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The Commonwealth Government's Role in the Australian Federal Legal Aid System

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1. Introduction

This paper provides an overview of the Federal Government's role in the Australian legal aid system. After outlining the development of legal aid in Australia, there is a discussion of the challenges inherent in the administration and delivery of a legal aid system in the Australian federal structure. It then considers the key initiatives that are being implemented by the Federal Government in an effort to address these challenges and ensure that legal aid resources are allocated efficiently and effectively for the benefit of the Australian community. Lastly, the paper touches on future directions for legal aid in Australia from the perspective of the Federal Government.

In its earliest form, legal aid was seen as providing a legal solution to a legal problem. While it may be seen as stating the obvious, it must be said that there will always be a place for the provision of public funds to enable representation by a lawyer in court. It would be a mistake to conclude otherwise. This is certainly the case in criminal matters and also for a range of family and civil matters, such as family violence and intractable family disputes characterised by dysfunctional family units. However, we are seeing an increasing shift towards non-litigious solutions to legal problems, especially in the family and civil areas. Hence legal aid is now more broadly defined.

In Australia, this is certainly the case at the federal level. The Federal Government has focussed on dispute prevention or dispute minimisation primarily in the family law area through the use of a range of mechanisms designed to obtain appropriate

professional help early in the development of a dispute. There is also a much greater range of alternative means of dispute resolution that has become available. The provision of legal aid in the civil and family areas is no longer simply a matter of going to court. Rather the approach to legal problems involves integration of a range of services, not necessarily limited to legal advice and representation. Accordingly, the federal legal aid service delivery arrangements today not only include service providers such as legal aid commissions (LACs) and community legal services, but also a range of other service providers such as mediation organisations, counselling organisations, conciliation and similar services to better meet the needs of the Australian community.

The system of legal aid in Australia involves mixed service delivery, some salaried and some through private practitioners. The private legal profession has played an important and continuing role in providing legal advice and representation to those in need in the community. This work is not only provided through government funded legal aid, where the profession accepts legal work at less than commercial rates, but also through speculative and contingency fee schemes and other initiatives of the law societies, most notably pro bono schemes.

In the broader financial environment, legal aid services are one of many competing priorities provided from taxpayers' funds and funding for legal aid services is therefore finite. This is not a new issue. A brief review of the Parliamentary debates from the 1970s shows similar sentiments expressed[1]. The challenge facing the Australian legal aid system therefore remains to ensure that available resources are used as effectively and efficiently as possible. It is the responsibility of all sectors of the legal community to accept and address this challenge. Legal aid commissions, community legal services, courts, government departments and the legal profession must work together to deliver legal services as effectively, quickly and affordably as possible, to ensure

[1] See, for example, the Ministerial Statement on Legal aid by Senator Murphy (as he then was) where he talked about "the need to avoid the 'bottomless pit' of ever increasing costs of providing legal aid." Senate Hansard, 13 December 1973, p2800.

that every Australian has the opportunity to obtain justice. Legal aid does not operate in isolation and it is only through better integration and coordination of service delivery that meaningful reforms can be achieved.

2. Background and Context to Legal Aid in Australia[2]

Australia is a federal system of government, it having been constituted on 1 January 1901. This year is the centenary year of federation. At the time of federation, the constitutional arrangements put in place gave the Federal Government enumerated heads of power[3] with the balance being available for State and Territory governments. Where there was an area in which both governments were able to legislate, the Constitution provided that the Commonwealth law prevailed to the extent of any inconsistency[4]. The Federal Government in Australia does not have a specific constitutional head of power over legal aid, although it is able to use its appropriation powers[5] to appropriate funds for the identified purposes. It is through this mechanism that it provides legal aid in Australia.

The earliest legal aid scheme established by the Federal Government was a criminal legal aid scheme for criminal matters. Section 69(3) of the *Judiciary Act 1903* provided in its original form that any person "committed for trial for an offence against the laws of the Commonwealth may at any time within fourteen days after committal and before the jury is sworn apply to a Justice in Chambers or to a Judge of the Supreme Court of a State for the appointment of counsel for his defence. If it be found to the satisfaction of the Justice or Judge that such a person is without adequate means

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[2] The following is provided as a short summary of the historical context of legal aid in Australia. It has been extensively recorded in a number of places and for a more complete treatment see, National Legal Aid Advisory Committee, *Legal Aid for the Australian Community,* Australian Government Publishing Service, Canberra, 1990 and Australian Government Commission of inquiry into Poverty, *Legal Aid in Australia: A Report by the Commission for Law and Poverty, Professor Ronald Sackville,* Law and Poverty Series*,* Australian Government Publishing Service, Canberra, 1975.

[3] S.51 of the Constitution.

[4] S.109 of the Constitution.

[5] S.81 of the Constitution provides for a Consolidated Revenue Fund (CRF) and s83 provides that appropriations from CRF must be made by law. The width of this power is beyond the scope of this paper but see *Victoria and Anor v the Commonwealth and Hayden* (The Australian Assistance Plan case) (1975) 134 CLR 338.

to provide defence for himself, and it is desirable in the interests of justice that such an appointment should be made, the Justice or Judge shall certify this to the Attorney-General who may if he thinks fit thereupon cause arrangements to be made for the defence of the accused person. Upon committal the person committed shall be supplied with a copy of this subsection."

In the civil area, the Federal Government confined its area of operation to matters, which were within its constitutional capacity to legislate. Accordingly, the establishment of specialised services for members of the armed forces and their dependents during World War II was the first significant Commonwealth involvement in providing a national legal aid program in the civil area. This scheme saw the establishment of the Legal Service Bureaux in 1942. The Bureaux were initially established administratively but received statutory recognition in the *Re-establishment and Employment Act 1945*. The Bureaux' function was to provide legal advice and assistance to members of the armed forces and their dependants during World War II[6]. From 1947, the *Interim Forces Benefit Act 1947 (Cth)* accorded the Bureaux a post-war role in providing legal services to members and families of the Commonwealth armed forces[7]. The Bureaux continued to provide legal assistance for repatriation, tenancy, war pensions, fair rents and general legal matters until 1973 when the Australian Legal Aid Office assumed its functions.

Throughout this time, various legal aid arrangements were also evolving in the Australian States and Territories. Examples of State government involvement include the establishment of a Public Solicitor and Public Defender Scheme in New South Wales and the Public Defender in Queensland. However, there was extensive involvement by law societies and in South Australia the scheme provided that "no person would be without proper legal assistance if he were deserving of such assistance and would be unable to obtain it without the help of the Societies'

[6] S.105 of the *Re-establishment and Employment Act 1945.*
[7] S.8 of the *Interim Forces Benefit Act 1947.*

members"[8]. The provision of legal assistance was left, almost exclusively, to the private legal profession. Law societies provided assistance through privately organised legal aid committees using the pro bono services of the private profession and funds released from the statutory interest accrued on solicitors' trust accounts. The pro bono work of lawyers was conducted on an ad hoc basis and these activities took place alongside, and quite separately from, the emerging institutionalised Commonwealth legal aid framework.

In the 1970s, the Federal Government adopted a more dominant role in funding legal assistance services. Amid significant controversy over the Commonwealth's constitutional authority to provide a legal aid service, the Federal Government established the Australian Legal Aid Office (ALAO) in 1973. The ALAO provided legal assistance for federal matters which were defined as covering matters arising under Commonwealth law or arising under State or Territory law where the people seeking assistance were persons for whom the Commonwealth had a special responsibility (for example, pensioners, Aborigines, ex-service men and women, and newcomers to Australia)[9]. This arrangement was developed to ensure that there was a firm constitutional foundation for the operations of the ALAO.

In addition to referral of matters to the private legal profession, the ALAO employed salaried lawyers to provide legal services and operated through a network of regional legal aid offices across Australia. This represented a significant development in the delivery of legal aid services. It was also intended that the ALAO would work in close cooperation with community legal and welfare organisations, the private profession, referral services and legal aid schemes that operated at that time within States and Territories.

[8] Sackville Report, op cit para 2.130.
[9] Legal Aid for the Australian community op cit, p29

The Commonwealth Legal Aid Commission Act 1977 established cooperative arrangements between the Federal and State and Territory governments under which legal aid would be provided by independent legal aid commissions to be established under State and Territory legislation. It was envisaged that these State and Territory legal aid commissions would eventually incorporate the activities of the ALAO as well as any existing State or Territory government or Law Society legal aid schemes. With the cessation of the ALAO, a number of functions remained. These residual functions are now administered by the Commonwealth and include a number of statutory and non-statutory financial assistance schemes.

The process of establishing legal aid commissions took a number of years. It commenced in 1976 with the establishment of the Legal Aid Commission of Western Australia and ended in 1990 with the establishment of the Legal Aid Commission of Tasmania.

The cooperative arrangements that were established by the *Commonwealth Legal Aid Commission Act 1977* provided for Commonwealth and State and Territory legal aid funding agreements. From 1 July 1987, under new legal aid agreements, funding for legal aid commissions was provided by Federal and State and Territory governments either on a 55:45 ratio or a 60:40 ratio to deliver legal aid services in accordance with priorities and guidelines set by the commissions[10]. Decisions about how government funds should be used to provide assistance to individuals were left to legal aid commissions and they were responsible for the setting of priorities and guidelines for the provision of legal aid.

The *Commonwealth Legal Aid Commission Act 1977* also established a Commonwealth Legal Aid Commission, however, in 1981, it was subsequently

[10] The jurisdictions funded on a 55:45 basis were NSW, Vic, Qld and ACT. The remaining jurisdictions were funded on a 60:40 basis although they commenced at a higher ratio. For the NT, the Commonwealth share dropped from 95% in 1989-90 to 60% in 1996-97; for SA, the Commonwealth share dropped from 75% in 1989-90 to 60% in 1992-93; for Tas, the Commonwealth share dropped from 86% in 1989-90 to 60% in 1994-95; and for WA, the Commonwealth share dropped from 69% in 1989-90 to 60% in 1991-92.

transformed into the Commonwealth Legal Aid Council.[11] The Council had similar functions but it was primarily to be a body for "keeping under review the need for legal assistance in Australia and making recommendations from time to time to the Attorney-General as to the most effective, economical and desirable means of satisfying that need".[12]

The Commonwealth Legal Aid Council was subsequently replaced by two advisory bodies: National Legal Aid Advisory Committee (NLAAC), all of the members of which were appointed by the responsible Commonwealth Minister;[13] and the National Legal Aid Representative Council (NLARC), the membership of which mainly comprised the Chairperson and Director of each legal aid commission.[14] It was envisaged that these two bodies, together with the newly created Office of Legal Aid Administration,[15] would provide advice to the Federal Government on legal aid policy, including the extent of the need for legal assistance in Australia and the best means of satisfying that need.[16] In 1991, NLARC was abolished, with the membership of NLAAC being increased by one.[17]

In 1994, the Access to Justice Advisory Committee released a major report on the justice system generally. In commenting on the legal aid system, criticism was made as to whether the Commonwealth had been sufficiently active in ensuring its interests had been satisfied[18]. However, the Committee expressly stated that it "did not mean to imply that the Commonwealth should seek to terminate the cooperative arrangements

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[11] *Commonwealth Legal Aid Commission Amendment Act 1981.*
[12] The Hon P D Durack, Attorney-General, Second Reading Speech, *Parliamentary Debates*, Senate, 14 May 1981, at page 1975.
[13] *Commonwealth Legal Aid Act 1977*, section 8, as amended by the *Commonwealth Legal Aid Amendment Act 1988*.
[14] *Commonwealth Legal Aid Act 1977*, section 5, as amended by the *Commonwealth Legal Aid Amendment Act 1988*.
[15] This organisation has changed its name twice and is now called Legal Aid and Family Services.
[16] *Commonwealth Legal Aid Act 1977*, sections 6 and 9, as amended by the *Commonwealth Legal Aid Amendment Act 1988*. Note that both bodies had the same terms of reference.
[17] *Law and Justice Legislation Amendment Act 1991*.
[18] Access to Justice Advisory Committee, *Access to Justice: An Action Plan,* Commonwealth of Australia, 1994, p238.

that have characterised the delivery of legal aid services over recent years"[19]. The report went on to state:

> [T]hat the Commonwealth should endeavour, in consultation with the LACs, to develop a range of national standards. We reiterate that the funding agreements with the States contemplate that the Commonwealth will monitor the performance of LACs and, in conjunction with the States, approve legal aid programs. We believe that the Commonwealth has and should have a clear responsibility, as the major funder of legal aid, to ensure that legal aid provision operates efficiently and effectively and in accordance with the objective of national equity. It is relevant, in this context, to note that the Commonwealth funds LACs in excess of the proportion of legal aid services that relate to "federal matters": we have been advised that, in the 1992-93 financial year, the Commonwealth provided 57% of government funding to LACs but only 19% of matters handled by LACs involved federal issues.[20]

The response to this report by the Federal Government saw the largest funding commitment to legal aid for many years[21]. However, legal aid and the responsibility of a government towards it is a matter of definition. One government may define its role in one way and another may see it differently. The comments made by the Access to Justice Advisory Committee were also taken up by the Federal Government in 1996 when it re-defined its role in the legal aid system.

One of the long-standing tensions in the legal aid system is the competition for funds between different areas of law. Should funds be provided to criminal matters in preference to, say, family matters? Under the arrangements in place to 1996 this was resolved by each legal aid commission. Faced with the choice of funding criminal matters where liberty was at stake, the resolution often favoured the funding of criminal matters and criticism was directed towards the legal aid system as having a

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[19] ibid

[20] ibid. The information was provided by the Attorney-General's Department, although it was recognised that in this sense, "federal issues" means issues arising under Commonwealth law. This disparity is not as great if "federal matters", such as cases arising under State law that involve recent migrants or social security recipients, are regarded as a Commonwealth responsibility.

[21] Attorney-General's Department, *Justice Statement,* Commonwealth of Australia, 1995, pp97-116.

gender bias. The decision in *Dietrich v The Queen*[22] placed added pressure on legal aid commissions to ensure criminal matters were funded, leading to an increasing share of the available legal aid funds being devoted to criminal matters. However, pressure mounted for increased funding also to be devoted towards the family and civil areas[23].

While the Federal Government had some mechanisms to direct legal aid commissions to spend more funds on family law matters, in 1996 it determined a different course of action. It re-defined its sphere of responsibility to provide funding to matters arising under Commonwealth law. This was enshrined in new legal aid agreements that were introduced from July 1997. Accordingly, State and Territory governments were expected to funds matters arising under State and Territory law.

The 1997 agreements saw the commencement of a move to new purchaser-provider style funding agreements for the provision of Commonwealth legal aid in each State and Territory. In this type of arrangement the purchaser determines which services are required and the provider has responsibility for delivering them. The Commonwealth is responsible for determining the priorities, guidelines and accountability mechanisms that should apply to the use of its funds and the State and Territory governments are responsible for the expenditure of funds provided by those governments. Commissions are responsible for managing those funds to provide efficient and effective legal aid services within defined parameters. These parameters for the Federal Government operate to ensure increased consistency and equity in the delivery of legal aid in Commonwealth matters across all jurisdictions.

While the division between purchaser and provider is not pure (commissions provide services and also purchase services from the private profession) the critical issue for the Commonwealth is to set the policies and priorities to be applied to the provision of

[22] (1992) 177 CLR 292. This permitted a stay of prosecution in circumstances where a defendant was charged with a serious offence and was unable to obtain representation through no fault of their own. The case is discussed in greater detail below at pp 16-17.

[23] This was exacerbated by court decisions such as Re K [citation] which expanded the role and categories in which a separate legal representative could be appointed for the child in family law proceedings.

legal aid for Commonwealth matters. In addition, the relationship between the Commonwealth and legal aid commissions is not strictly commercial. It is based on a shared understanding of each other's roles and responsibilities, a shared purpose to implement Federal Government policy and a shared goal to ensure access to justice through efficient, effective and economic legal services.

The Federal Government is of the view that the purchaser-provider arrangements operate effectively to ensure its priorities in the legal aid area are met[24]. Provided the Commonwealth has a mechanism whereby it can set the policies and priorities to be applied to the provision of legal aid for Commonwealth matters, it has no preference for the form that the agreement takes. The agreements could either be a Commonwealth-State/Territory agreement or a Commonwealth-Commission agreement. Some legal aid commissions now operate under a similar quasi-contractual arrangement with their respective State and Territory governments.

The purchaser-provider model of service delivery allows the Commonwealth to set the policies and priorities to be applied to the provision of legal aid for Commonwealth matters. As the Commonwealth becomes a more informed purchaser of legal aid services it is likely that it will move towards more specificity in terms of the kinds of services it purchases. This will in turn permit the Commonwealth to better focus its key resources to ensure a coordinated and cohesive national system of legal aid service delivery.

3. Broader Commonwealth Legal Aid System

Apart from providing legal assistance through legal aid commissions the Commonwealth administers a number of legal financial assistance schemes and also funds community legal services throughout Australia.

[24] Daryl Wiliams AM QC MP, *Legal Aid Forum - Towards 2010, Keynote Address (21 April 1999).*

Community Legal Services

Alongside the development of a more formal Federal Government administered legal aid system, the first community legal services (CLS) in Australia were established in the early 1970's. They developed out of concern about the inadequacy of the legal system to address the needs of those disadvantaged people in their local communities who did not have reasonable access to legal services. They are non-government, community managed, non-profit services which provide a range of assistance on legal and related matters to people on low incomes and those with special needs. They have grown to become a key component of Australia's legal aid system. They provide a distinctive and effective form of service delivery which complements the services provided by legal aid commissions and the private legal profession.

CLS usually operate from shop front premises and provide legal advice, information, minor assistance, community legal education and undertake law reform activities. The services make extensive use of volunteers and pro bono schemes operated by the private legal profession. Many services offer general legal assistance on, for example, family and civil matters, while some services offer specialised assistance in areas such as social security issues (welfare rights), disability discrimination, child support, youth advocacy and women's issues. As well as providing face-to-face services, many CLS operate FREECALL™ telephone advice lines and/or websites.

The Commonwealth Community Legal Services Program (CCLSP) provides financial and other support to CLS as part of the Commonwealth's broader commitment to achieving equitable and improved access to legal services in the community. Legal services are currently purchased by the Commonwealth on behalf of socio-economically disadvantaged Australians from 126 community legal service organisations throughout Australia. State and Territory legal aid commissions and the South Australian Attorney-General's Department play an important role in the administration of funds under the CCLSP. Oversight of the day to day operation of the centres and monitoring of service delivery is the responsibility of State and Territory

level program managers employed within commissions and the South Australian Attorney-General's Department. Centres in the Northern Territory and Australian Capital Territory are directly funded and administered by the Commonwealth. Funding sources for CLS vary, with some centres funded entirely by the Commonwealth, some receiving only State and Territory government grants, some receiving grants from both sources and others receiving no government funding. Most services also attract some funds from alternative sources such as law societies, local government, charitable institutions or donations.

Financial Assistance Schemes

These schemes exist to provide legal aid in cases where the circumstances constitute special cases of Commonwealth interest and where aid is not generally available from legal aid commissions. The schemes are administered direct by the Attorney-General's Department. Some of the statutory schemes now include matters arising under certain provisions of the *Industrial Relations Act 1988*, the *Freedom of Information Act 1982*, and the *Native Title Act 1993*. The non-statutory schemes include matters involving overseas custody (child removal), public interest and test cases. Applicants under both the statutory and non-statutory schemes are subject to guidelines which usually include means and merits tests.

4. Challenges in the Australian Legal Aid System

In managing the arrangements for delivery of legal aid the Commonwealth is faced with a number of challenges, many of which are presented by the federal system of governance. Two challenges stand out as being the most critical, these being national consistency to ensure equity in the delivery of legal aid services and improved integration of legal aid into the broader Australian family and criminal law systems.

It has to be recognised that the legal aid commissions are in a difficult position as the provider of services being funded by different levels of government, with perhaps different objectives and priorities. The concern on the part of the legal aid

commissions is efficient and effective service delivery. However, this may become complicated where they are subject to directions and controls from outside their institutions.

National Consistency

One challenge facing the Commonwealth is to ensure that the provision of legal aid is consistent across all States and Territories, in relation to Commonwealth law matters. In attempting to achieve this goal, the Commonwealth has focussed on equity (accessibility, and eligibility), quality and accountability considerations.

A prime objective of the Commonwealth legal aid program is the achievement of an equitable and accessible system of federal law and justice. This responsibility is not confined by geographic boundaries: all members of the Australian community are to be treated equally in terms of accessibility, regardless of where they live. Equity demands that a person in one jurisdiction has equal access to legal assistance as people in other jurisdictions. The Commonwealth has attempted to achieve equity through new Commonwealth legal aid guidelines and through its new funding distribution method. In addition, the Commonwealth has ensured consistency in eligibility criteria for the provision of legal aid for Commonwealth matters. Eligibility for assistance, a direct responsibility of each legal aid commissions on a case by case basis, is assessed through a test of means, the applicant's financial circumstances, and a test of merits, the reasonableness of the applicant's matter.

The Commonwealth has also identified the need for proper lines of accountability between governments and service providers as an important goal. To this end, legal aid agreements incorporate a revised performance information collection, monitoring and reporting framework. This includes financial information and a requirement that commissions report on the quantity and quality of services provided. At this stage, our quality measures focus on adherence to practice standards and the timeliness of service delivery. Other possible quality measures should also be explored. I note that quality

is one of the key themes of this conference and I look forward to hearing what other jurisdictions are doing in this regard.

Integration into the Broader Legal System

The second challenge to be met by the Commonwealth is to address the lack of integration of legal aid within the broader legal system. The Commonwealth recognises that legal aid is just one part of the much larger system of justice and that neither legal aid nor other parts of the system operate in isolation. Rather, they are connected in a myriad of ways and the challenge is to encourage greater interaction and cooperation between all the players in the system. Not only does this promote a better solution for clients but it also ensures efficiency in service provision by avoiding duplication and fragmentation of resources.

Family Law System

Families facing separation inevitably need to draw on a range of support services. In Australia these include a number of government agencies such as Centrelink and the Child Support Agency, the Family Court, legal aid commissions, State, Territory and local government services, community organisations, medical practitioners, lawyers and private counsellors. With such a wide range of services available, a more coordinated approach was needed[25] to help families faced with the distress of family separation to be able to access appropriate services and support.

An effective, client-centred family law system would provide early, integrated information services, put the family, rather than the law, at the centre of decision making, and build collaboration and cooperation across service providers. It would focus on early intervention and encourage alternative dispute resolution. Increasing the alternatives to litigation, for families undergoing relationship breakdown and distress, also delivers quicker, more cost-effective resolutions of family law disputes

[25] Joint press release of 17 May 2000 of the Attorney-General, the Hon Daryl Williams AM QC MP and the then Minister for Family and Community Services, Senator the Hon Jocelyn Newman.

and assists in alleviating the need for, and demands upon, the Family Court litigation services.

The key goals for the family law system are expressed in s. 43 of the *Family Law Act 1975*:

- to preserve the institution of marriage;
- to strengthen and support family life;
- to promote the interests of children;
- to encourage parental responsibility; and
- to provide protection from abuse and violence.

A range of activities has been implemented, or are in the process of being implemented, in order to enhance the functioning of the family law system. These include:

- the establishment of a high level Family Law Pathways Advisory Group to map the pathways followed by separated/separating families and advise on means to ensure that the most appropriate form of assistance is provided at the appropriate time;
- the establishment of a free national telephone hotline and Internet service with information about where to go for legal information and advice in the areas of family law and child support;
- strategies to promote and enhance PDR services, family law regulations, PDR quality standards and qualifications; and
- the establishment of a Federal Magistrates Service, to deal primarily with routine family law matters.

Criminal Law System

The criminal law system poses some unique challenges for Commonwealth legal aid service delivery. Under Australia's federal system of government, criminal law enforcement is primarily a matter for the States and Territories. The States and Territories are, in general, responsible for traditional categories of offence such as

murder, sexual assault and theft. The Commonwealth has no explicit or direct power to legislate with respect to criminal law under the Constitution. It can only enact criminal laws where some independent head of power is involved (eg. taxation, external affairs).

Nonetheless, the Commonwealth has taken on significant criminal justice responsibilities in certain areas where it has legislative authority under the Constitution. For example, offences relating to 'child sex tourism' by Australians overseas, drug import/export offences, and offences relating to tax evasion, have been enacted under Commonwealth law. The Commonwealth also participates in Commonwealth/State/Territory legislative schemes to achieve national regulation in areas such as crimes at sea and environmental and corporate regulation.

For the most part, the Commonwealth relies on the laws of the State or Territory in which a person is subject to trial, to regulate trial procedures and evidential rules in relation to the prosecution of a Commonwealth offence. This is provided for under section 68 of the *Judiciary Act 1903*. There are exceptions, for example some classes of Commonwealth offence are subject to trial in the Federal Court and hence the terms of the Commonwealth's own *Evidence Act 1995*. One overarching requirement in Commonwealth cases concerns the right to trial by jury in indictable matters under section 80 of the *Constitution*.

Reliance on local (State and Territory) procedures has the benefit that State and Territory courts and legal counsel are more likely to be familiar with the laws in question and not fall into legal error. It also simplifies matters in the common situation where a person is prosecuted for both Commonwealth and State or Territory offences arising out of a single course of criminal conduct (eg. drug trafficking).

However, it does mean that an alleged Commonwealth offender may be subject to somewhat different rules of criminal procedure and evidence, depending on the State

or Territory in which they are tried. In this regard, it should be noted that the Commonwealth Attorney-General has been actively involved in promoting the 'Criminal Trial Reform' process.

Expensive Commonwealth Criminal Cases

The 1992 ruling of the High Court of Australia in *Dietrich v The Queen*[26] has had profound implications for the legal aid system in Australia. Dietrich had applied to the Victorian Legal Aid Commission for legal assistance to defend charges relating to serious criminal drug offences. Assistance was refused to defend the charges and was granted only for representation for a plea of guilty. An appeal to a legal aid review committee was unsuccessful. All avenues for legal assistance were exhausted before the trial and Dietrich himself was without the means or money to secure that representation. He appeared unrepresented, and was found guilty by a jury of importing not less than a trafficable quantity of heroin and sentenced to seven years imprisonment. He was acquitted of a charge of possession of a prohibited import, namely heroin.

An appeal to the Full Court of the Supreme Court of Victoria was unsuccessful and Dietrich sought special leave to appeal to the High Court on the ground that he should not have been required to stand trial without legal representation. A majority of the High Court (5-2) were of the view that special leave to appeal should be granted, the appeal allowed, the conviction set aside and a new trial ordered. The dissenting judges concluded that special leave to appeal should be granted but that the appeal should be dismissed.

This ruling established that a person cannot be convicted of a serious offence if he or she is not legally represented through no fault of their own. In this situation the court may order a stay of proceedings until the defendant is provided with the legal representation necessary for a fair trial. This means that a defendant might avoid

[26] (1992)177 CLR 292.

prosecution for these serious offences unless they are able to obtain legal representation at public expense.

In order to deal with the potential for stays of Commonwealth criminal prosecutions and ensure that the cost of a serious criminal matter does not impact on the capacity of legal aid commissions to maintain assistance to others in need, the Commonwealth has established an Expensive Commonwealth Criminal Cases Fund[27]. This fund is primarily intended to assist legal aid commissions in smaller States and Territories, where a single Commonwealth criminal case can consume up to 10 per cent of a commission's annual budget. Expensive Commonwealth cases for which legal aid is sought are typically complex corporations fraud matters or drug importation cases which have the potential to drain vital legal aid resources.

5. Current Initiatives and Reforms

Family Law Pathways

The Family Law Pathways initiative aims to find ways to create a social coalition of all individuals, families, business, government and charitable and welfare organisations involved in the family law system,[28] and map 'pathways' used by separating families to identify their characteristics, circumstances and outcomes. The initiative also aims to consider how best to meet the needs of people who feel aggrieved by their family situation and frustrated by the family law system in order to deliver practical options to channel families into the most appropriate methods of dispute resolution as early as possible.[29]

This initiative is being progressed through an advisory group that comprises representatives from academia, legal aid, family relationships and other community service providers, the Family Court and magistrates courts and the wider community,

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[27] Commonwealth Priorities and Guidelines, Guideline 8.
[28] Daryl Wiliams AM QC MP, *Legal Aid Forum - Towards 2010, Keynote Address (21 April 1999).*- op cit
[29] ibid

in addition to key government agencies.[30] The group's report is currently being finalised and will be presented to the Federal Government for consideration shortly.

Law By Telecommunications

Prevention of disputes is a high priority of the Commonwealth. Many legal problems could be avoided or minimised if people had sufficient information to make timely and informed decisions about their actions. Early intervention can avert further complications and ultimately reduce distress, cost and the extent of legal problems.

A new Commonwealth service, the Law by Telecommunications (LBT) initiative, is a free national telephone hotline and Internet service that contains information about where to go for legal information and advice, particularly about family law, which will commence operation shortly. This initiative will provide a national gateway to legal information and assistance, such as counselling, mediation and other forms of dispute resolution, primarily for people dealing with the family law system. It will also provide a referral service for people living in rural, regional and remote locations who do not have access to existing telephone legal advice services.

The LBT initiative has been designed to be the first port of call for people seeking information on, or gaining access to, the various agencies and organisations assisting families to minimise conflict, manage change more successfully and meet new obligations and commitments. It will assist people in finding the most appropriate pathway to assistance as early as possible and promote improved accessibility, targeting and coordination of information within the family system.

The LBT call centre will directly assist all callers seeking information on family law, primary dispute resolution services or child support matters. In addition, rural and remote callers requiring legal advice or general legal information, who do not

[30] The full list of members of the group can be accessed at the date of writing from: http://law.gov.au/aghome/commaff/fllad/familylawpathways/Welcome.html#members

currently have access to these services, will be introduced and directly connected to an appropriate service provider. Legal aid commissions and community legal services will play a vital role in the provision of this service.

Primary Dispute Resolution

There is wide community concern that adversarial processes can be destructive, both financially and emotionally, to families and to children in particular. Increasingly, the Commonwealth has been looking at alternative strategies for helping people resolve their family law disputes without going to court.

The *Family Law Reform Act 1995* provided, as one of its objectives, encouragement of people to use PDR mechanisms (such as counselling, mediation, arbitration or other means of conciliation or reconciliation), rather than litigation, to deal with issues arising on the breakdown of marriage[31]. The use of the term *primary* dispute resolution, as opposed to alternative dispute resolution, was designed to convey the message that these methods are best considered first in family law disputes rather than proceeding directly to litigation. PDR is also seen as including many other processes, such as conferencing (in legal aid commissions), expert appraisal and solicitor-led negotiations.

Encouragement of PDR is, therefore, a desirable public policy objective as it should produce more cost effective and workable outcomes than litigation.

The Federal Government, through the Attorney-General's Department, is currently implementing a strategy to promote and deliver PDR in the family law field. The PDR strategy comprises 4 inter-related elements:

- effective information and communication about PDR;

[31] Joint meeting between the Family Services Council and the Family Law Council on Primary Dispute Resolution Services in Australia, 14 May 1998.

- improved dispute management practices to build the awareness, knowledge and skills of professionals within the family law system;
- integrated and collaborative approaches for the early and effective use of PDR in the community though partnership projects at the local and regional level; and
- greater availability of PDR services.

PDR in Legal Aid Commissions

The Commonwealth priorities contained in legal aid agreements emphasise the importance of assistance directed at the early resolution of a matter through PDR processes and recognise the need for priority to be given to resolving family law matters through non-litigious processes. Commissions must consider resolving family law matters by referring an applicant for legal assistance to a PDR process, unless it is clearly inappropriate.

A Commonwealth-funded national evaluation of existing PDR services delivered by legal aid commissions was recently undertaken. The evaluation identified gaps in existing service provision as well as areas of concern for legal aid commissions to address in the context of improving service delivery.

As part of its commitment to greater availability of PDR services, and following on from the national evaluation, the Commonwealth has provided additional funding to commissions to expand and enhance their existing services. In a number of jurisdictions, new and specialised approaches to delivering these services will be implemented. These include a pilot program for indigenous clients in New South Wales and property arbitration schemes in Queensland and the ACT. Property arbitration represents a new approach to dealing with disputes that are often complex and time consuming. In addition, new approaches to addressing issues surrounding intake and screening procedures where domestic violence is involved are also being implemented. These initiatives will explore the effectiveness of new approaches for the conduct of PDR programs and inform good practice in this area.

In addition, the Commonwealth is providing funding for the implementation of a national strategy for PDR in legal aid commissions. This strategy will assist in developing national consistency, particularly in relation to intake and screening procedures and training for those involved in legal aid conferencing programs.

Federal Magistrates Service and Family Court Case Management Practices

For those matters that do require a litigated solution, obviously the concern is to ensure that legal aid funds are used as effectively as possible. Streamlined court procedures are one means of achieving this. The Federal Magistrates Service was established in July 2000 to provide a cheaper, faster and simpler method of dealing with less complex civil and family law matters. In the family law jurisdiction, it will deal mostly with the many less complex cases that are currently dealt with in the Family Court thus allowing judges to deal with more complex cases.

The Family Court has recently completed a review of its case management procedures and is moving to implement revised procedures that incorporate both a resolution and a determination phase. The legal aid guidelines incorporate a stage of matter approach to reflect the Court's case management procedures and the guidelines will be amended, as necessary, to reflect case management practice.

6. Key Commonwealth Initiatives

In managing the legal aid program, the aim has been to achieve accountability, transparency of decisions making and national consistency in the operation of national programs. In particular the new legal aid agreements for 2000-2004 distribute legal funding on a more objective basis than previous years and incorporate revised performance information collection, monitoring and reporting framework, including financial and quantity information.

Distribution of Commonwealth Legal Aid Funding

The key initiative undertaken at the federal level was to ensure that federal funding for legal aid services across Australia are distributed on an objective basis. This was called the Legal Assistance Needs Study project and it sought to establish an empirical basis for the distribution of legal aid funding.

Prior to the 2000-04 round of legal aid funding agreements, the distribution of Commonwealth funds to legal aid commissions was based on historical arrangements that had been carried over from the old Australian Legal Aid Office days. Through the development of a distributive funding model, the Commonwealth sought to distribute legal aid funding in a more objective manner.

The impetus for this project came from the Justice Statement in 1995[32]. When the new Independent consultants were engaged to undertake the necessary research into legal aid needs and to develop a distribution model.

The central goal in developing such a model was to take account of various demographic differences between States and Territories that had an effect on the demand for, and the capacity of commissions to deliver services. For example, the cost of delivering legal aid services in States and Territories whose populations are fairly dispersed are greater than the costs of delivering services to more densely populated areas. On the other hand, however, the cost of providing a service in the central business district of a city, can often be quite high due to, for example, the higher rental rates and other costs. Other differences relate to predictors of demand such as income levels, the relative rates of divorces involving children, unemployment rates and States and Territories relative share of the Australian population.

[32] Access to Justice Advisory Committee, *Access to Justice: An Action Plan,* Commonwealth of Australia, 1994.

Identifying these variations was, in itself, a difficult task. However, for the model to achieve the goal of greater equity, it also had to take account of the relative differences between each State and Territory for each of these variables.

The model that was developed, known as the Legal Aid Needs (LAN) Model, incorporated an analysis of relevant demographics, and risk and cost factors. This approach was modelled on that taken by the Commonwealth Grants Commission (CGC) in determining its general revenue grants relativities and was used for the distribution of funding for the 2000-04 round of legal aid agreements.

Although the new method of distributing funding is, by far, more equitable than previous arrangements, it is by no means perfect. Work has already commenced on refining the model for the purposes of the 2004-2008 funding round. Nevertheless, the new method of distributing legal aid funding is more equitable than ever before and thus represents a major advance in the history of legal aid funding arrangements.

The Legal Aid Needs Study also incorporated a range of qualitative and quantitative research including discussions with key stakeholders, client focus groups and a community survey.

The community telephone survey found that:

- 23% of low-income people experience a need for legal assistance in a Commonwealth matter;
- overall, 3 out of 4 of these people actually seek assistance; 1/3 of those go to legal aid, although confidence is higher in the private profession;
- 1 in 5 of those who do not seek assistance believe they would not be eligible for legal aid; and
- 13% did not know about legal aid generally, with the level of awareness about community legal services being particularly low.

Clearly there is a need for better information about the services that are available. The LBT initiative scheduled to commence shortly is one means of ensuring the availability of this information.

Commonwealth Data Requirements

Under the legal aid agreements commissions are required to provide the Commonwealth with specific data related to the services they provide. The Commonwealth uses this information to monitor the performance of the commissions against requirements contained in the purchaser/provider agreements.

Data is also used to meet other Federal Government obligations such as monitoring the impact of programs and policy decisions on the legal aid environment. Despite a considerable amount of effort, there has been, over a long period, a problem in achieving consistent data collection across service providers. Considerable time and energy is spent on dealing with data discrepancies and definitional issues, time and energy which would be better devoted to facilitating service delivery.

The Commonwealth and National Legal Aid (the representative body of legal aid commissions in Australia) have, for a number of years, been working to ensure adherence to a set of national definitions and improving the collection of nationally consistent data. One of the key reforms arising from this process, in recent times, has been a move to consideration of a uniform set of national codes.

Means Testing and Eligibility Criteria

The availability of mainstream legal aid services, which result in a grant of assistance to pursue either primary dispute resolution or litigation has long been subject to conditions of eligibility in relation to a client's means. There are also other conditions that limit the types of assistance which will be provided, and who is eligible to receive the assistance.

In the less regulated CLS sector, however, the issue has only recently emerged as governments pursue greater accountability in relation to how funds are spent and more assurance that the right outcomes are being achieved with the taxpayers' funds they provide.

The issues of client eligibility and client contributions towards the cost of services were recently considered in the context of joint Commonwealth and State reviews into the CLS programs in Queensland, South Australia and Victoria. The reviews highlighted the need for a consistent approach for access to, and contributions towards, government funded CLS across Australia to avoid the possibility of inequity in service, access and availability.

The Commonwealth considers that it has a primary role in delivering consistency in service in the community legal sector. All CLS which deliver services purchased under the CCLSP are required to enter into a service agreement with the Commonwealth which sets out the conditions of funding and required outputs.

The Commonwealth has also issued the CCLSP Guidelines for CLS. The overarching purpose of the CCLSP has been defined in the Guidelines as delivering CLS to "*the disadvantaged*"[33] in the Australian community.

The current guidelines describe a range of personal circumstances which may lead a community legal service to decide whether or not to provide some form of assistance to a potential client. The reviews in South Australia and Victoria both found that CLS, as well as following the guiding principles outlined in the Program Guidelines, have developed a number of localised procedures for screening clients which were consistent with those principles.

There are four key issues affecting the value of a national client eligibility model:

[33] Program Guidelines, Commonwealth Community Legal Service Program, Child Support Scheme Legal Services Program, Commonwealth Community Environmental Legal Program June 1998.

1. how to resolve the tension between the Commonwealth's accountability for the expenditure of public funds and the autonomy of community based organisations;

2. how to determine who falls within the meaning of socio-economically disadvantaged;

3. what, if any, types of services should be deemed out of scope; and

4. how to overcome the problems posed by resource limitations within the community legal sector.

Commonwealth vs CLS Autonomy

The Commonwealth, in meeting its accountability obligations for the expenditure of public funds, must demonstrate that it is meeting that obligation by ensuring that there is an appropriate accountability framework in place for CLS which use public funds to provide legal services.

CLS are autonomous organisations which are constituted under the appropriate State or Territory incorporated body Acts and are managed by volunteer management committees.

Any proposed eligibility model must therefore remain flexible enough to incorporate the Commonwealth's overarching accountability requirement and maintain service autonomy, as far as this is practicable, under a public accountability regime.

The meaning of socio-economically disadvantaged

The current Program Guidelines point to several broad factors which help the CLS to identify who the Commonwealth considers might reasonably be categorised as disadvantaged. Examples of these factors are eligibility for health care cards or other social security entitlements, cultural and linguistic background, physical or intellectual disability.

The concept of 'disadvantage' needs to be transferred into tangible properties that can be referred to when considering whether a client may be eligible for community legal services. The concept needs to take into account both low income, other significant barriers to accessing justice and such things as relevant legislation.

Services which are out of scope

The issue of whether or not there are certain types of legal matters which should not ordinarily be dealt with by CLS, either because they are freely available elsewhere or they are too resource intensive to justify being undertaken needs to be addressed.

Resource limitations faced by the sector

An overriding factor in the consideration of client eligibility for community legal services is the resource limitations in the sector. There are only finite resources available to fund the sector and many new measures would require additional administrative support. Measures such as means and asset testing would need to be relatively simple, otherwise they would absorb considerable staff resources.

There needs to be a process of evaluation as to whether the benefits achieved from implementing more defined eligibility criteria justify the resource implications.

Current position

The Commonwealth will continue to consult with key stakeholders about the issue of client eligibility. The commitment that they have to ensuring that socio-economically disadvantaged members of the community have ready access to legal resources, combined with its accountability obligations for the expenditure of public funds, means that the need to screen clients through eligibility testing for CLS, in the Federal Government's view, is unavoidable. To ensure that there is consistency in service across Australia it may prove essential that a national framework is established.

Quality Standards

Diversity of services

The concept of CLS covers a wide range of organisations with virtually each service varying in some way with regard to organisational and management structures and focus of work priorities. The Commonwealth supports a large number of generalist services and a diverse range of specialist activities, including services for women, services which provide assistance in relation to the Commonwealth Child Support Scheme legislation, disability discrimination legislation and environmental matters.

Some CLS are funded only through the Commonwealth program, some receive State or Territory and Commonwealth funds, many also receive funding from other sources and/or other government funding programs. The diversity in funding sources and level of funding adds a further dimension to the challenge of obtaining consistent information in relation to CLS operations.

These issues are further complicated by the range of geographical locations from remote to metropolitan services and the large range in the size of the volunteer base which underpins a lot of CLS activity.

Most services were established independently in response to community need. However, Commonwealth funding initiatives in recent years has led to a number being contracted through a tender process in high need areas.

Quality assurance

From this diversity the Commonwealth endeavours to collect relatively standard information to enable it to monitor and assess the performance of the program as a whole.

CLS utilise the Commonwealth developed national information system (NIS) to provide information on their activities.

In 1999/2000 CLS undertook 153,271 face-to-face, telephone and mail advice

activities. Cases completed from casework in same period were 30,918.

However, cases can be defined as any ongoing assistance and may just comprise delivery of 2 advice sessions on the same matter. Perhaps more indicative is the number of cases which included court representation for that financial year, which was 2,280.

Other core service activities undertaken by CLS were:

- provision of information (94,657);
- community legal education (2050 projects); and
- law reform projects (495).

Independence

CLS cannot be considered to be quasi government organisations established simply to deliver government services. A large number of CLS receive funding from sources other than just Commonwealth or State or Territory funds provided under the general program. The management of CLS is through community based management committees. Many CLCs make use of volunteers and see this as intrinsic to operation as a community organisation. Services tend to operate from a philosophical opposition to any kind of direct control of their activities by government funding bodies.

Service quality

Notwithstanding these concerns, the preparedness of governments to support the activities of organisations is increasingly dependent on the capacity of those organisations to demonstrate value for money. Under current arrangements this is achieved through service agreements with each service. Each agreement includes requirements to ensure financial accountability as well as performance information. Current service agreements are for 12 months, but there has been general support at government level and among services for a move to a longer-term arrangement to introduce greater certainty into the budgeting processes of services. The move to a longer term service agreement, from a funder or purchaser's perspective, also means a

need for greater certainty over the delivery of the services being paid for. In order to improve the capacity of agreements to ensure at least a minimum standard and approach to service the Commonwealth initiated a project for the development of service standards and performance indicators (SSPI) for CLS.

The SSPI project commenced in 1998 and concluded in December 2000. It involved extensive discussion between practitioners, service managers and volunteers, together with the Commonwealth Attorney-General's Department, State and Territory managers, and the consultants, Community Link Australia.

The completion of the project has seen a total of 9 standards developed covering information and referral, advice, casework, CLE, law reform & legal policy, accessibility, organisational management, management of information and data, assessing client satisfaction and complaints. Final agreement on the standards is still to be settled with the sector. Once that has been achieved compliance with standards will become a requirement under new 3-year service agreements commencing 1 July 2002.

In addition to that a set of 3 performance indicators developed – efficiency, effectiveness and accountability. The sector has not been prepared to endorse the indicators as meaningful performance measures, but has recognised that they will be introduced. The Commonwealth sees the indicators as providing a means of monitoring general performance of the program but there is no intention to link performance with funding and no intention to move to a unit costing approach to the delivery of services.

The standards are designed to provide an assurance that community legal service provision across Australia meets minimum quality standards. The Federal Government's interest arises from its role as the purchaser of services and its accountability to the community for public funds. Compliance with national service

standards will demonstrate that community legal service providers meet reasonable operating standards, providing assurance to clients about the quality of services they receive.

Current position

Currently there is a debate about compliance based or foundational quality versus aspirational quality (best practice issues) which has been put forward by services. The general approach of the participants might be summed up in the following quotes.

> "…compliance with foundational standards offers confidence regarding a 'capacity to operate'; but it does not offer 'true quality' or a framework for 'best practice'. The phrase 'true quality' reflects the higher tier of aspirational quality, and 'best practice' is a phrase associated with demonstrating specific instances of 'true quality." (SSPI Final Report – Community Link Australia)

> "…it is our view that if the SSPI project had prioritised evaluation and aspirational quality as the core focus of the project, auditing of compliance with service standards would have been unnecessary. That is, if well resourced and thoroughly implemented evaluations demonstrated that CLCs deliver high quality services to their clients, observance of appropriate service standards could be assumed." (National Association of Community Legal Centres – March 2000)

At the Commonwealth level, it is recognised that there are limitations of a standards based model in the pursuit of best practice or continuous improvement in service delivery. Notwithstanding these limitations, at this point in the development of the program the introduction of minimum service standards will provide the necessary guarantees to government of general consistency and quality in the services that are delivered through the program.

National Fees Scale for Legal Aid

National consistency is also a consideration with respect to the fees paid to lawyers across Australia for the provision of legal aid in Commonwealth matters. While the Commonwealth operates a national legal aid program, service delivery is effected through a State and Territory structure. Accordingly, the fees paid for Commonwealth legal aid matters can vary quite markedly across Australia, for example in criminal law rates can vary from $122 per hour in the Northern Territory to $86 per hour in Tasmania. Even in the family law area, where there is federal legislation and a federal court structure, fees vary considerably. While these rates can be explained in terms of the separately evolving fee scales in the various States and Territories, the inconsistencies are considerable.

In December 1999, the Commonwealth Attorney-General announced his intention to improve the fees paid to the private profession who undertake legal aid work and thereby encourage larger numbers of experienced lawyers to undertake legal aid cases.

The Commonwealth does not have the luxury of a clear field in which to set fees, instead it has to work within the framework of existing historically based differences to achieve a consistent approach. To assist in developing the new scale the Attorney-General's Department recently circulated a Discussion Paper to key stakeholders. Responses to the paper have consistently recommended that the new fee scale be developed on the basis of a uniform methodology, which would not necessarily result in the same dollar amount being paid in each jurisdiction.

7. Conclusion

In order to improve the delivery of legal aid to the Australian community the Federal Government has shifted from traditional litigation centred approaches to resolve legal problems. Approaches that work towards dispute prevention through early intervention and alternative means of dispute prevention are being employed

increasingly. In addition, the Federal Government has focussed on integrating the broader legal system to ensure that services target the individual needs of the people in the community and are coordinated to achieve both equality of access to justice for all Australians and efficient and effective service delivery.

In the legal aid area specifically, national equity in service delivery arrangements is achieved through purchaser-provider mechanisms that enable the Commonwealth to determine the priorities, guidelines and reporting requirements that should apply to the use of its funds.

The 2000 - 2004 legal aid agreements represent the first year of a national approach to a purchaser/provider model of funding for legal aid services. Future directions will focus on the Commonwealth becoming more informed purchasers of legal aid services in terms of type, quantity and cost. While the current purchaser/provider model is in an early stage of development it has provided the Federal Government with a mechanism whereby it can set the policies and priorities to be applied to the provision of legal aid for Commonwealth matters. This greater degree of control will in turn enable the Commonwealth to further realise its objective of achieving a more efficient and effective legal aid system.