

## ***SLIDE1: INTRO***

### **How Big Is The Gap? - Restoring the Australian Legal Aid System.**

As is well recorded, in 1997 the Howard Government cut back Commonwealth expenditure on legal aid by \$120m over four years. Overnight, the response of all eight Australian legal aid commissions was to shut down their civil law legal aid programs. Such drastic action was the only way legal aid administrators of that era were able to wind back expenditure to meet the new financial realities imposed by the Commonwealth.

For over a decade now, the major legacy of these cuts has been the narrowing of core legal aid commission business to criminal law in the adult and children's' court, and to family law where the interests and welfare of children are at stake under the Family Law Act or in the child protection jurisdiction.

The provision of civil law legal aid, once a key responsibility of legal aid commissions, was simply stopped. Nowadays commissions provide very little or no assistance with social security matters, in consumer, debt or employment law, with tenancy, immigration, personal injuries, discrimination and other matters in civil law.

As a result, the great challenge facing the institution of legal aid in Australia, and facing governments that fund that institution, is the restoration of civil law legal aid as core legal aid commission business.

The first question governments ask about this challenge is “how much will it cost to fix the problem, to undo the damage?”

The purpose of this short paper is to look at what some other industrialized nations spend on their legal aid systems, legal aid systems that provide a comprehensive service in crime, family and the civil law jurisdictions. In particular, I want to look at the legal aid systems in England & Wales, Scotland and the Netherlands. They allow for easy comparison and, at least in respect of two of those jurisdictions, the legal systems are very similar to Australia’s system.

## **ENGLAND & WALES**

First let’s turn to legal aid in England & Wales. Legal aid is administered by the Legal Services Commission of England & Wales, a non-departmental body sponsored by the Ministry of Justice.

The LSC provides comprehensive services in criminal law for anyone in need of urgent legal advice or, subject to a means test, representation. In addition it funds comprehensive legal aid services in civil, including family & domestic violence law, children’s law, housing, debt, employment, welfare benefits, immigration & asylum law, education, community care, mental health, human rights & personal injuries law. Although the LSC has a small public defenders unit, most services are delivered via contracts with the private profession and not-for-profit organizations.

The English & Welsh system is widely regarded by the international legal aid community as the most comprehensive and well resourced legal aid institution in the world. It’s annual budget is £ GBP 2.1 billion

or \$AUD 4.9 billion. With a population in England & Wales of 53.8 million, in Australian dollar terms Westminster invests \$91 per head of population in legal aid annually to provide that community with a comprehensive, highly accessible legal aid service.

## ***SLIDE 2: SPEND/HEAD POP ENG & WALES***

### **SCOTLAND**

Turning now to Scotland, the responsibility for the administration of legal aid there rests entirely with the Scottish Legal Aid Board, an independent statutory authority. Legal aid policy matters are the responsibility of the Scottish Executive – the devolved government of Scotland – including eligibility, setting practitioner fee rates and determining the kinds of proceedings for which legal aid is available. The Board has a small but growing in-house practice with most services delivered by contract with the private profession.

Means tested legal advice, assistance and representation is available for any matter of Scots Law including crime and matrimonial law, wills, personal injuries, employment law, immigration, housing, debt & welfare law.

Costing £ GBP 158m for a country with a population of 5.1 million, in Australian dollar terms the Scottish executive invests \$73 per head of population to provide a comprehensive system of legal aid to those of its citizens with limited means.

## ***SLIDE 3: SPEND/HEAD POP SCOTLAND***

You'll see that the Scots are, somewhat unexpectedly, holding more tightly to the purse strings than their neighbours on the other side of the River Tweed.

## **THE NETHERLANDS**

Turning now to the Netherlands, the Dutch also regard a comprehensive legal aid system for disadvantaged members of the community as an essential right of citizenship.

The Netherlands provides a unique, two tiered system.

The first tier comprises a nation-wide in-house service which provides assistance called "primary legal aid" to all Dutch citizens through a network of 30 legal service shop fronts called "Juridisch Lokets" or "Legal Service Counters". No Dutch citizen is more than an hour's public transport away from a Locket.

The Locket's sole function is to provide "primary legal aid", that is: simple legal advice and legal information. If the citizen requires representation, a referral is made by the Locket to the profession. Referral is done on a transparent basis with panel firms each receiving their equal share of referrals from the Lokets. The private profession therefore does all legal aid work requiring the representation of the client. The private practitioner then makes the usual application for means tested legal aid in the usual way. Legal aid via a grant of aid is the second tier of the Dutch legal aid system and grants of aid are available for most law types.

The services of the Lokets are free, open to any citizen and cover all law types.

They were established recognizing that the responsibility of government is to provide its citizens with accurate legal information and simple advice which can often overcome problems. Where citizens require more complex assistance, Lokets are able to make sound referral to private practitioners and, in doing so, can ensure that the clients fully understand the predicaments in which they find themselves, the likely costs to be incurred and their contribution obligation should an application for legal aid be successful.

Dutch society recognizes that the Loket system is the gateway to the legal system. The community understands that people can bring any kind of problem remotely related to the law to a Loket. They can do so confident in the knowledge that the Loket will identify whether the problem is one for which a legal remedy exists and will show the citizen the pathway to obtaining that remedy. The Loket strategy is driven by the philosophy that the government, having committed so much tax payers' money to building a justice system, has an obligation to cheaply, quickly and easily show members of the community how to access that justice system.

In circumstances where there may be no legal remedy to a particular problem, the Loket workers are qualified and trained to make appropriate referrals in those circumstances to non-legal community agencies.

The Dutch government invests € Euro 430 million into their legal aid system for a country of 16.5 million citizens. In Australian dollar terms, that's a spend of \$AUD 52 per head of population

#### ***SLIDE 4: SPEND/HEAD POP THE NETHERLANDS***

Finally, what gap do we face in Australia if we are to restore the Australian legal aid system so that all indigent Australians can access legal aid for civil law matters as well as for crime and family law matters?

In 2006-07 Commonwealth and state governments contributed \$450 million to legal aid. With Australia's population standing at about 20.5 million, that funding represents \$22 per head of population.

#### ***SLIDE 5: SPEND/HEAD POP COMPARING AUSTRALIA***

You can see from the graph that Australia falls well behind the other developed, industrialized countries that we have discussed today. And that's no surprise given that \$120 million was pulled out of the Australian system over a decade ago. In those days the Commonwealth contributed about 60 cents of every dollar spent on legal aid. As a result of the Howard government's approach to legal aid, that has reduced to less than 40 cents.

What investment would Australian governments need to make to ensure all Australians, including those in financial need, could have access to the law?

Last year, in a publication entitled “A New National Policy For Legal Aid in Australia”, National Legal Aid argued that full legal aid service capacity to address legal needs in the jurisdictions of family & criminal law, poverty & human rights law as well as the legal needs of Indigenous Australians and those living with special hardships could be restored by an additional investment of just \$165 million dollars, an increase in current legal aid funding of about 30%. That would bring the per capita spend on legal aid in Australia to just \$30 per head of population, still well under the investments of our European neighbours – so it’s not an extravagant bid. And when one considers that \$120 million was pulled out of the Australian system ten years ago, it’s not an unreasonable bid.

Australia has a public health system, public education and public housing programmes and a social security net which, for all their shortcomings, are still the envy of most other countries in the world.

But our legal aid system has fallen into disrepair over the last decade and it needs restoration.

If we are to regard access to the law for the protection of rights and entitlements as a right of citizenship in the same way that we have institutionalized the right to health care, education and social security, then governments, particularly the Commonwealth Government, needs to do more than pay lip service to that need and I hope this paper contributes to the discussion about the dimensions of that challenge.

Thank you