Presentation by Bill Grant, CEO, Legal Aid Commission of NSW to the Access to Justice Conference

12 August 2006

Legal Costs in Legal Aid Work

"Muzzle not the Ox"

The precise quote from Deuteronomy 25:4 says:

> "You shall not muzzle the ox when he treads out the grain."

One reason we do not want to muzzle the ox is to avoid getting in its way when it is doing something productive.

This verse is also quoted by Paul in explaining why those who preach the gospel should be allowed to make their living from it.

Applied in the legal context, let the profession do its job and pay it appropriately for doing so.

However, there is another way of looking at this verse and it is that the Hebrew word for "treading" can also mean "to make fat" – so we could also read this verse as saying,

> "Do not muzzle an ox when it is fattening."

Thus we are not to muzzle "the ox" even when it is eating food it does not currently need.

The preferred interpretation of this biblical quotation for us legal aid administrators lies nearer the end of the scale which provides a good day's pay

for a good day's work. The reason for this is that while practitioners should not grow "fat" from undertaking legal aid work, they should be allowed to get on with the job and be appropriately rewarded for their efforts. There would be few objections from Commissions to this approach but there are factors which constrain our ability to deliver on this position.

The NSW *Legal Aid Commission Act 1979* provides in section 12 that:

> In respect of the provision of legal aid the Commission shall
> ensure that legal aid is provided in the most effective, efficient and economical manner.

By virtue of section 39 of the Act the Commission is to:

1. Determine the fees to be paid by it to private legal practitioners to whom work is assigned;
2. Consult with the profession about the level of fees to be paid; and
3. Ensure that the fees determined in respect of a legal service "shall be less than the ordinary professional cost of the legal service".

Most, if not all, other Commissions across the country would have similar provisions in their legislation.

So, the question for Commissions is what fees should be paid for the legal services rendered by the profession to legal aid clients which is "less than the ordinary professional cost of the service" but still, somehow, returns an appropriate level of remuneration whilst providing:

- The client with good services from an experienced practitioner;

- The Commission with a level of service to its clients which is appropriate in terms of quality; and
- The practitioner with a level of fees which provides them with some profit cost and encourages them to continue providing their services to legal aid clients.

The NSW Experience

The recent NSW experience is that when I arrived at the Commission in 2001 there had been no substantial increase in fees paid to practitioners for 10 years or so. This was a major problem to be overcome because:

- Experienced practitioners were leaving or had left the legal aid system;
- We had parts of the State with few or no private practitioners willing to undertake legal aid work;
- The prospects of many practitioners still being part of our mixed service delivery model of delivering legal aid services in five years time were not good; and
- The adjustments to be made were significant because of the lapse in time since fees had been increased.

Another important challenge facing the Commission was that the Commission's means test had not be updated since 1995 meaning that with the effects of inflation every year fewer and fewer economically and socially disadvantaged members of our community would be eligible for legal aid.

Although the eroding value of the means test was an important matter which needed to be addressed, two other factors led the Commission to tackle the fees issue first. The first was practitioners in Far Western NSW advised that their

services could not continue to be provided at current legal aid rates given the particular challenges faced by those practitioners in remote NSW. The other issue was the firms in Dubbo who provided legal aid services advised, en masse, that they would no longer provide such services and that the Commission should make alternate arrangements.

The answer the Commission made to the first challenge was to introduce a new fee package for Far Western NSW which recognised the special economic factors at play in that region. As for Dubbo, the Commission opened a new Office there to provide legal aid services to our clients. When this occurred, some practitioners said they would provide "some" legal aid services, particularly when the Commission had conflict issues or required "back-up assistance". The partnership was restored, but with a different service delivery mix.

I say at this point that opening new offices is not an answer to practitioners leaving the legal aid system. It is not economically feasible to keep opening new offices, particularly when the Local Court in NSW sits at somewhere like 160 different locations throughout the State.

Having decided to tackle the question of low practitioner fees, which had not been increased for over 10 years and which provided a return of sometimes less than $100 per hour, let me say that persuading Government to put more money into the pockets of private practitioners is not an easy task no matter how good the case is for an increase. All Commissions throughout the country have spent years making budget submissions to attract the funding to increase fees, most often without success. What new money there was for Commissions generally went into existing service delivery areas, particularly into criminal law programs. As the Courts became more and more efficient and increasingly focused on judicial case management, so the demand for legal aid services increased dramatically as

did the cost of providing them. Similarly, Commissions being "downstream" agencies, felt the effects of funding being provided to Courts, Police and prisons, frequently without any increase in funding for the defence end of the Bar table. Similarly, legislative changes frequently meant more demands for legal aid services, again with little or no increase in legal aid resources. New rights, processes and procedures were created which significantly impacted upon resources.

The funding provided to Commissions was generally to meet the increasing demand for existing services with no increase in funding for new services or for the cost of providing those services, ie. practitioner fees. The NSW Commission ran deficit budgets for many years and until the last few years our criminal law budgets were always in the red.

Against this background how then to attract the necessary resources to increase fees. The NSW Commission is funded from three mains sources. First, the State Government, second the Commonwealth Government and third from the NSW Public Purpose Fund. The Commission worked with these funders, making cases for new funding so it could increase its fees to a level which would, if not encourage practitioners back into the legal aid scheme, at least slow down the departures from our mixed model of service delivery.

I am pleased to say that we have been somewhat successful, as have other Commissions across the country. In NSW we have lifted fees from under $100 per hour to $140 per hour in State matters and to $130 per hour in Commonwealth matters. This still does not allow practitioners a return which reflects commercial reality but I am confident that these rates at least allow many practitioners to stay in the legal aid system. For how long is another question.

In summary, Commissions have great difficulty persuading their funders to provide them with the funds to increase the fees they pay to private practitioners. Any additional money provided to Commissions has generally gone to our budget overruns, are provided for specific projects or are diminished by things such as "productivity savings" which makes Commissions, like other public sector agencies, "do more with less".

There are four other factors touching the question of costs to which I now wish to refer. These are:

1. There is presently a Commonwealth study into the participation of private practitioners in the provision of legal aid services in Australia. The Commonwealth has commissioned a social research agency to undertake this study. This study, involving in part a comprehensive telephone survey of 1500 private legal practitioners, will help to inform the formulation of Commonwealth Government policy on supporting private legal practitioners' participation in legal aid service delivery.

   The survey will provide:

   a) A snapshot of the current legal aid market in the context of the broader market for legal services in Australia and it will deal with such issues as:
      - The type and current volume of legal aid work presently being performed;
      - The age and post admission experience of private practitioners doing legal aid work; and
      - The reasons why some private practitioners are not currently doing legal aid work.

b) The survey will also provide information to the Commonwealth Government on the changes in the legal aid market for Commonwealth law matters over the last 5 years; and

c) It will deal with the likely future changes in the legal aid market over the next 5 years.

This initiative is, I believe, an important step in assisting in the Commonwealth Government's understanding of what legal aid work is undertaken, why some practitioners do not do legal aid work, or have stopped doing it and what might happen over the next 5 years in the delivery of legal aid services. This information should inform Government policy on a range of issues including, of course, the question of the appropriate level of remuneration for legal aid work.

2. The second issue I wish to touch upon is what I call "adding value to the professional practice of private practitioners who undertake legal aid work".

If Commissions cannot pay fees which are considered appropriate by private practitioners undertaking legal aid work we can still value add to their legal practices. There are a number of ways in which we can add value to private practitioners' legal practices. These include:

a) Invitations to legal conferences and MCLE sessions run by Commissions at no cost or at a reduced rate. The NSW Commission, as do other Commissions, run some of the best conferences in Australia in Criminal, Family and Civil Law.

b) We also conduct practitioner training in Criminal Law in regional locations, at no cost to the private practitioner. These sessions have

been well received and we are planning to conduct more of these in the next 12 months.

c) In NSW we also have a dedicated area on our website for private practitioners, giving them information and guidance on legal issues which will arise in their practices. In NSW we have just finished our Criminal Law Solicitors' Manual which deals with practical issues that solicitors face daily, particularly in the Local Courts. This manual will shortly be placed on our internet for the information of and to be used by private practitioners who do legal aid work.

In these practical ways we can enhance the professional development and conduct of the practices of private practitioners who undertake legal aid work.

3. Another cost issue which needs to be borne in mind is travel costs. There is a great divergence around the country in how much Commissions pay in travel costs. Like fees, travel costs are generally low, increased irregularly and therefore impose an additional cost burden on private practitioners undertaking legal aid work particularly in rural and regional areas. I mention this issue to simply say that this cost of providing a professional service for legal aid clients should be set at a rate which appropriately compensates private practitioners who undertake travel to provide services to legal aid clients.

4. Another factor to be mentioned is the constraints upon Commissions in providing a full range of legal aid services to comprehensively meet the needs of the economically and socially disadvantaged. In the Commonwealth jurisdiction the ability of Commissions to act independently to meet community need has largely been removed and

Commissions now need to follow Commonwealth priorities and guidelines to grant aid only in matters authorised by our Agreements with the Commonwealth. In areas such as Immigration, Veterans and other areas of civil law Commissions are not allowed to grant aid independently of what is contained in the guidelines, no matter what the needs or merits of an individual case. This is a matter of some concern.

In the State jurisdiction, Commissions are restricted by the amount of funding available, rather than having any prohibition on undertaking certain types of work. Accordingly, some Commissions undertake very little civil law work, others do some civil work and a few, like NSW, have a reasonable but still restricted range of civil law work it can undertake, largely in the "poverty law" area. The ability of Commissions to provide aid in the civil law area is by one means or another greatly restricted and many would see this as not being in the public interest.

Having considered some of the reasons why fees for undertaking legal aid work are so low, perhaps we should now give some consideration to how this position might be changed. The question of appropriate fees is one of a number of difficult issues which would fall to be determined in an ideal system. An "ideal system" might accommodate four things:

1. Legal aid being available to the economically and socially disadvantaged, who come within the means test limits as determined by Statute. In other words the bar, below which you are considered to be financially eligible for aid is set by Statute – the New Zealand system is getting close to this.

2. An agreed range of work (policies) so the Commission can grant aid for a range of matters in Criminal, Family and Civil Law and its funders know

and agree that work for the economically and socially disadvantaged, as defined, will be undertaken by legal practitioners in these areas and paid for by legal aid.

3. A level of fees being set for the work undertaken by the private profession in legal aid matters which, while complying with the statutory prescription of being "less than the ordinary professional cost of the service", would still provide an appropriate level of remuneration to practitioners for the work they undertake. Once established, these fees could be increased annually by some CPI factor or regularly reviewed for continuing relevance.

4. A mechanism whereby Commissions' budgets can be enhanced by reference to the previous three factors and also by reference to the level of work undertaken in a particular year. In other words, if you fix eligibility fees and the range of work undertaken, some care must be taken to provide a means by which commission budgets can be enhanced to accommodate increased workloads so that Commissions are not again forced to reduce services to balance budgets.

I have spent some time explaining the difficulties inherent in trying to obtain dedicated funding from Governments to allow Commissions' to increase fees paid to private practitioners undertaking legal aid work. There have, over the years, been numerous studies and reports on the topic of fees for legal aid work, largely with no result. It is frequently seen, incorrectly I would add, as an avaricious professing seeking to "fatten" itself when scarce public resources should be spent elsewhere.

I would submit there must be a new approach if there is to be change on this issue and other important legal aid issues. This would involve pursuing, in partnership with many other interest groups in society, the "ideal system". This would involve:

1. A statutory means test.

2. An agreed range of policies in criminal, family and civil law.

3. An agreed level of fees payable for legal aid work; and

4. A statutory obligation on Governments to meet the cost of the "ideal system.

I am suggesting an approach which calls for systemic change to the legal aid system in this country, which is able to be supported by a broad range of interest groups, within and outside of Government, and which is aimed at all levels of Government across the nation may receive a better hearing and have greater prospects of success than a simple call by the profession for a significant fee rise. Linking fee justice for the profession with social justice for the economically and socially disadvantaged may be worthy of thought and at least some exploration by all interested parties. To do nothing more than rely on the failed approaches of the past may only doom the system to a slow and painful death.