NATIONAL ACCESS TO JUSTICE CONFERENCE

"A NEW NATIONAL POLICY FOR LEGAL AID – WHO MISSES OUT"

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Introduction

First, may I acknowledge the traditional owners of the land we meet on – and pay my respects to their elders, both past and present.

I am very pleased as the immediate past Chair of National Legal Aid, and as Director of the Legal Services Commission of South Australia, to have the opportunity to talk to you today on the topic of *"A new national policy for legal aid – who is missing out"*.

The National Legal Needs Survey which Geoff Mulherin and the Law and Justice Foundation of NSW is conducting on behalf of National Legal Aid (NLA) will sometime next year give us the most comprehensive view of legal needs in Australia ever assembled – from that we will be able to fairly accurately assess and quantify "who is missing out". But until then we can still draw a reasonable picture of who is missing out by analysing the current scenario of legal services available around Australia.

There are two myths though that at the outset it may be best to dispel.

The first is one of the most commonly asked questions about legal aid.

"What is the income level where legal aid cuts out?

There really is no such thing as a cut off point for income. The means test and contribution calculations are sliding scales – the more serious the charge and the higher the costs of legal representation, the higher the income can be, when compared to those costs, before they receive no aid at all although the contribution would also be higher. Furthermore, some applicants may not be eligible for assistance initially but may later become eligible once their personal funds have been depleted.

The second myth is that if you get a legal aid lawyer you are "missing out" because they are not real lawyers. People don't realise that as much as 65% of legal aid representation in criminal work is briefed out to the private profession – many of whom, including our in-house practitioners, are the best possible lawyers available for the type of work required. We are all in debt to those private lawyers who perform these services at ridiculously low legal aid fee scales.

So with those two opening myth busters I now turn to the topic which arises from a paper, *"A New National Policy for Legal Aid in Australia"*, published by NLA last year, which presents the vision of Australia's eight legal aid commissions for a new Commonwealth approach to legal aid in Australia.

NLA consists of the Directors of the commissions combining at a national level and one of their number is, on a rotational basis, elected as Chair.

NLA meets at least three times a year and its mission is to promote leadership and management of a national system of legal aid through the coordinated efforts of legal aid commissions by sharing resources, knowledge and systems which enhance best practice and value for money in the delivery of legal aid to clients.

I had occasion recently to peruse the first annual report of the Commission in South Australia. The opening paragraph of that report from 1979 said:

> *"Every person in … Australia is required to live under and obey the law. But every person is also entitled to use the law to protect his or her rights and interests. If some members of the community but not others have access to the protection of the law, then people are denied justice, the path of the law is skewed, and the law itself inevitably becomes unfair."*

Those sentiments are still relevant today. Both as to the importance of legal aid in protecting the interests of persons who would otherwise be denied access to justice, as well as forming a basis for the consideration of our topic on *"who is missing out"*.

Commonwealth Approaches

It is useful to set the scene by spending a few minutes on history as there have been three identifiable Commonwealth approaches to legal aid since the beginning of the modern era of legal aid in the early 1970's.

I am told that the Law Society of South Australia was one of the earliest, if not the first, bodies in Australia when in 1933 it established a scheme under which private practitioners provided legal assistance to needy clients for a proportion of their normal fees.

In 1974 the Commonwealth Government set up the Australian Legal Aid Office to provide legal aid for so-called Commonwealth "persons". In South Australia state legislation, the *Legal Services Commission Act 1977*, led to the establishment of the Commission which combined the functions of the Legal Aid Office and the Law Society.

The approach adopted by the Commonwealth in those early years has been described as a "Commonwealth Persons" model. In summary, this took responsibility for the provision of legal aid to people for whom the Commonwealth had a special responsibility including social security recipients, returned servicemen and women, Indigenous Australians and migrants.

The model also provided legal aid for matters that arose under Commonwealth law. For example, in the areas of social security, divorce and offences under taxation legislation. In those days state and territory governments contributed relatively little towards the provision of legal aid and those contributions arose mainly from interest derived from lawyers' trust accounts.

A second Commonwealth approach was implemented in the 1980's and saw responsibility for the provision of legal aid effectively handed to the states and territories through their various legal aid commissions. Under this approach funding was allocated in line with an agreement which, at one stage, apportioned 55% of the funding responsibility to the Commonwealth and 45% to the states and territories. The legal aid commissions, established under State Statutes, determined their own priorities for the use of this revenue.

A third approach was adopted by the Commonwealth in 1997 and remains the Commonwealth policy today. It ushered in an funding era which is sometimes referred to as the *"Commonwealth State Divide"*. The approach inaugurated a reduction in funding from the Commonwealth and tighter restrictions on the range of matters which qualified for Commonwealth legal aid assistance.

That assistance was, and remains, confined to a relatively narrow range of matters arising under Commonwealth laws primarily concentrating on matters in the field of family law. Although social security and immigration are governed by Commonwealth law, the use of Commonwealth legal aid funds for services in these jurisdictions is tightly restricted under the current model and States have been reluctant to pick up the shortfall in these areas.

Legal aid commissions are obliged to use state or territory funds for the remaining legal aid services in all other areas of the law.

Current Environment

The commissions, together with community legal centres and Indigenous legal services, play a fundamental role in enhancing access to justice for disadvantaged Australians at risk of social exclusion.

In the family law field, which accounts for roughly 85% of Commonwealth legal aid funding, those agencies work in collaboration with Family Relationship Centres, recently established by the Commonwealth, and other service providers, which deliver family dispute resolution services.

While considerable emphasis is being placed on optimising collaborative working relationships between all legal service providers each category of agencies have their own unique roles. Legal aid commissions are the largest in terms of income and expenditure.

Their legal assistance services include the provision of representation in family and criminal law fields, legal advice and information, family dispute resolution services, specialised advice and assistance on child support issues and community legal education.

For the current financial year the total estimated income of legal aid commissions in Australia is in the order of $494 million. Of that total, approximately $151 million, or roughly 31%, will be received under Commonwealth grants.

Eligibility for legal aid

Each application for legal for legal aid to a legal aid commission, at least when the assistance applied for is in the form of representation in court proceedings, is assessed applying three tests namely:

- A means test, which also assesses any contribution a client must make towards the cost of the case;
- A merits test, and
- A guidelines test.

Means test

The means test takes account of an applicant's income and assets including those of any financially associated person such as a spouse or partner. It considers all possible means that an applicant may have to pay for the legal services he or she requires.

The test was developed by legal aid commissions in the mid 1990's and is applied nationally however some variances across the States have arisen. Its main elements are:

- An underlying philosophy that eligibility should be determined having regard to applicants' ability to pay – not "cut off points"; there is no single income point of 'cut off'
- Standard criteria for all applicants and the use of generic benchmarks to determine maximum ceilings for eligibility thresholds;
- The ability for individual commissions to fix appropriate monetary amounts where regional, or particular economic, factors justify such an approach e.g. house prices;
- Clearly identified discretions by reference to specific factors;
- A format which is easy to use and update.

The operation of the means test can provide examples of legal assistance claimants who "miss out". For example, some critics of the test would say that it does not protect nest eggs or modest savings enough or allow sufficiently large deductions from income. For example, if an elderly couple had $10,000 in savings they would miss out on getting legal aid, and would be expected to fund their own matter privately to at least $6,350.00.

Additional funding may enable modifications to ease the impact of the means test on eligibility in appropriate categories of assistance. But, the reality is that the test must enable Commissions to work within their budgets, as they are currently funded.

Merits test

In general, legal aid for representation is only available for matters considered to have merit. There are three aspects to the merits test which an applicant must satisfy, namely:

- The case must have at least reasonable prospects of success – an exception are serious criminal cases for trial where a reasonably arguable defence will be accepted;
- The case, if successful, must produce a real benefit to the aided person, such that an "ordinarily prudent self-funding litigant" would risk their own funds in the case;
- The expenditure on the matter must represent a proper use of public funds.

The necessary strict interpretation of this test means that where the prospective legal fees exceed the amount in dispute then legal aid is refused, for example, and assuming legal assistance was available for such matters, in fencing disputes, minor motor vehicle property damage claims or consumer credit disputes involving modest amounts.

Commission Guidelines

Legal aid commissions set their own guidelines, as distinct from Commonwealth Guidelines, from time to time. These apply to matters arising under State law and, where not covered by the Commonwealth Guidelines, to matters arising under Commonwealth law. Commissions may depart from or waive these guidelines in exceptional cases.

The guidelines are designed to ensure that the limited funds available are directed to areas of greatest need, and aid is not granted in cases where it is not really necessary because:

- There is some other possible source of funding, or
- The case could be handled by some other agency or service, or
- It would be reasonable to expect the applicant to represent him or herself. For example, in criminal cases that do not involve a realistic risk of imprisonment being imposed as a penalty by the Court.

For example, an 18 year old youth charged with a minor assault, or a shoplifting, or a minor street offence, would not under current guidelines get legal aid for representation because there is no realistic risk of imprisonment being imposed. He would miss out.

However, a conviction may well damage or hinder a future apprenticeship, or employment prospects of that youth. With greater funding, commissions may be able to expand eligibility criteria to include applicants, for whom the consequences are still significant even though not involving imprisonment.

Commonwealth Priorities and Guidelines

The expenditure of Commonwealth funds by legal aid commissions is subject to Commonwealth Legal Aid Priorities and Guidelines which, in effect, spell out the details of the third Commonwealth approach to legal aid applying from 1997.

In summary, the Commonwealth Legal Aid Priorities delineate the Commonwealth law matters that litigation and dispute resolution services may be provided for by Commissions under grants of legal assistance.

The Commonwealth Guidelines impose relevant terms, conditions and limits on the eligibility for, and provision of, legal assistance under such a grant of aid. Where the provision of assistance for representation is involved the Commonwealth Guidelines adopt, and apply, the means and merits tests I have referred to earlier.

Who is missing out

As a consequence of the current funding model applied by the Commonwealth divisions between state and Commonwealth responsibilities have ensued. That is, the *"Commonwealth – State Divide"*.

Family law and child protection

For example, whilst the Commonwealth takes responsibility for Family Law Act matters, closely related legal aid services in child protection and family violence matters fall under state law and have to be funded from state revenue.

Clients sometimes can and do fall between the gaps created. It is considered that there would be considerable benefits achieved by a more seamless provision of legal assistance services when family problems result in cases for the same individuals in both Commonwealth and State courts.

In addition, at present in most states, and to varying degrees applicants for representation assistance with divorce, property settlement or defending restraining order applications generally do not qualify for aid unless exceptional or defined circumstances apply.

Civil law matters

Another area where a very large number of people are currently missing out is in the field of civil law. As a result of the Commonwealth funding reductions in the mid 1990's, and the introduction of the new funding model at that time, all Commissions either shut down or dramatically reduced their civil law aid programs. In some States limited programs remain funded from either State grants or public purpose funds.

In South Australia, for example, the Annual Report of the Commission for 1995-96 reported on the Commonwealth's then proposals to change its funding model which, at that time, were accurately anticipated to lead to cuts in legal aid funding.

The proposed changes, as well as other pressures, led the Commission at that time to identify strategies to maintain its financial integrity. Decisions made as a result included abolishing legal assistance for representation altogether in civil costs recovery jurisdictions.

The result was a sharp reduction in the number of grants of aid made by the Commission in South Australia for civil matters. For example, in 1995-96 a total of 492 grants of legal aid where made for representation in the civil cases including property, employment, consumer, personal injury, and social security matters but excluding protection applications concerning children. The comparable figure two years later, in 1997-98, was 181 which represented a 63% reduction and today grants for these purposes could be counted on one hand.

In general, with the Commonwealth now primarily funding family law legal aid, most state/territory funding of legal assistance is used in the provision of criminal law services in situations where a person's liberty is at stake. As a result, it appears some states and territories increasingly tend to regard their obligation to support the work of legal aid commissions as being confined to criminal law and child protection matters. Increasingly, Commissions are funding Indigenous applicants, charged with state criminal law offences.

This has led to a situation where civil law legal aid has fallen through the cracks. Tenancy, consumer, employment and social security legal services, to name a few, are no longer core commission priorities although problems in these jurisdictions may equally have profound consequences on peoples lives. To a limited extent community legal centres and some pro bono services will pick up a few of these matters whilst the masses turn up at Civil Magistrates Court unrepresented.

Migration law

NLA's view is that the current Commonwealth legal aid guidelines are too restrictive in the work that commissions are able to undertake in matters arising under migration law.

NLA has submitted that the guidelines should be expanded to enable legal aid to be granted, subject to the means and merits tests, for applications to the Department of Immigration and Citizenship and to merits review tribunals in relation to applications for protection visas and other visas where there are strong humanitarian and/or compassionate circumstances, and for visa cancellation and deportation cases.

It has also submitted that legal aid should be available to protection visa holders for offshore applications for family reunion, including spouse and child visas, as well as refugee and humanitarian visa classes. Aid should also be available, subject to the merits test, for proceedings in the Federal Court, Federal Magistrates Court or High Court dealing with a migration matter.

Indigenous Australians and legal assistance

Over recent years some legal aid commissions, including South Australia, have experienced a rapid increase in the number of, and expenditure on, grants of legal assistance to Indigenous clients.

In South Australia, for example, over the five year period from 2003-04 to 2007-08 the number of grants of legal assistance to Indigenous clients grew from 943 to 1,569. A 66% increase.

Expenditure on that assistance, over the same period, rose by over 110% from $0.86m to $1.83m and it is estimated that in the order of 80% of that aid would have been in the field of State criminal law and therefore drawing on funds provided to the Commission by the State Government.

As I mentioned earlier, the “Commonwealth Persons” model of funding which was applied in the 1970’s was in part based on the principle of the Commonwealth providing legal aid funding for those people for which it had a special responsibility, clearly including Indigenous Australians.

The Commonwealth does of course fund Aboriginal and Torres Strait Islander legal services (“ATSILS”) and a considerable proportion of their work is in the area of criminal law legal assistance.

It is not clear why there has been an increased recourse to “mainstream” legal assistance however, it is arguable that there should be some recognition in the Commonwealth model, in the form of supplemental funding, in respect of the change which appears to be taking place.

Towards a new paradigm for legal aid in Australia

NLA proposed in its paper, *"A New National Policy for Legal Aid in Australia"*, that the Commonwealth should adopt a new, simple approach to legal aid based on prioritised areas of need.

Such an approach would address priority areas of disadvantage rather than depending upon whether the law was enacted by a Commonwealth or state parliament. The approach proposed in the NLA paper involves additional expenditure by the Commonwealth and NLA submits that its adoption would give effect to the commitment that all citizens can be assured of protection under the law, of access to justice and the guarantee that legal rights, privileges and protections apply to all.

The policy proposed in the NLA paper identified six priority areas of need which, it suggested, would become Commonwealth legal aid priorities. The priorities referred to are:

- Supporting Australian families and protecting vulnerable family members. This would, for example, allow for a more seamless provision of assistance when family problems result in cases in both the Commonwealth and State courts;
- Supporting Australians at risk of social exclusion due to poverty. This priority would focus on the restoration of a civil law legal assistance program;
- Supporting Indigenous Australians at risk of social exclusion with a priority on the legal representation of Indigenous Australians in any matters;
- Supporting Australians at risk of social exclusion due to special circumstances including young people, women, people living in rural, regional and remote areas, people with disabilities and older people;
- Supporting a fair criminal justice system. This priority would ensure that the extraordinary powers with which Australia's policing and investigative authorities have been entrusted are used strictly according to law, thereby ensuring that miscarriages of justice do not occur;
- Supporting human rights and equal opportunity. This priority underpins our democratic system by protecting all the basic human rights and freedoms recognised by Australian law that are not covered by other priorities such as freedom from discrimination on grounds of race or religion.

Conclusions

The discussion of possible new approaches to the funding of legal aid is taking place at a pivotal time as the current four year agreements between the Commonwealth and each state and territory, for the provision of legal assistance services, expire in December this year.

It is likely that the existing provisions of these agreements will be "rolled over" for a period. Arrangements for the new agreements will still take some time to be developed and will be known as National Partnership agreements. What these will contain is still to be determined.

The Communiqué from the July 2008 meeting of the Standing Committee of Attorneys-General (SCAG), reported that Ministers noted the Commonwealth is currently reviewing its legal aid funding policy including the requirement that Commonwealth legal aid funding be used for Commonwealth law matters.

The Communiqué also stated Ministers:

- *"Agreed that the Commonwealth bring forward to the next meeting of SCAG in November 2008 recommendations on the incorporation of a focus on objectives and outcomes for legal aid National Partnership agreements, developed in consultation with the States and Territories, and*
- *Noted the need to broaden the focus of legal aid to optimise collaborative working arrangements between all legal service providers, including legal aid commissions, community legal services and Indigenous legal services, to ensure better access to justice outcomes for disadvantaged Australians at risk of social exclusion."*

NLA, and the legal aid commissions forming it, are committed to playing positive and constructive roles in the development of the new National Partnership agreements. This is reflected in the goals of NLA, set out in its Strategic Plan, which include promoting *"… a national legal aid partnership with the Commonwealth, States and Territories"*, and their commitment to maximising cooperative and collaborative arrangements between all legal service providers to ensure that as much as possible no one misses out and that everyone in our community has appropriate access to justice and to legal advice.

In conclusion, it can be seen that the need for the renewal of the agreements does provide the opportunity for fresh approaches in funding arrangements to be considered, and for the issues arising under the current Commonwealth funding model to be taken into account in that process.