, the Commonwealth sees its role as a principal, contracting out the provision of services in return for funding. The Commonwealth has indicated that it wants its legal aid funding used only on matters relating to Commonwealth law.⁶

At the time of writing (15 August), all State and Territory Governments except Victoria, New South Wales and Australian Capital Territory, had signed new legal aid funding agreements with the Commonwealth. The details are not yet available on the grounds of commercial confidentiality. Queensland and New South Wales have indicated that they will run their own State-based legal aid bodies, without Commonwealth involvement, which *may* contract to provide services for the Commonwealth. The signed agreements include a list of Commonwealth priorities for cases handled. It seems that these priorities are not standard and may vary from State to State.

An indication of a change in the Commonwealth's position was given in 1995, when the Commonwealth agreed to the abolition of the Legal Aid Commission of Victoria and the creation of Victoria Legal Aid, 'a new and more business like corporate body'. The Commonwealth supported the shift from a 12-member commission with nominees of the legal profession, community legal centres, salaried legal aid staff, council of social services, and the Attorneys-General to a five-member board of directors constituted solely of nominees appointed by the State (3) and Commonwealth (2) Attorneys-General. This has resulted in a management structure with no direct input from providers or users of the system.⁷

The Victorian model has now been adopted by the Queensland Government. In March 1997, the Queensland Attorney-General announced the Legal Aid Commission would be scrapped and replaced by a State body of five to be funded by the State Government and handle issues under

Queensland law. This body does not include Commonwealth nominees.

The *Legal Aid Queensland Act 1997* has the following objectives:

To provide for giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way; and

To pursue innovative commercial arrangements, including legal assistance arrangements, for giving legal assistance at a reasonable cost to the community and on an equitable basis throughout the State.⁸

So in addition to a restructure, the Queensland Act introduces a new concept to the provision of State-based legal aid — *legal assistance arrangements*. In the second reading speech, the Minister noted that the establishment of legal assistance arrangements forms the basis of an innovative funding mechanism in purchaser/provider arrangements. The purchaser is the agent who decides what services are required and the provider is the agent who delivers the services. It is envisaged that Legal Aid Queensland will be both a provider and purchaser. Other providers could be a private lawyer, a community legal centre or some other entity. It is still not clear how these arrangements will operate in practice.

In Victoria, it was recently announced that the projected \$9 million cut in Commonwealth funding has been reduced to \$2 million.⁹ Although no agreement has been signed, it appears that a 'co-operative arrangement' will be reached at least for the next 12 months. This suggests that proposed amendments to remove the requirement for the State Attorney-General to consult with the Commonwealth Attorney-General in relation to changes to the *Legal Aid Act*, may not be enacted.

Apart from the changes wrought by Commonwealth policies, there are also developments at a State level that undermine the concept of cohesive and consistent provision of legal aid services. For example in Victoria, 'Law Aid' was launched in March 1997. The scheme, a joint undertaking between the Law Institute, Victorian Bar and the Victorian Government, provides assistance in civil matters. Under the scheme all disbursements (except counsel's fees) are paid for by Law Aid while the legal practitioners agree not to charge unless and until the litigation has been successfully concluded. Voluntary participation by legal practitioners is central to the scheme which is established by Trust Deed and administered by the Law Institute and the Victorian Bar. There is no statutory requirement for an annual report on the activities of the scheme nor any published guidelines about eligibility.

In 1975, Professor Ronald Sackville, the Commissioner for Law and Poverty found 'grave' deficiencies in the then legal aid system. These included specific issues relating to the limited range of orthodox legal services provided. For instance, in criminal cases there was no representation available for people appearing in Magistrates Courts. More generalised concerns were that 'the barriers to the effective use of legal aid services, including stringent means tests, financial conditions imposed on assisted persons and the centralised nature of the service' had not been broken down. Equally, the 'barriers of fear and ignorance that exist in the community' were not addressed. Similarly, then existing schemes had 'tended to approach legal problems in a traditional manner'. Finally, Sackville found there was a 'serious

lack of co-ordination between the various legal aid schemes'.¹⁰

If a review of legal aid, similar to that undertaken by Sackville, were to be conducted in 1997, how different would the findings be? Certainly aspects of the legal aid system of the late 1990s are very different to that which operated in the late 1960s and early 1970s. There is greater availability of telephone advice and accessible legal information. But the Australian legal aid system is becoming increasingly limited in the legal assistance it offers people due to declining levels of funding.¹¹ Additionally, the dismantling of the Commonwealth-State agreements, has resulted in a system which is becoming more fragmented. With the abandonment by the Commonwealth of its leadership role, there will be growing inconsistency among the States in issues like eligibility and types of legal assistance available.

As a consequence, if a review of the Australian legal aid system were to be held now,¹² it would most likely conclude that the situation of the poor and disadvantaged in need of legal advice and assistance in the late 1990s is little different from that recorded by Sackville 25 years ago.

References

1. In 1994, the Law Council reported that an extra \$50 million in legal aid funding was needed to bring it back to the levels of assistance provided in 1987.
2. Ministerial Statement, Attorney-General, Senate, 13 December 1973, *Parliamentary Debates*, p.2802
3. For a detailed discussion and evaluation of the various legal aid schemes operating in the early 1970's see Sackville, R., 'Legal Aid in Australia', AGPS Canberra 1975. For a short history of Commonwealth involvement in legal aid see Access to Justice Advisory Committee, 'Access to Justice — An Action Plan', National Capital Printing, Canberra, 1994, p.228; and for more detail see National Legal Aid Advisory Committee, 'Legal Aid for the Australian Community', Canberra, 1990, Chapter 3.
4. *Legal Aid Ordinance 1977 (ACT)*; *Legal Services Commission Act 1977 (SA)*; *Legal Aid Commission Act 1977 (WA)*; *Legal Aid Act 1978 (Qld)*; *Legal Aid Act 1978 (Vic.)*; *Legal Aid Commission Act 1979 (NSW)*.
5. National Legal Aid Advisory Committee, 'Legal Aid for the Australian Community', AGPS, Canberra, 1990.
6. Reynolds, S. 'Contracting for Chaos', (1997) 22 (1) *Alternative Law Journal* 22. This use of 'commonwealth matter' is in contrast to the use of the term prior to 1987 when it related to individuals that the Commonwealth had some responsibility for like social security recipients, Aborigines and veterans
7. Noone, M.A. 'What the Justice Statement didn't say' (1995) 20(3) *Alternative Law Journal* 143
8. *Legal Aid Queensland Act 1997*, s.3(1)
9. In anticipation of the cuts, Victoria Legal Aid introduced severe restrictions on the types of matters eligible for legal aid and placed ceilings on the amount of legal assistance available. For instance in Family Law matters, the maximum available is \$10,000.
10. Sackville, R., above, p.164.
11. See article in this issue: Regan, F. 'Rolls Royce or Rundown Holden Kingswood?', (1997) 22(3) *Alt.LJ.*
12. The Senate Standing Committee on Legal and Constitutional Affairs is currently conducting an on-going inquiry into legal aid.