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Legal Aid, the Community Legal Sector and Access to Justice: What has been the Record of the Australian Government?

Mark Rix

University of Wollongong, mrix@uow.edu.au

Publication Details

This conference paper was originally published as Rix, M, Legal Aid, the Community Legal Sector and Access to Justice: What has been the Record of the Australian Government?, in Proceedings of the International Symposium on Public Governance and Leadership: Managing Governance Changes Drivers for Re-constituting Leadership, University of Plymouth, United Kingdom, 24-25 May 2007.

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Abstract

This paper will consider the record of the Australian Government in supporting and promoting the work of state and territory Legal Aid Commissions and community legal centres. Legal Aid and the community legal sector play an important role in providing predominantly, but not exclusively, poor and otherwise disadvantaged Australians with legal and related services helping to ensure that they are able to achieve some measure of access to justice. Beginning in 1997 with the decisions of the Government to cease funding Legal Aid Commissions for matters falling under state and territory law and to implement purchaser-provider funding arrangements for the two agencies, it will consider how these decisions have affected the agencies' ability to provide access to justice for their clients.

Disciplines

Business

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**Legal Aid, the Community Legal Sector and Access to Justice:
What has been the Record of the Australian Government?**

**Dr Mark Rix
Graduate School of Business
University of Wollongong NSW 2517
AUSTRALIA
Ph. (+61 2) 4221 4740 Email mrix@uow.edu.au**

Paper presented at the

INTERNATIONAL SYMPOSIUM

*Public Governance and Leadership:
Managing Governance Changes Drivers
for Re-constituting Leadership*

UNIVERSITY OF PLYMOUTH
UNITED KINGDOM
24-25 MAY 2007

Introduction

This paper considers the record of the Australian Government in delivering access to justice to poor and otherwise disadvantaged or excluded Australians, and to the Australian community as a whole. It does this through an investigation of the Government's treatment of state and territory Legal Aid Commissions (which will regularly be referred to as LACs or simply Legal Aid for the remainder of the paper) and the community legal sector since the Howard-led Coalition (comprising the Liberal and National parties) was elected to national office in 1996. These two agencies have a vital role in ensuring that Australians who do not have the means themselves to engage private legal practitioners are able to achieve at least some measure of access to justice. By providing poor, disadvantaged and excluded Australians with an avenue into the justice system, and with the opportunity to seek just outcomes of the civil, administrative, family and criminal law matters they require to have resolved, the two agencies make a significant contribution to the enhancement of the cohesiveness and inclusiveness of Australian society. This contribution is important also in that access to justice, and equality before the law, underpin the legitimacy of the legal system and the willingness of individuals to accept and comply with the laws of the land. Thus, the activities of both agencies help to uphold the rule of law and prevent social fragmentation.

The first section of the paper looks at the administration and funding of Legal Aid during the Howard Government's period in office, and the following section examines how the community legal sector is administered and funded. The paper concludes with an assessment of the Government's treatment of the two agencies and its implications for access to justice and equality before the law.

Legal Aid

The Commonwealth (or, Australian) Government regards the provision of Legal Aid as a "core element" in its efforts to promote access to justice, being one of the main ways that disadvantaged members of the community who require legal assistance gain access to legal services (AGD n.d.). Those who need legal services do so through applying for legal assistance to the Legal Aid Commission (LAC). Each State and Territory has a LAC which provides a range of services for dealing with criminal, family and civil law matters including "information, advice and minor assistance (eg document preparation), primary dispute resolution [PDR], duty lawyer services, family conferencing to resolve disputes, and grants of aid for legal representation (AGD n.d.)." LACs employ a "mixed model" mode of service delivery, that is, they use both in-house salaried lawyers and private practitioners to provide legal services to those people who have been granted financial assistance. This model enables legal aid services to be provided to clients living in rural, regional and remote areas where there is no Legal Aid office located.

A profile of Legal Aid

Legal Aid Commissions are independent statutory authorities established under State/Territory legislation which are funded by both the Commonwealth Government and the State and Territory governments to provide legal aid or legal assistance. The funding received by LACs for the purpose of providing legal aid or assistance is subject to the Agreement for Provision of Legal Assistance Services that each State and Territory enters into with the Commonwealth (the current Agreement runs from 2004 to 2008). Under the Agreement, the Commonwealth provides legal aid funding for matters arising under Commonwealth law,

with each State and Territory funding cases falling under its own laws. This arrangement began in 1997, when the Commonwealth began to describe itself as the purchaser of the services provided by the State and Territory LACs. The Agreement for Provision of Legal Assistance Services between the Commonwealth and each State/Territory requires LACs to: 1. provide a range outputs (in other words, services) which each output having an “allocated quantitative target and unit price identified against it” and 2. make applications for grants for financial assistance subject to application of the Commonwealth Legal Aid Guidelines in each case (AGD n.d.).

The following services are provided by LACs (again, with the proviso that the Commonwealth only provides funding for services falling under Commonwealth laws):

- Information and referral—by telephone or at the reception counter of commissions,
- Legal advice and minor assistance, which can include preparation of simple documents or correspondence—by telephone or through face-to-face appointments,
- Legal education—seminars, publications and do it yourself kits,
- Duty lawyer services at Courts, and
- Grants of aid for legal representation in Commonwealth criminal, family and civil law matters (AGD n.d.).

The Commonwealth Legal Aid Priorities and Guidelines (to be considered in a following section) set the terms and conditions for the provision of grants of aid for legal representation in Commonwealth law matters.

While some legal aid services are provided free of charge, “legal representation is subject to means and merits testing, and not all applicants will be eligible for legal aid (AGD n.d.)” These tests assess the applicant’s income, assets and the merits of the claims with applicants often having to make a “small contribution”. In some cases, the applicant may have to repay some or all of the costs of the legal representation they receive with any contribution based on the financial situation of the applicant and the cost of the matter. The means and merits tests are discussed more fully below.

The administration and funding of Legal Aid under the Howard Government

Before 1997, each State and Territory LAC had responsibility for setting its own budget priorities and determining the amount of funding allocated to them. The Federal Attorney-General’s representation on the management boards of LACs enabled the Commonwealth to participate in and monitor the budget and priority-setting process and attempt, in keeping with its national responsibilities, “to promote national equity in the provision of scarce resources (Zdenkowski n.d.: 2).” However, in 1996 the Commonwealth decided to withdraw from this co-operative arrangement and “since July 1997 the state and territory legal aid commissions have been restricted to allocating Commonwealth funding to matters arising under Commonwealth laws (SLCRC 2004: 1).” In accordance with this decision, the Commonwealth also ceased to be represented on LAC management boards. The full implications of the Commonwealth’s decision are starkly outlined in National Legal Aid’s submission to the Senate’s 2003-04 access to justice inquiry:

Prior to 1997 the Commonwealth funded Commissions on the basis of its then policy that it was responsible for assisting “Commonwealth persons” [i.e., Australian citizens and permanent residents and those persons for whom it has assumed responsibility under the international treaties and conventions that it has ratified].

Funding was on the basis of a specified level of overall government funding with an annual inflator. In 1996 the Attorney-General announced that from 1997-1998 the Commonwealth would cease to provide assistance on that basis and would instead provide funding for matters arising under Commonwealth laws. This involved the cessation of Commonwealth support for matters arising under State and Territory laws, even where the applicant in those matters was a “Commonwealth person”. On the basis of this changed policy the Commonwealth reduced its funding to Commissions by \$33.16 million per annum from 1997/1998 (NLA 2003: 2-3).

The decision to withdraw from the co-operative funding arrangement and to cease funding matters falling under state and territory law was effectively an abrogation by the Commonwealth of its constitutional responsibilities to so-called Commonwealth persons, including those for whom it had assumed responsibility by entering into international treaties under the authority granted it by the external affairs power of the Constitution. Commonwealth funding, reduced by over \$33 million annually, was essentially restricted to family court, child support and war veterans matters. Then Federal Attorney-General Daryl Williams’ attempt to “characterise the cuts as a withdrawal to the correct position (that is, funding only federal matters leaving all else as state and territorial (*sic*) responsibilities) amounted to a sleight of hand and a denial of history” of the previous twenty years over which there had been “a bipartisan approach to a Commonwealth-State partnership in legal aid funding (Zdenkowski n.d.: 2).”

The purchaser/provider funding arrangement

Even though it was claimed by Legal Aid’s supporters, such as National Legal Aid, that the quality of legal services provided by Legal Aid did not suffer as a result of the cuts to Commonwealth funding, they were concerned that it was the quantity and extent of service provision that had declined. For one thing, the purchaser/provider funding and regulatory arrangement that replaced the discarded co-operative model, had introduced another layer of administrative and financial accountability requiring LACs to divert resources that should have been devoted to providing services. The requirement to keep a separate account for Commonwealth funding and State/Territory funding partly accounts for the increased administrative costs which amount to an estimated 4 to 5 percent of Commonwealth funding (SLCRC 2004: 33). Moreover, the Commonwealth/State funding dichotomy, an effect of the introduction of the purchaser/provider arrangement under which as has been seen the Commonwealth only funds matters falling under Commonwealth law, is quite arbitrary because “many legal matters do not fall neatly into either category” inhibiting “the effective servicing of legal needs” and creating “unnecessary administration costs for legal aid commissions (SLCRC 2004: 33).” Citing domestic violence as an example, National Legal Aid points out that the policy to fund only Commonwealth matters leads to outcomes that are “illogical, inconsistent and, in many cases, insufficient”. Domestic violence should logically be considered a family law matter, and therefore fall within the Commonwealth’s funding responsibilities, but is instead classified as a State matter “because aspects of [a] case can rely on State legislation (NLA 2003: 9).” Another illogical, even if unintended, outcome was the inability of LACs to use surplus Commonwealth funds for matters not falling clearly within the Commonwealth Legal Aid Guidelines.

The introduction of the purchaser/provider arrangement, and associated Commonwealth/State funding dichotomy, effectively limited the use of Commonwealth funding to family court matters, child support and war veterans. As noted above, it was accompanied by a significant reduction in the Commonwealth funding received by LACs. With regard to the NSW LAC,

for example, the restriction on the use of Commonwealth funds and associated reduction in Commonwealth funding “dramatically changed the entire operation of the Commission” by, for example, significantly reducing the monies available for Commonwealth civil law matters (NSW A-G 2006: 31).” The figures tell the story: for 1997-98, 1998-99 and 1999-00 Commonwealth funding received by the NSW LAC was \$31.1 million per annum, an \$11.2 million per annum drop in Commonwealth funds. It was not until 2004-05 that Commonwealth funding returned to the 1996-97 level but this was only in nominal terms (NSW A-G 2006: 31).

At the national level, in 2003-04 the dollar amount of Commonwealth funding for Legal Aid (\$126 million) was less than that in 1996-97 (\$128 million). Moreover, in real terms the level of Commonwealth funding in 2003-04 was significantly lower than in 1996-97. As the Senate Legal and Constitutional References Committee observed in its 2004 report, “After taking account of inflation, \$128 million in 1996/97 is actually \$153 million in real terms for 2003/04” meaning that “in real terms, the 2003/04 Commonwealth funding is \$27 million less than it was in 1996/97 (SLCRC 2004: 4-5).” Hit particularly hard by the reduced funding available for Commonwealth civil law matters was, for example, the NSW LAC’s ability to expand its civil law services in line with increased demand for existing services and demand for new services arising in areas such as aboriginal communities, regional, rural and remote communities, youth and older people.

In a late, even if tacit, admission that Commonwealth funding for Legal Aid had not kept pace with demand for legal aid and assistance the Attorney-General Philip Ruddock recently announced that an additional \$19.7 million had been allocated over four years in the 2007-08 Budget to provide greater assistance to people living in rural areas. The funding package “includes \$8.3 million to *maintain* legal aid services in regional, rural and remote Australia (Ruddock 2007; emphasis added).” The package also provides an additional \$6.2 million for serious criminal prosecutions to ensure that funding for key priority areas such as family law is not diverted to high cost cases.

In its 2004 report on legal aid and access to justice, the Senate Legal and Constitutional References Committee recommended that the purchaser/provider funding arrangement be scrapped, and that Commonwealth funding for Legal Aid be provided under the pre-1997 co-operative model (SLCRC 2004: 34). The Commonwealth rejected this recommendation on the basis that “The Government’s policy of ensuring that its funds are used by legal aid commissions to provide assistance in Commonwealth law matters is well founded and ensures that disadvantaged Australians with legal problems arising under Commonwealth law, such as family law matters, have to access to assistance (AGD n.d. b: 7).” According to the Government, the purchaser/provider arrangement ensures that priority is given to people who require assistance with Commonwealth law matters and that these people do not have to compete for scarce resources as the demand for assistance in state and territory criminal law matters increases. There was no acknowledgement by the Government that these resources would not be so scarce if Commonwealth funding for Legal Aid was increased (by more than an amount that merely maintains services at current levels) and if it agreed to return to the co-operative funding model.

Commonwealth legal aid priorities and the means and merits tests

The Commonwealth legal aid priorities and guidelines are set out in the Agreements for Provision of Legal Assistance Services between the Commonwealth and the State and Territories 2004-2008. The Priorities comprise Clause 6 of the Agreements, and the

Guidelines are set out in a schedule to the Agreements (Schedule 3). The Commonwealth regards a family law or child support matter arising under Commonwealth legislation (such as the Family Law Act 1975 or the Child Support (Assessment) Act 1989) as a Legal Aid Priority if it relates to such things as separate representation of children, injunctions relating to family violence, spousal maintenance, child support and child maintenance, property proceedings and enforcement proceedings (this is not the complete list). As for criminal law, “A criminal law matter that is a Commonwealth Law Matter is a Commonwealth Legal Aid Priority if it relates to the legal representation of a person charged with a criminal offence (AGD n.d. a).” A civil law matter that is a Commonwealth Law Matter is regarded as a priority if it relates to: a Commonwealth pension, benefit or allowance, “including a pension, benefit or allowance relating to war veterans”, discrimination, migration, and consumer protect (again, this is not the complete list). Other legal matters that do not fall under any of these categories are regarded as Legal Aid Priorities if they are Commonwealth Law Matters and they are considered by a LAC to fall into the ‘special circumstances’ category. Special circumstances include a situation where the applicant for a grant of Legal Aid has a language or literacy problem, the applicant has an intellectual, psychiatric or physical disability, the applicant cannot obtain legal assistance because they live in a remote location, or if there is, or a likelihood of, domestic violence in relation to a family law matter (this list is not complete). Crucially, and in an important qualification, such a matter can only be taken to be a Commonwealth Legal Aid Priority if Commonwealth Legal Aid Monies are available to provide Litigation or Primary Dispute Resolution Services for the matter (AGD n.d. a).

There are seven Application (of the Agreements) Guidelines, the third dealing with the means test and the fourth with the merits test. There are also 19 Family law guidelines, 11 Criminal law guidelines (the ninth Criminal law Guideline has been omitted; see note 3 below) and 9 Civil law guidelines. The focus here will be on Application Guidelines 3 and 4, and 7 (National Security matters—requirement for security clearance). Under Application Guideline 3, the means test to be applied is the means test employed by a LAC for an application for assistance in a State or Territory law matter. There are two means tests that can be used to assess an applicant’s eligibility for legal aid, the National Legal Aid Means Test (used by all LACs other than Queensland and Tasmania) and the Simplified Legal Aid Means Test (used by Queensland and Tasmania¹). In a subscript to Guideline 3, the Commonwealth expresses its “strong preference” for the simplified means test used by Queensland Legal Aid and for this to be adopted nationally. This is because the Commonwealth regards the simplified test as being easier to administer and therefore more cost effective. While the two tests have the same assets test component they assess income differently. Unlike the national test, the simplified test “uses a formula that takes into account the number of dependant persons in the applicant’s household as well as the employment status of the applicant and partner (if applicable) (SLCRC 2004: 17).”

According to the NSW Auditor-General’s performance audit report of the NSW Legal Aid Commission, an applicant for a grant of legal assistance who receives a full Centrelink benefit will pass the income component of the means test (NSW A-G 2006: 31). Centrelink is the Commonwealth Government agency responsible for providing income support payments, and other social security payments, under a variety of schemes on behalf of policy departments (such as the Department of Families, Community Services and the Indigenous Affairs, and Health and Ageing Department). These payments include the Youth Allowance which is paid to full-time students aged 16 to 24 or unemployed people under 21. The Newstart Allowance

¹ In October 2005, Legal Aid NSW introduced a simplified Means Test, but it is not clear whether this is the same one that is used by Queensland and Tasmania.

is for people aged over 21 who are unemployed or are temporarily unable to work due to illness, injury or disability. Other payments and pensions include the Disability Support Pension, Age Pension, Wife Pension, Parenting Payment, Carer Payment and Mature Age Allowance. There is a significant gap between the Newstart Allowance and other Allowance payments and pension rates but, as will be seen below, the latter are still quite low. Each of these payments has its own strict income and assets tests.

In August 2006, NSW Legal Aid set the maximum income eligibility threshold at \$269 per week (the threshold is set at roughly the same level in the other States and Territories). Setting the income threshold at this level means that a Centrelink recipient on a full benefit will pass the income component of the means test but this does not necessarily mean that they will pass the assets test (which, in order to 'ration' the availability of scarce legal aid services, is set lower than Centrelink's). To put the income threshold in context, the OECD 'summary measure' of Australia's social security benefits as a percentage of a production worker's wage is 25% (in 2004, the OECD put the Australian Average Production Worker Wage at AUD52,777 per annum), putting Australia seventh lowest of the 21 countries surveyed by the OECD in terms of Australian income support payments compared with wages paid to production workers (ACOSS 2005; OECD 2004).² A single, unemployed adult receiving the Newstart Allowance receives 46% of the income of an equivalent low paid worker employed full time. The maximum amount paid to a single, unemployed adult receiving the Disability Support Pension in 2006 was \$254 (ACOSS 2005). In its submission to the Senate Legal Aid inquiry, National Legal Aid warned that the means test makes "a large percentage" of the Australian population ineligible for legal aid. Many of those who do not qualify for legal aid are not able to afford to engage a private lawyer, or can only do so with great hardship (NLA 2003: 11). In similar vein, the NSW Auditor-General's report pointed out that

...providing legal aid services to an ageing population is an emerging issue. For them to just fail an asset test, because of their property and superannuation benefits, can be a significant issue. However to change this would result in grandparents being treated differently to the younger working poor who can't afford a lawyer. What is common is an increasing gap between litigants who qualify for legal representation and those who don't qualify but cannot afford private representation (NSW A-G 2006: 31).

An applicant must meet each of three sub-tests in order to satisfy the merits test: 1. the reasonable prospects of success of test; 2. the prudent self-funding litigant test; and, 3. the appropriateness of spending limited public legal aid funds test. According to the Legal Aid priorities and guidelines document, the prudent self-funding litigant test is satisfied "only if the [Legal Aid] Commission considers that a prudent self-funding litigant would risk his or her own financial resources in funding the proposed action, application, defence or response for which a Grant of Legal Assistance is sought (AGD n.d a.)." The Government's rationale for using this test is a quite revealing one. The test is one of the "strategies" employed by the Government to minimise the cost of providing legal assistance to eligible clients thus lessening the inequity between those who are eligible and those who are "marginally excluded". Acknowledging that "Many taxpayers who are above the means test threshold for the granting of legal assistance have their own access to justice constrained in whole or in part because of their limited financial resources", the Government seeks in using the test "to put assisted clients into an equal but not better position than private litigants without 'deep

² The OECD summary measure is defined as the average of the gross unemployment benefit replacement rates for two earnings levels, three family situations and three durations of unemployment. The 'replacement rate' is the ratio of an individual's (or a given population's) (average) pension in a given time period and the (average) income in a given time period.

pockets' who risk their own funds (AGD. n.d. a)." In its submission to the Senate Inquiry into Legal Aid and Access to Justice, the Legal Aid Commission of NSW argued that this test should be done away with "on the grounds that it is subjective, ambiguous and difficult to apply' (cited in SCLRC 2004: 20)." The appropriateness of spending limited public funds test is satisfied "only if the Commission considers that the costs involved in providing the assistance are warranted by the likely benefit to the applicant or, in appropriate circumstances, the community (AGD. n.d. a)." Again, the rationale for this test is to ensure that LACs select the most appropriate uses of limited Commonwealth legal aid funds from the many competing claims for assistance that are received. In its submission to the Senate Inquiry on this test, the Combined Community Legal Centres Group of NSW expressed the view that it "leads to a sense of arbitrariness with the provision of legal aid, which does not assist clients or, particularly, solicitors when they are considering acting on a legal aid basis" because of the difficulty of determining eligibility (cited in SCLRC 2004: 20).

One of the effects of using the means and merits tests has been a significant reduction in the number of applicants for legal assistance who actually qualify for legal aid. This in turn has seen an "increasing number of unrepresented litigants and appellants appearing before courts and tribunals in family and administrative law matters [for example, 40% of those appearing in the Family Court are unrepresented] (NACLC 2003: 10)". The increasing number of unrepresented litigants has had a considerable, and generally adverse, impact on access to justice by raising litigation costs and making the administration of justice less efficient and expeditious (see SCLRC 2004: Chapter 10 Self-represented Litigants).

Legal Aid, anti-terrorism legislation and access to justice

Commonwealth Legal Aid Application Guideline 7 deals with 'National security matters—requirement for security clearance'.³ It was introduced to ensure compliance with the National Security Information (Criminal and Civil Proceedings) Act 2004 (the NSI Act) which imposes restrictions on disclosing national security information to a legal representative in Commonwealth criminal, civil and family proceedings. A legal representative will be informed that the proceeding is one to which the NSI Act applies through a National Security Notification from the Secretary of the Commonwealth Attorney-General's Department. The effect of such a notification is to put the legal representative on notice that national security information is relevant to the proceedings and that the legal representative cannot obtain access to this information unless he or she has a valid national security clearance. A legal representative acting for a legally aided person cannot maintain carriage of a matter referred to in a security notification unless they already have or can quickly apply for a security clearance. The effect on the legally aided person is to disbar a legal representative from acting for them in proceedings unless that representative is eligible to obtain a national security clearance. Thus, a grant of legal aid will be terminated, and a legal representative will not be paid by a LAC, in situations where the representative does not satisfy the guideline. A Commission can only continue to pay a legal representative for 14 days from the date a notification was issued. After this time the Commission cannot pay for any further work performed by the representative without the representative first receiving a clearance (NSW LAC 2006).

³ It is noteworthy that Application Guideline 7 commenced operation on 4 July 2006, replacing the former Criminal law Guideline 9 National security matters. This was apparently to ensure compliance with the NSI Act. The exceptions included in old Guideline 9, which under certain specified circumstances enabled assistance to be provided even when an applicant's representative did not hold a security clearance, have been completely deleted.

The requirement for a security clearance makes the administration of justice unwieldy and inefficient. It holds legally aided people hostage to the discretion of the Secretary of the Attorney-Generals' Department regarding the issuing of national security notifications and to the Department for determination of the appropriate level of clearance required by a legal representative. The process of issuing a national security notification and determining whether a security clearance is required and, if so, what level, appears to be a completely arbitrary one, lacks transparency and is not open to public scrutiny. Thus civil society organisations which seek to keep executive government and its agencies accountable and answerable for their actions are not able to keep this process under scrutiny and review. Just as importantly, this requirement provides the executive arm of Government with wide access to information about individual lawyers and therefore opens up the possibility of misuse and abuse of both access to information, and the information itself, by the executive and the national security authorities which act on its authority. Furthermore, the NSI Act permits "the prosecution and conviction of individuals on the basis of information which, for reasons of national security, is not itself tendered in evidence against them at trial (Emerton 2004: 143)." Amongst other things, the Act also allows for partially, or even completely, secret trials, evidence to be censored, and defendants and their lawyers to be excluded from trial proceedings (Head 2005: 211).

The Senate Committee inquiry into Legal Aid heard that State and Territory law and order campaigns, involving amendments to existing legislation or the introduction of new legislation, lead to significant increases in demand for legal aid services. However, it did not specifically consider the impact of new Commonwealth legislation on demand for these services. Since, September 11, 2001, for example, there has been a substantial increase in Commonwealth anti-terrorism legislation. At the conclusion of its Australian hearing into counter-terrorism laws, the Eminent Jurists' Panel on Terrorism, Counter-Terrorism and Human Rights, an initiative of the International Commission of Jurists (ICJ), observed that "During the hearing the Panel's attention was drawn to the large number of laws enacted since 2002 as part of Australia's strategy to counter terrorism (EJP 2006: 1)." In an earlier publication, ICJ Australia had pointed out that "As at September 11, 2001, there was in place a patchwork of some 35 pieces of Commonwealth legislation in Australia relating to terrorism, dealing with issues including air navigation, police powers, chemical and biological weapons, criminal offences, hostages, immigration, border protection, intelligence, nuclear non-proliferation, proceeds of crime, telecommunications, and weapons of mass destruction (ASICJ 2004: 1)." Justice Michael Kirby called attention to the fact that since the attacks of September 2001 "17 items of legislation restricting civil freedoms have been adopted by the federal Parliament" with complementary State legislation also being passed (Kirby 2004: 226). The Commonwealth Government's anti-terrorism legislation joins the long list of Commonwealth, State and Territory laws affecting the daily lives of citizens that have been enacted over the past 30 years or so. The National Association of Community Legal Centres estimates that, since the early 1970s, there has been a doubling of legislation affecting the daily life of Australian citizens without any corresponding increase in resources and funding for legal advice, representation and community education (NACLC 2003). Nevertheless, it appears likely that Legal Aid (and the community legal sector) will increasingly be called upon by the Australian community to ensure that ordinary citizens have access to justice and enjoy equality before the law in the face of the Australian Government's curtailment of those rights in its anti-terrorism legislation. This will be particularly so for those sections of the Australian community that are regarded as potentially 'suspect' by the Government and national security authorities, specifically, Muslim groups and individuals and those of Middle Eastern origin. The requirement for a security clearance could make this a particularly

difficult assignment in the case of Legal Aid and will probably mean that the community legal sector will become the contact of last resort for people whose application for legal aid has failed because their preferred legal representative does not have or cannot obtain a security clearance.

The Community Legal Sector

There are more than 200 CLCs across Australia, 129 of which are funded under the Commonwealth Community Legal Services Program (CCLSP) to provide legal services to people on low incomes and individuals and groups with “special needs”. Community-based and not-for-profit, CLCs are an important part of the Australian legal aid and legal assistance system offering legal services that complement the services provided by state and territory Legal Aid Commissions and the private legal sector (AGD 2005: 5). In the eight years up to 2003 the 129 centres in the Program “provided services to more than 1.5 million people throughout Australia in urban, regional and remote areas, and provided over 2.5 million instances of legal advice, information and case assistance (NACLC 2003: 11).”

According to the CCLSP Guidelines, CLCs are “community based, independent non-profit organisations” (AGD 2005: 5). The community legal sector comprises individual community legal centres (CLCs), state and territory associations of CLCs such as the NSW Combined Community Legal Centres’ Group and the Federation of Community Legal Centres (Victoria), and the National Association of Community Legal Centres (the National Association is, as its name would suggest, the peak national body representing CLCs and the State and Territory associations). There are a number of different types of centres: generalist centres provide a broad range of legal services to communities in particular geographical areas; specialist centres offer services to a specific section of the community and groups with special needs such as migrants, indigenous women or young people; and, so-called hybrid centres are essentially generalist centres that also provide one or several specialist services (NACLC 2001).

A profile of the community legal sector

As the CCLSP Program Guidelines put it, the stakeholders in the Program are “funded community legal service providers, the National Association of Community Legal Centres (NACLC), and State-based Program Managers—the legal aid commissions [LACs] in New South Wales, Victoria, Queensland, Western Australia and Tasmania and the Attorney General’s Department of South Australia (AGD 2005: 3).” The Commonwealth purchases services from the LACs and the SA Attorney General’s Department to assist it in managing the Program “under a cooperative working relationship” (AGD 2005: 8). In other words, the Commonwealth in effect makes a payment to LACs and SA Attorney General’s to run the Community Legal Services Program in their respective states and territories. In 1996-97, the longstanding grants based model for funding the 129 CLCs in the Community Legal Services Program came to an end, the Commonwealth preferring purchaser/provider type funding arrangements. In accordance with these arrangements, the 129 centres in the program no longer received an annual funding grant but moved instead to a three-year service agreement with the Commonwealth (the second of the service agreements, for the period 2005-2008, is currently in operation). The Commonwealth purchases the services provided by each of the 129 CLCs in the Program in accordance with the terms of the Service Agreement. While the State Program Managers have responsibility “for the day-to-day administration of the

Program” in their respective states, “[t]he Commonwealth directly manages the Program in the Australian Capital Territory and the Northern Territory (AGD 2005: 8).”

The National Association of Community Legal Centres (NACLC) points out that CLCs “are often the first point of contact for people seeking assistance and/or the contact of last resort when all other attempts to seek legal assistance have failed (NACLC 2003a: 3).” In addition to this very important role, community legal centres “serve the growing numbers of people who cannot afford private legal assistance and who do not qualify for legal aid (NACLC 2003: 11).” CLCs have “specialised expertise” in legal fields such as family law and civil and administrative law matters including housing, credit and debt, neighbourhood disputes, motor vehicle matters, and problems encountered by welfare recipients in the administration of social security payments and income support schemes (NACLC 2003: 11).

CLCs are characterised by their willingness to experiment with innovative modes of legal service delivery that are generally designed to maximise the accessibility of centres to their communities and the availability of the services they provide. Language diversity, opening hours, location, and affordability of services (most centres provide services free of charge or at very low cost) are some of the key factors in these respects. Innovation in service delivery is matched by CLCs’ efficiency and cost effectiveness in providing services. Efficiency and cost-effectiveness are to a large extent attributable to the use of volunteers, not only in direct service delivery but also in the administration and management of centres. The corps of volunteers working in and for legal centres includes professional lawyers from the private and public sectors, academics, law students, paralegals, accountants, managers, and others (Rix 2005).

The administration and funding of the community legal sector under the Howard Government

In its budget submission to the Commonwealth Government for the period 2004-2007, NACLC estimated that in the period 1997-2002 Commonwealth funding for CLCs rose by 2.45% per annum and that over this same period there was an increase in average weekly earnings of 4.5%. This amounts to a 10.25% cumulative shortfall in CLCs’ staffing budgets, already operating off a low base. This cumulative shortfall has to be placed in the context of overall CLC operating expenses. CLC staffing costs account for a higher proportion of overall operating expenses than in other forms of legal practice (65.9% of expenditures in CLCs, 54.7% in private practices, 34.4% in legal aid authorities (NACLC 2003b: 6; these figures are taken from an Australian Bureau of Statistics survey)). This leaves a modest proportion of the total funds available to CLCs which can be directed to meeting other legitimate, indeed often indispensable, operating costs many of which are higher than in other forms of legal practice. Telephone assistance, outreach services, and the location of many CLCs in rural, regional and remote areas, for example, all add to the already significant financial burdens faced by CLCs. The ability of CLCs to meet the legal and associated needs of the growing number of CLC clients is therefore put under considerable pressure.

In 2004/2005, the 129 CLCs in the CCLSP received a total of \$32.1 million in Commonwealth and State funding through the Program. These centres delivered more than 340,000 services to a total of nearly 180,000 different clients, representing “a national average cost per client of approximately \$180 (Institute for Sustainable Futures 2006: 1).” What has to be taken into account, however, is that not all of the funding received by CLCs is spent on the direct delivery of legal services such as legal advice, information and casework

to clients. A portion of the funding is used by CLCs to support their community legal education and policy-related activities which they are required to perform under the CCLSP Program Guidelines (which are considered in below). This means that the average cost of providing services to individual clients is probably much lower than \$180. In other words, the community legal sector serves as a vehicle for the delivery of low-cost legal and related services to poor and otherwise disadvantaged clients.

The Commonwealth Community Legal Services Program (CCLSP)

According to the CCLSP Guidelines, the Program is part of the Commonwealth's contribution to legal aid and forms "a vital part of the Commonwealth's multi-layered approach to addressing the legal needs of the disadvantaged members of the community (AGD 2005: 5)." The Guidelines "set out essential principles and obligations governing the management of the program and the delivery of services (AGD 2005: 3)." It is noted in the Guidelines that in addition to Commonwealth Program funding several states also provide funding. The Commonwealth and state funding bodies have a "collaborative arrangement" under which "the CCLSP and the State community legal services programs operate under a single service agreement with community legal service providers known as the Community Legal Service Program (CLSP) (AGD 2005: 3)." The Program is administered at a national level by the Commonwealth Attorney-General's Department using an "accrual based outcomes and outputs framework" which is designed to enable resources to be managed and community legal services to be delivered effectively. Underpinning the outcomes and outputs framework is the Program's outcome statement: "Equitable access to legal assistance services for disadvantaged members of the Australian community and those with special needs (AGD 2005: 6)." As for the Program's outputs, these consist of the core service activities undertaken by CLCs and are underpinned by the Program's outcome as defined in the statement referred to. These core activities include legal information provision, advice and casework, community legal education (CLE) and law reform and legal policy projects.

The requirement for CLCs to collect and report service data to the Commonwealth through the Community Legal Services Information System (CLSIS) is a key provision of the Program Guidelines, and of the superseded and current Service Agreements which are explained in more detail below. Among the most important reasons for collecting the data is to enable the Commonwealth government, State governments and CLCs themselves to evaluate the overall performance of the Program in terms of how well it is meeting its outcome and output objectives. The data collected also enable the performance of individual CLCs to be evaluated against performance targets. In addition, they are amongst other things, used in planning future service provision (AGD 2005: 15).

The Service Standards

The Guidelines specify nine service standards "which are used to establish a nationally consistent, foundational level of quality for service provision (AGD 2005: 16)." Five of the Service Standards relate directly to service delivery and core service activities. These are:

1. the provision of information
2. the provision of advice
3. casework
4. community legal education (CLE)
5. law reform and legal policy (LRLP)

The other Service Standards refer to non-core activities including accessibility, organisational management, management of information and data, and assessing client satisfaction and managing complaints (AGD 2005: 16; all of the Service Standards, and related performance

indicators, are explained in considerable detail in Community Link Australia 2000 which underpins the sections dealing with the Service Standards in both the Guidelines and the Service Agreements).

The first of the core Service Standards relates to information provided to a client which does not make any specific reference to the particulars of the client's case. An advice "is a discrete activity which occurs on an individual occasion" at the conclusion of which "there is no follow up action to be undertaken and there is no expectation that the client will have further contact with the service provider about the same problem (AGD 2005: 21)." An advice helps a client choose between options for dealing with their problem and can include counselling, referral and simple legal advice. Drafting correspondence and making phone calls related to the client's issue or problem are also included. Casework, as the term would suggest, refers to an activity which involves the provision by a CLC of ongoing legal assistance to a client with regard to a particular problem and also includes acting on behalf of the client with respect to that problem. CLE encompasses activities undertaken by a CLC that involve "the provision of information and education to members of the community on an individual or group basis about the law and legal processes" and also refers to the process "of increasing the community's ability to participate in legal processes by utilising community development strategies (AGD 2005: 21)." Naturally, CLCs design community development strategies that are appropriate for the clients and communities they serve. LRLP refers to a range of activities undertaken by a CLC that, like CLE, are designed to increase the community's participation in and understanding of the legal system. These activities contribute to the process of bringing about, where needed, changes in the law, legal processes and legal or welfare service delivery. According to the CCLSP Guidelines, one of the key objectives of the Program is to provide legal services to assist individuals, groups and "the community overall" and to direct legal assistance "towards people who experience some form of systemic or socio-economic barrier to accessing legal services and/or *whose interests should be pursued as a matter of public interest* (AGD 2005: 5; emphasis added)." CLE aims to provide "people, service providers and other agencies" with an enhanced ability not only to "understand and critically assess the impact of the law and the legal system on themselves" but also to "use the law, legal system and other regulatory mechanisms where appropriate" while LRLP gives CLCs the capacity "to meet the priority needs of the target groups and communities with whom they work (AGD 2005: 6)." In other words, both CLE and LRLP seek to improve access to justice and equality before the law for Australian citizens and residents—and the community overall. In the sub-section following the next, the implications of Attorney-General Ruddock's threats to review funding to community legal centres for undertaking CLE and LRLP work relating to the anti-terrorism legislation will be considered.

Service Agreements 2003-2005 and 2005-2008

In 1996-97, the Australian Government moved all 129 legal centres in the Commonwealth Community Legal Service Program from a grants-based funding model to a purchaser/provider model. A three-year service agreement is a fundamental part of this model. The agreement is a template document for all CLCs in the Program, adapted where appropriate to reflect the particular circumstances of individual CLCs. It is in effect little more than a performance contract, establishing the relationship between the Commonwealth and the community legal sector as one of a strict principal-agent sort. Under the service agreement (in both the 2005-2008 and 2003-2005 iterations), the Commonwealth "operates" the CCLSP and the relevant State "operates" the State Community Legal Services Program, together constituting the Community Legal Services Program. However, only in the 2003-2005 agreement is it also stated that the Commonwealth is responsible for determining

CLCSP priorities, monitoring the Program's performance and ensuring the accountability for Commonwealth funding provided under the Program. Nevertheless, even the old agreement includes a measure of self-regulation in that it acknowledges the detailed knowledge that a CLCs has of the community it serves and its capacity to reduce to some extent the legal needs of that community, identify unmet areas of need, and successfully administer the centre and the services it provides (Commonwealth of Australia 2003). The service standards in the agreement are the same as those contained in the Program Guidelines and accordingly cover all of the core service activities, and non-core activities, undertaken by a CLC. One key difference between the new and old service agreements is that the new stipulates that a centre must conduct a client satisfaction survey only once over the term of the agreement (2005-2008) rather than every six months as in the old agreement. Relaxing this reporting requirement suggests the Government realises that it can rely on the commitment of the sector and its staff to meeting the needs of their clients without the need for a strict reporting and accountability regime (Rix 2006). The new agreement also contains much less onerous provisions than the old regarding a centre's ability to retain and use surplus funds (as defined in the Agreement) (Commonwealth of Australia 2005).

The community legal sector, CLE and LRLP, and anti-terrorism legislation

In a submission to the Spring 2006 issue of *the PartyRoom* ("a journal designed to promote new policy discussion by showcasing the breadth of ideas amongst current members and senators who make up the Party Room within the Federal Coalition"), Federal Attorney-General Philip Ruddock stressed the need for 'Community Legal Centre reform'. He began his piece with an ominous pronouncement: "Legal centres must restore their focus on their clients, rather than political causes (Ruddock 2006: 4)." "Unfortunately", the Attorney-General averred, "some centres devote valuable resources to running political campaigns and the promotion of ideological causes, rather than providing legal advice and assistance to Australians in need (as per their Charter) Ruddock 2006: 4; Ruddock should know that there is no such thing as a legal centre "Charter")." Here, Ruddock turned his sights on the Federation of Community Legal Centres (Victoria) which had produced a manual on "political campaigning" for its member centres and their staff. The manual urged Victorian community legal centres "to build capacity to 'take on' the Howard Government over its anti-terrorism legislation (Ruddock 2006: 4)." According to Ruddock, it is "positively Orwellian" to use the term "community education" to describe such activities. Concluding the *PartyRoom* piece, he sounded an even more ominous note than he had at the outset:

In future, the Government will adopt a model for assessing the adequacy of Community Legal Centre funding which focuses not on inputs, but on the outcomes delivered to clients. Centres must focus on serving clients, not running private political agendas. It is time for reform (Ruddock 2006: 5).

As Attorney-General Ruddock's criticisms of the community legal sector's "political campaigning" make pretty clear, the Howard Government opposes the CLE and LRLP work of the sector when the anti-terrorism legislation and its provisions are in the spotlight. His remarks also suggest that the Government is not at all comfortable with third sector organisations like the community legal sector informing and educating the Australian public about the implications of the legislation for their personal liberty and security. And, the Government obviously does not wish to be held to account by these organisations. It is difficult to accept that CLE and LRLP work carried out by the sector devoted to informing and educating individuals and groups about the implications of the anti-terrorism legislation such as the NSI Act on their ability to exercise and enjoy their civil and political rights does

not meet the relevant Service Standards. After all, such work provides information and education about the anti-terrorism laws and associated legal processes and increases the ability of individuals and groups to participate in legal processes surrounding the operation of these laws. Moreover, it is very hard to accept that CLE and LRLP work in these areas is not genuinely in the public interest. Informing individuals about the laws and their operation serves to protect people from falling foul of them and to avoid, where possible, becoming 'persons of interest' to national security authorities. However, the Attorney-General's remarks about the need for a funding model which focuses on outcomes delivered to clients suggests that in future Commonwealth funding to the community legal sector will be made conditional on its ceasing to undertake CLE and LRLP work to inform and educate the Australian public about the anti-terrorism legislation. This is in spite of the fact that such work falls under two of the core Service Standards contained in the Program Guidelines and the Service Agreement. In all likelihood these Service Standards will either be amended to meet the Government's demands or removed altogether. This could happen with the expiry of the current Service Agreement in 2008 (probably whether or not the Howard Government is returned to office).

Conclusion

As George Zdenkowski points out, "Legal aid (like health and education) is a national public policy issue", for "Equitable and adequate funding are preconditions for access to justice for disadvantaged Australians (Zdenkowski n.d.: 2)." In similar vein, the Senate Legal and Constitutional References Committee observed in its 2004 'Legal aid and access to justice' inquiry report that a "civilized society" owes an obligation to provide its citizens with access to justice, but most "particularly to those who are already disadvantaged (SLCRC 2004: xv)." And, as Zdenkowski also notes, Australia has committed itself to the important principle of "equality before the laws, courts and tribunals" by virtue of the international treaties which the Government has ratified such as the International Covenant on Civil and Political Rights (ICCPR) (Zdenkowski n.d.: 2). To the ICCPR should be added "the United Nations Convention on the Rights of the Child, the United Nations Convention relating to the status of Refugees, Principals for the protection of the (*sic*) persons with mental illness and for the improvement of mental health care, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Elimination of all Forms of Racial Discrimination, and the United Nations Congress on the Prevention of Crime and the Treatment of Offenders (NLA 2003: 3)."

The Howard Government could with some justification claim that it has been meeting the obligations it has assumed by ratifying the international treaties and covenants listed above. It has continued to provide funding for both agencies, and has even increased funding to enable them either to maintain services at existing levels or to begin to return to the service levels that had been achieved when it first came to office. By meeting these obligations, it has also demonstrated that it does have a commitment to the principles of equal access to justice and equality before the law and that it does wish to see Australians who are not able to afford private legal practitioners or who do not qualify for Legal Aid provided with legal services that in some measure begin to meet their needs. To this extent it has also demonstrated a modest commitment to ensuring that Australia remains, to use the Senate Committee's term, a "civilised society". However, this is at best only a small part of the story.

The manner in which the Howard Government has administered and funded the two agencies has made it extremely difficult for them to cope with the growing demand for services and to arrest the widening gap between those not able to afford to engage a private legal practitioner

and those who qualify for legal aid or assistance of some sort. The growth in this gap has put added pressure onto the community legal sector which, given its still inadequate funding, has struggled to meet the growing demand for services. Putting the squeeze on Legal Aid began with the decision to end the co-operative Federal-State/Territory funding and administrative arrangement and to begin providing Commonwealth funding to LACs only for matters falling under Commonwealth law matters. This decision only served to add to the existing pressure on the community legal sector by putting even greater pressure on Legal Aid. Using the purchaser/provider model for funding and administering the two agencies enabled the Commonwealth more closely to control the use of the funds it provides and to monitor the performance of both agencies against financial and economic criteria *and* political and ideological expectations. For Legal Aid, closer control is also manifest in the Priorities and Guidelines, particularly the means and merits tests, and for the community legal sector in the Program Guidelines and Service Agreement. The Government's political and ideological expectations are evident in the requirement for a security clearance for legal representatives who are acting for legally aided clients and in the Attorney-General's complaints about the CLE and LRLP work of CLCs which highlights the implications of the anti-terrorism legislation for suspect communities and individuals. Closer control and measuring performance against quantitative criteria *and* political/ideological benchmarks have put even greater constraints on Legal Aid and the community legal sector as they struggle both to meet the needs of their clients and to narrow to some extent the widening ability-to-afford-a-private-legal-practitioner/eligibility-for-legal-aid gap. However, closer control has, on the other hand, enabled the Government to reduce the disparity between the performance of Legal Aid and the sector and the Government's quantitative standards and political and ideological expectations. Unfortunately, reducing this disparity while leaving the other gap wide open means that Australia still falls a long way short of being a civilised society which provides its citizens, particularly poor and disadvantaged ones, with access to justice and equality before the law.

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