



## A New National Policy for Legal Aid in Australia



## Introduction

This document, a New National Policy for Legal Aid in Australia, presents the vision of Australia's eight Legal Aid Commissions for a new Commonwealth approach to legal aid in Australia that will deliver comprehensive access to justice to disadvantaged Australians. It positively reflects the belief that all citizens in a democratic society should have access to the law to protect and enforce their legal rights.

## The role of legal aid

The mission of Legal Aid Commissions is to provide marginalised and economically disadvantaged Australians with access to justice. The extent to which Commissions achieve this aim provides a measure of the strength of the Australian system of justice.

Our society invests in a necessarily complex system of justice, a system of institutions - the courts, tribunals and other related agencies - to protect rights, ensure civil liberties and enforce civic responsibilities. If access to these institutions was reserved only for wealthy citizens, the confidence of the broader community in our system of justice would be undermined and we could hardly claim to have robust institutional justice. Without a strong system of justice the rule of law would be compromised as would the rights and liberties enjoyed by all Australians.

Our democratic society therefore depends on the premise that all Australians are equal before the law, a premise which needs to be understood in relation to the question of access. Legal Aid Commissions play a defining role in achieving that equality by striving to ensure that all citizens, including those who can't afford to pay, have access to legal services and to the law.

Commissions provide access to justice by delivering the following legal services:

- Legal representation in court proceedings for people who cannot afford a lawyer
- Duty lawyer services, legal representation on the day for people who appear at court without a lawyer
- Legal advice and information about legal rights and remedies
- Community legal education, publications and other programs about the law and legal rights.

## The emergence of legal aid in Australia

A New National Policy for Legal Aid in Australia promotes a completely new direction for the Commonwealth's role in the provision of legal aid. We've seen three different Commonwealth approaches to legal aid since the beginning of the modern era of legal aid in 1973.

The first approach emerged in the early '70s when the Commonwealth adopted a 'Commonwealth Persons' model. In doing so it took responsibility for the provision of legal aid to people for whom the Commonwealth had a special responsibility including social security recipients, returned servicemen and women, indigenous Australians and migrants. It also provided legal aid for matters that arose under Commonwealth law, eg. social security matters, divorce, tax offences etc. In those days state and territory governments contributed relatively little towards the provision of legal aid.

The second approach was implemented in the 1980s with responsibility for the provision of legal aid being handed to the states and territories. According to this model, funding was allocated in line with an agreement which apportioned 55% of the funding responsibility to the Commonwealth and 45% to the states/territories. Commissions determined their own priorities for the use of this revenue.

The third approach was adopted by the Commonwealth in 1997 and it remains Commonwealth policy today. The policy inaugurated a reduction in funding and a restriction in the range of matters which qualify for Commonwealth legal aid funding. Commonwealth funding is currently confined to a narrow range of matters arising under Commonwealth laws, primarily concentrating on Family Law Act matters. Although social security and immigration are governed by Commonwealth laws, the use of Commonwealth legal aid funds for services in these jurisdictions is tightly restricted. Commissions are obliged to use state/territory funds for the remaining legal aid services in all other areas of the law.

### What's wrong with the current approach?

Whilst governments are undoubtedly entitled to prioritise the use of their funds, the current Commonwealth legal aid policy is problematic in a number of ways. As a consequence of the current model, divisions between state and Commonwealth responsibilities have ensued.

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

Another flaw in the current policy concerns civil law legal aid. As a result of the Commonwealth funding reductions of the mid 1990s, all commissions shut down or dramatically reduced their civil law legal aid programs. With the Commonwealth now funding family law legal aid, most state/territory revenue is used up in the provision of criminal law services understandably in situations where a person's liberty is at stake. As a result, some states and territories increasingly tend to regard their obligation to support the work of commissions as being confined to criminal law.

This has led to a situation where civil law legal aid has fallen through the cracks. Tenancy, consumer, employment and social security legal services, to name a few, are no longer core commission priorities although problems in these jurisdictions equally have profound consequences on peoples' lives.

### Towards a new paradigm for legal aid in Australia

It is time for the Australian government to embrace a fresh national approach to legal aid funding. A citizen facing denial of their democratic rights or legal entitlements is not well served by legal aid systems that discriminate on the basis either of a particular relationship with government or on the basis of the parliamentary origins of the relevant law. A New National Policy for Legal Aid in Australia proposes

that the Commonwealth should adopt a new, simple approach to legal aid based on prioritised areas of need.

Such an approach addresses priority areas of disadvantage rather than depending upon whether the law was enacted by a Commonwealth or state parliament. It provides a framework which allows for seamless service delivery and under which essential civil law legal aid programs can be restored. The Commonwealth currently expends nearly \$240 million annually on legal aid via commissions, CLCs and ATSILS. The new national policy involves an additional annual Commonwealth investment of \$165 million. Its adoption would give effect to the commitment that all citizens can be assured of protection under the law, of access to justice and the guarantee that legal rights, privileges and protections apply to all.

The New National Policy identifies the following six priority areas of need, with costings, which would replace the current Commonwealth legal aid policy and which need to be addressed in order to ensure that all disadvantaged Australians are able to have recourse to the law for the preservation and enforcement of their legal rights:

1. Supporting Australian families and protecting vulnerable family members
2. Supporting Australians at risk of social exclusion due to poverty
3. Supporting Indigenous Australians at risk of social exclusion
4. Supporting Australians at risk of social exclusion due to special circumstances
5. Supporting a fair criminal justice system
6. Supporting human rights and equal opportunity

These matters, described in detail on the following pages, would therefore become Commonwealth legal aid priorities.

policy **01**

Supporting Australian families and protecting vulnerable family members



The fundamental importance of the family unit in society is well established in human rights law.<sup>1</sup> However, the family unit is vulnerable to social, economic, and political pressures, which can result in inadequate parenting, family violence and family breakdown or a combination of all three. This priority allows for seamless service provision when family problems result in cases in both the Commonwealth and State courts.

**Child protection**

The law imposes obligations on the state to help keep families together and to care for children who lack parental care or are otherwise at risk. The tragic consequences when the State inappropriately removes children from their parents and provides inadequate alternative care are well documented.<sup>2</sup> However, around 27,000 children are placed on care and protection orders each year.<sup>3</sup> This priority supports children and parents to safeguard their rights when the state seeks to intervene in family life.

**Family violence**

The right to security of person is recognised as a basic human right.<sup>4</sup> Criminal, family and civil laws all recognise the need to protect children and family members at risk of harm from family violence. However, 23% of Australian women have experienced family violence.<sup>5</sup> The effects of family violence can include mental and physical health issues, homelessness, and poverty. This priority supports children and vulnerable family members to seek intervention orders as protection from family violence.

**Family law**

The priority recognises that many people need support to resolve the legal issues that arise when a family breaks down. The priority provides children and parents with assistance for parenting issues, such as how much time a child spends with each parent, to ensure that proper arrangements are made for the welfare of children. It also recognises the importance of resolving related financial issues, such as child support payments and the division of property, so that all family members maintain an adequate standard of living after family breakdown.

priority **01**

Matters relating to families or children arising under:

- > the Family Law Act 1975
- > Commonwealth child support legislation
- > state or territory family violence legislation
- > state or territory child protection legislation.

This includes:

- > legal representation of children
- > parenting orders and parenting plans

- > child support and child or spousal maintenance
- > family violence
- > child protection proceedings
- > dissolution and nullity of marriage
- > property proceedings
- > breach, enforcement and contempt proceedings.

**Total cost \$199,509,000**

policy **02**

Supporting Australians at risk of social exclusion due to poverty



The right to an adequate standard of living, including adequate food and housing, is a basic human right that is supported by international law.<sup>6</sup> However, on any given night around 100,000 Australians are homeless and 10% of those are children under the age of 12.<sup>7</sup>

Adequate income and housing is essential if people are to live with dignity. Without it, many other basic rights will be compromised. For example, there are clear links between homelessness and problems such as physical and mental illness, unemployment, social isolation, exposure to violence<sup>8</sup> and contact with the criminal justice system.

This priority recognises the 'cause and effect' relationship between poverty and other problems addressed by this policy. For instance, the link has clearly been established that family breakdown and family violence are among the most common reasons for homelessness.<sup>9</sup> This priority closes a major gap in legal aid services that was opened up as a result of the reduction in legal aid funding in the mid 1990s.

This priority also redresses the power imbalance that exists when financially disadvantaged people such as welfare recipients and low wage employees are in dispute with the government, employers, landlords or creditors.

priority **02**

Matters relating to:

- > social security, including war veterans' benefits
- > employment, including Commonwealth, state and territory workplace relations legislation

- > housing, including Commonwealth, state and territory legislation about tenancy and alternative forms of accommodation, for example:
  - boarding houses
  - caravan parks
  - retirement villages
  - nursing homes.
- > Commonwealth, state and territory consumer legislation especially in respect of credit and debt.

**Total cost \$110,560,447**

policy **03**

## Supporting indigenous Australians at risk of social exclusion



By almost all socio-economic indicators, Indigenous Australians are the most disadvantaged group in our community.

For example, indigenous people

- have a life expectancy 17 years less than other Australians
- have a median weekly income of \$340 compared with \$618 for other Australians
- are 13 times more likely to be in prison than other Australians.<sup>10</sup>

This priority acknowledges that Indigenous Australians are extremely vulnerable to social exclusion and face multiple barriers to accessing effective legal services. The priority is broadly framed in recognition that this group may have multiple legal needs that involve criminal, family or civil issues that extend beyond those covered by other priorities.

priority **03**

The legal representation of Indigenous Australians in any matters.

This priority supports the Australia wide network of Indigenous legal services and recognises that commissions also provide assistance to large numbers of Indigenous clients.

In addition, the priority responds to the challenge that Indigenous legal service provision is currently focussed on the criminal law by recognising the broader and often complex needs of Indigenous communities in the civil law jurisdictions.

**Total cost \$85,269,000**

policy **04**

Supporting Australians at risk of social exclusion due to special circumstances



A number of reviews have identified certain sections of the community that are particularly disadvantaged and face additional barriers in accessing justice.

For example, the 2004 Inquiry into Legal Aid concluded that:<sup>11</sup>

- young people are a particularly vulnerable group in the legal system
- women may find it difficult to achieve access to justice and equality of rights
- people living in rural, regional and remote areas experience a range of difficulties accessing legal services.

Other reviews have recognised the need for additional legal services for:

- people with disabilities<sup>12</sup>
- older people.<sup>13</sup>

The priority is broadly framed, in recognition that these people may have multiple legal needs that involve criminal, family or civil issues that extend beyond those covered by other priorities.

priority **04**

The legal representation of the following vulnerable Australians in all matters:

- > children (aged 18 and under)
- > older people (aged 65 and over)
- > people with a physical, intellectual or psychiatric disability
- > people with language or literacy problems

- > people who have difficulty obtaining legal services because they live in a remote location
- > women.

**Cost is included as part of other priorities**

policy **05**

## Supporting a fair criminal justice system

This priority protects the fundamental human right to liberty.<sup>14</sup> Commonwealth government agencies such as the Australian Federal Police, the Director of Public Prosecutions and ASIO, have very broad powers to investigate and prosecute crime and issues of national security. Their actions may have significant consequences, ranging from affecting a person's reputation, financial position and family life, up to detention or imprisonment.

The integrity of our criminal justice system depends on these agencies exercising their powers appropriately and on all defendants receiving a fair trial.

This priority ensures that the extraordinary powers with which Australia's policing and investigative authorities have been entrusted are used strictly according to law, thereby ensuring that miscarriages of justice do not occur.

> Criminal matters:

- arising under Commonwealth criminal legislation
- prosecuted by a Commonwealth agency
- involving the legal representation of:
  - Indigenous Australians
  - other vulnerable Australians (as defined in Priority 4).

**Total cost \$9,053,300<sup>15</sup>**

priority **05**

policy **06**

Supporting human rights and equal opportunity



**Human rights:** This priority underpins our democratic system by protecting all the basic human rights and freedoms recognised by Australian law that are not specifically covered by the other priorities, eg. freedom from discrimination on grounds of race or religion.

**Migrants**

The right to asylum is a recognised human right.<sup>16</sup> The 2004 Inquiry into Legal Aid found that migrants and refugees are among the most disadvantaged groups in terms of access to justice.<sup>17</sup> This group has special needs due to language and cultural barriers, poverty and, in some cases, the effects of past trauma.

The detrimental consequences of keeping people in migration detention are well documented.<sup>18</sup> Inappropriate repatriation may result in physical harm or even death. This priority ensures that migrants are able to preserve and, if necessary, enforce their rights at law.

priority **06**

Matters arising under:

- > Commonwealth, state and territory discrimination and equal opportunity legislation
- > Commonwealth migration legislation
- > International human rights treaties.

**Cost included as part of other priorities**

## The Cost of a New National Policy for Legal Aid in Australia

### Proposed priorities:

Family law	\$199,509,000
Poverty (civil)	\$110,560,447
Indigenous	\$85,269,000
Special circumstances	included in 'poverty' costs
Criminal Law	\$9,053,300 <sup>15</sup>
Human rights	included in 'poverty' costs
<b>Total</b>	<b>\$404,391,747</b>

### Current priorities:

Currently, the Commonwealth spends:

LACS	\$153,674,150
Indigenous	\$85,269,000
<b>Total</b>	<b>\$238,943,150</b>

**Additional funds required to implement the proposals: \$165,448,597**

The detailed costing of this policy is available from [legalaidpolicy@iprimus.com.au](mailto:legalaidpolicy@iprimus.com.au)

### Notes on costings

#### Supporting families

The family law costing is based on current national expenditure on family law. The policy raises the legal aid fees paid to the private profession to 75% of a 'reasonable market rate' charged by the profession for this work. The 'reasonable market rate' was determined by a survey of sixty legal firms across the city, suburban and regional areas in New South Wales, Victoria and Queensland.

#### Poverty law

Developing a costing for the restoration of a national civil law legal aid program required a cost estimate for civil law legal advice and an estimate for civil law litigation. The advice component is an extrapolation to the national level of the civil law advice programs provided in New South Wales by Law Access, the NSW Legal Aid Commission and NSW community legal centres. Since there is so little legally aided civil law litigation in Australia, the litigation component was calculated using litigation data from the very similar jurisdictions of England, Wales and Ontario where there are comprehensive civil legal aid programs. Between those jurisdictions, for every legal aid dollar spent on civil law advice, \$1.12 is spent on civil law litigation. This ratio was used to estimate an approximate cost of a national civil law legal aid program in Australia.

#### Supporting Indigenous citizens

This costing includes current Commonwealth expenditure on legal aid services to Indigenous people. Elements of expenditure on this priority will be covered by other funding priorities such as civil and family law priorities.

#### Special circumstances and human rights

A legal aid response to special circumstances and human rights will fall within the costing for family, civil and criminal law priorities.

#### Criminal law legal aid

This costing reflects current Commonwealth expenditure on criminal law legal aid services.

All of the above costings have been reviewed by KPMG. On 22 October 2007 KPMG reported as follows:

- “
- the document A New Legal Aid Policy identifies the components of the New National Policy for Legal Aid, and provides cost estimates for each component;
  - the information contained in this document is based on a number of assumptions about the nature and volume of services that are needed to build such a system;
  - these detailed assumptions are documented in the supporting materials provided to KPMG, but the basis and accuracy of those assumptions was not investigated;
  - the financial values contained within the source documents were correctly transposed into the calculations of costs for the New National Policy for Legal Aid; and
  - if the examination accepts that these underpinning assumptions are accurate, KPMG can confirm that the subsequent calculation of costs for the New National Policy for Legal Aid is arithmetically correct.”

- <sup>1</sup> Eg. Article 16, *Universal Declaration of Human Rights 1948*
- <sup>2</sup> Eg. *Bringing them Home*, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, 1997
- <sup>3</sup> *Child Protection in Australia 2005-06*, Australian Institute of Health and Welfare, 2007
- <sup>4</sup> Eg. Article 3, *Universal Declaration of Human Rights 1948*
- <sup>5</sup> ABS *Women's Safety 1996*
- <sup>6</sup> Eg. Article 11 *International Covenant on Economic, Social and Cultural Rights 1966*
- <sup>7</sup> ABS 2001 Census data
- <sup>8</sup> National Conference on Homelessness, address by Chris Sidoti, Human Rights Commissioner, 1996
- <sup>9</sup> Supported Accommodation Assistance Program data 2002-03
- <sup>10</sup> *Overcoming Indigenous Disadvantage: Key Indicators 2007*, Steering Committee for the Review of Government Service Provision, Commonwealth of Australia, 2007
- <sup>11</sup> *Legal Aid and Access to Justice*, Legal and Constitutional References Committee, Commonwealth of Australia, 2004
- <sup>12</sup> *Review of the Disability Discrimination Act 1992*, Productivity Commission Commonwealth of Australia, 2004
- <sup>13</sup> *Older People and the Law*, Committee on Legal and Constitutional affairs, Commonwealth of Australia, 2007
- <sup>14</sup> Eg. Article 3, *Universal Declaration of Human Rights 1948*
- <sup>15</sup> This costing addresses standard operational demands. Additional provision such as is currently provided through the Commonwealth Expensive Criminal Cases Fund is required to meet the cost of long, complex and high cost Commonwealth criminal trials.
- <sup>16</sup> Eg. Article 14, *Universal Declaration of Human Rights 1948*
- <sup>17</sup> *Legal Aid and Access to Justice*, Legal and Constitutional References Committee, Commonwealth of Australia, 2004
- <sup>18</sup> Eg. *National Inquiry into Children in Detention*, Human Rights and Equal Opportunity Commission, 2004



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