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Australian legal aid and the private legal profession: A healthy alliance?

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Introduction

In 1990, the National Legal Aid Advisory Committee (NLAAC) described the Australian legal aid infrastructure as a partnership between governments, legal aid commissions community legal centres and private practitioners.[1] Substantial change to this legal aid infrastructure has occurred in the last decade. Change has occurred in the organisational structures of legal aid organisations; the management of the provision of legal aid services; the funding arrangements; the form and number of legal services delivered; and the relationships between the stakeholders in the system.[2] This paper specifically explores the change to the relationship between the stakeholders in the legal aid system.

During the 1990s the private legal profession increasingly acted as advocate for legal aid against government. Concurrently, the nature of the relationship between the private profession and government, legal aid commissions and community legal centres was altering. Professional bodies were increasingly denied an opportunity to have input into legal aid policy and the management of legal aid organisations; individual private practitioners stopped doing legal aid work; legal aid commissions adopted new systems that limited a client's right to choose a legal practitioner; the private profession established alternative or supplementary legal assistance schemes; and new forms of partnerships were forged between the private profession and community legal centres.

The focus of this paper is to detail these changes, describe the current state of the various relationships and assess whether the alliances are healthy or not?

The last decade has also seen significant changes to the legal profession and the legal services industry: changes to regulation of the legal profession, increasing competition in the legal services industry, challenges to the concept of professionalism, changes to nature and form of legal services, the scope of legal education, the increase in numbers of law graduates and the demographics of the legal profession. The full impact of these changes on legal aid policy and practice is

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1 National Legal Aid Advisory Committee, *Legal Aid for the Australian Community* (1990)Canberra AGPS at pp xvii - xix

2 Noone, M.A., \`The State of Australian Legal Aid' (2001) 29 *Federal Law Review* 37

difficult to determine. In the conclusion some tentative links are made which require further research.

Equally, there have been significant changes in the social context of legal aid and the way government operates. As Arup describes, the current dominance of economic globalisation with a philosophy of neo–liberalism has increased the focus on competition policy and undermined the concept of the welfare state. Welfare becomes a personal responsibility rather than a social one. `Government services are reduced, with remaining responsibilities contracted out to private practitioners in a commercialised purchaser-provider relationship'.[3] This approach is reflected in changes the Commonwealth made to legal aid funding detailed below.

This paper does not intend to be a comprehensive account of the relationships in each State and Territory. Instead it aims to highlight examples to inform discussion about the future of legal aid policy and practice. The history of relations between the legal profession and legal aid commissions and community legal centres varies considerably from State to State. As NLAAC noted in 1990, the relations between legal aid commissions and private legal practitioners in some States and Territories are `occasionally strained'.[4].

Background

Australian legal aid system

The Australian legal aid system is referred to as a `mixed model'. It combines salaried lawyers (employed by legal aid commissions and community legal centres) and the private profession through `judicare' arrangements. Legal aid commissions are independent statutory bodies constituted by a board of commissioners prescribed by State legislation. Prior to 1995, this usually included nominees of the State and Federal Attorneys-General, the local law society and bar association, an organisation representing recipients of legal aid and community legal centres.[5] The primary function of legal aid commissions is to provide legal assistance by referral to private legal practitioners or salaried lawyers employed by the commission. In performing this function the legislation typically requires the commissions to have regard to a range of matters affecting the efficiency and effectiveness of providing legal assistance, the independence of the private legal profession, liaison and co-operation with other legal aid commissions and private legal practitioners, eligibility for legal assistance, the accessibility of services provided in the legal aid programs and the provision of duty lawyer services.[6]

Networks of Aboriginal Legal Services[7] and Community Legal Centres[8] also exist throughout Australia. These services are critical to the provision of legal services to

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[3] Arup, C., `Pro Bono in the Future Spectrum of Legal Services' (2001) *Law in Context* Forthcoming
[4] National Legal Aid Advisory Committee n.1, p111
[5] For a more detailed discussion of the financial and regulatory structure of legal aid see Access to Justice Advisory Committee, *Access to Justice: an action plan* (1994) AGPS p 231
[6] National Legal Aid Advisory Committee, n.1 pp 36-37
[7] For a discussion of the history of Aboriginal Legal Services see Chapman, M, "Aboriginal Legal Service - A Black Perspective" in Neal, D., (Ed) *On Tap, not on Top - Legal Centres in Australia*

the Australian community. Both community legal centres and Aboriginal Legal Services are independent non-statutory organisations. Community legal centres are funded by both State and Federal governments and employ between 1 to 5 people. They provide legal advice and advocacy to both individuals and groups in the community, especially people on low incomes or otherwise disadvantaged in their access to justice. This work includes individual legal advice and assistance as well as related activities aimed at addressing systemic problems. These activities include law reform, test case litigation, referrals and community legal education.[9] Aboriginal Legal Services are funded through the Aboriginal and Torres Strait Islander Commission and provide individual legal services to the indigenous population as well as pursuing test cases and land rights issues. [10]

Commonwealth's new direction

The nature of the Federal government's involvement in the Australian legal aid system changed dramatically on 1 July 1997. The partnership arrangement between the Federal and State governments for the provision of legal assistance to the poor and disadvantaged which has been in place in most States since 1979 was severed. Simultaneously, the method of funding legal aid changed.[11]

In late June 1996, the Federal Attorney-General (part of newly elected Liberal government) wrote to his State and Territory counterparts advising them that the Commonwealth was terminating the existing Commonwealth/State legal aid funding agreements. He indicated that new agreements would be renegotiated to have effect from 1 July 1997. [12]

Additionally the Commonwealth Government announced, in the August 1996 budget, legal aid funding cuts of around 22% for 1996/97.[13] In the Attorney's budget press release, he confirmed that the Commonwealth would "no longer provide funds to support the growing demand for legal aid matters arising under State or Territory laws". The release went on to say,

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1972-1982 (1984) at 35 and Lyons, G., "Aboriginal Legal Services" in Hanks, P. & Keon-Cohen, B.(eds), *Aborigines and the Law* (1984).

8 For a discussion of the history of Community Legal Centres see Basten J., Graycar, R. & Neal, D., "Legal Centres in Australia" (1983) 6 *UNSWLJ* 163 and Neal, D., "Ten Years After - the Victorian Centres" in Neal, D. (Ed), n. 7

9 http://www.austlii.edu.au/au/other/clc/

10 For further information see http:www. atsic website

11 For a detailed discussion of the changes and related policy issues see Fleming, D., "Australian Legal Aid under the first Howard Government" in O'Reilly J., Paterson, A. & Pue, W. (Eds), *Legal Aid in the New Millennium* (1999).

12 Attorney-General's Department, *Renegotiation of the Commonwealth-/Territory Legal Aid Agreement's* (1996) reproduced in Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System – First Report* , March 1997 at Appendix 3, p1.

13 For the actual amounts paid see table in Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System – Third Report* , June 1998 p 5

> That a proper apportionment of responsibility between the Commonwealth and the States and Territories for legal aid will lead to a reduced requirement for Commonwealth funding: accordingly, the Commonwealth outlays will be reduced by $33.16 million from 1997/98.[14]

Both announcements combined to signal the end of the partnership between the Commonwealth and the States/Territory governments in the provision of legal aid services. In the press release referred to above, the Attorney stated that the then current arrangements represented an unjustified subsidy to the State governments. The new agreements signified a shift in how the Commonwealth viewed its role in the provision of legal aid services. The Commonwealth moved to being a principal contracting with the legal aid commissions to deliver legal aid services in matters only involving Commonwealth law.[15]

Private legal profession and legal aid

When the above changes were announced, the legal professional organisations maintained strong support for the national legal aid system and increased its advocacy for additional legal aid funding. The Law Council of Australia mounted one of its biggest lobbying exercises as a consequence of the Commonwealth's announcements in 1996.[16]

But this overt support for the current legal aid system from the legal professional organisations has not always existed[17]. In the early 1970's when community legal centres were first established and the Australian Legal Aid Office commenced operations there was open hostility from the private legal profession. This is best exemplified when the Law Institute of Victoria mounted a High Court challenge to the newly established Australian Legal Aid Office in 1975. This action reflected the generalised concerns of the private legal profession with salaried lawyers, loss of control of provision of legal aid and disagreement over the appropriate aims of a legal aid system.[18]

Conflict over legal aid continued into the 1980s.[19] As Weisbrot notes, despite the large amounts of public money devoted to legal aid during the 1980's and the consequent expansions of work for lawyers, the profession and judiciary continued to attack and undermine the legal aid system.[20]

In contrast, the later half of 1990's was marked by strong and ardent support from the legal professional bodies for the institutions of legal aid and increased legal aid

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14 Williams, D, *Law and Justice for Australians-1997-98 Budget*, Press Release, No 20 (August 1996) Attachment 3.

15 Reynolds, S., "Contracting for Chaos" (1997) 22(1) *Alternative Law Journal* 22 at 23

16 `Legal aid crisis continues' (1997) 32(2) *Australian Lawyer* 28

17 There has been support for concept of legal aid. As early as the mid 1960s the Law Council called on the Commonwealth government to fund a federal legal aid system based on judicare (UK scheme) and controlled by the legal profession.

18 Tomsen, S., "Professionalism and State Engagement: Lawyers and Legal Aid Policy in Australia in the 1970's and 1980's" (1992) 28 *Australian and New Zealand Journal of Sociology* 307 at pp 312-314; MacMillan, C., `Constitutional Challenge to ALAO' (1975) 1 *Legal Service Bulletin* 165

19 For a detailed analysis of this conflict see Tomsen, n.18

20 Weisbort, D., *Australian Lawyers* (1990) Longman Chesire p 241

funding[21]. The Law Council of Australia actively campaigned to increase legal aid funding from the Commonwealth and on a State level the local law societies also regularly express their concern about lack of funds and actively support community legal centres.

But while this overt support for legal aid was forthcoming from the professional organisations, relations between some sectors of the profession and legal aid organisations was faltering. At the same time new partnerships were developing. These changes are discussed below.

Policy and Control – the legal profession and government

> The goodwill which is apparent in the relations between the OLAA[Office of Legal Aid Administration][22] and the legal aid community and amongst legal aid commissions, community legal centres and private legal practitioners in many States and Territories is a tangible and major asset in national legal aid management in the short, medium and long-term.[23]

The timing and lack of consultation that surrounded the 1996 Commonwealth changes indicated that the Commonwealth government no longer valued the goodwill identified in 1990 nor saw it as an asset.[24] The developments in the second half of decade had a profound effect on the stakeholders in the national legal aid system. In the private legal profession, both the organised legal profession and individual practitioners were affected.

The current Federal Attorney-General Darryl Williams, is reported as wanting to

> "take the decisions on how Commonwealth legal aid money is spent, out of the hands of 'stakeholders' on the boards of commissions, including law societies, bar associations and consumer and community welfare groups". [25]

He did this by specifying in the new Commonwealth/State agreements the type of legal matters that were to be funded by Commonwealth monies. He gave no discretion about expenditure of Commonwealth funds to the legal aid commission boards.

But other actions from both State and Federal governments also limited the private profession's involvement in legal aid policy and management. On a State level one of the most significant trends in legal aid in the second half of the 1990's has been the corporatisation of State based legal aid commissions. Organisational and management structures were changed to reflect a corporate ethos.[26]

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21 For example Syme, J.,`Crisis in Legal Aid – President's Page' (1996) 70(1))*Law Institute Journal* 3

22 The Federal government department responsible for legal aid.

23 National Legal Aid Advisory Committee n.1, p 298

24 Three years later, the same Attorney-General was calling on the goodwill of the legal profession to promote pro bono activities and for the legal profession to form a social coalition. See discussion below.

25 "Legal Aid Bodies must remain integrated and funding be maintained" (1997) 35 (3) *Law Society Journal* 39 at 40.

26 Corporatisation "requires that government activities that are commercial in their nature are made to work under conditions that approximate to those of their private sector counterparts and occasionally their competitors": Davis, G., Wanna, J., Warhurst, J. & Weller P., *Public Policy in Australia* (1993) at 119

The changes in Victoria and Queensland included reducing the size of the board and limiting the scope for input from providers of legal aid and users of the system.[27] The Commonwealth supported this model as adopted by Victoria in 1995.[28] This approach led to a reduced role for representatives of the private legal profession in these two legal aid organisations. Equally there is no role for representatives of the salaried staff nor community legal centres in this model of management.[29] Although in Victoria the amendments included the establishment of a community consultative committee. The legislation stipulates that the committee to consist of at least two members, one of whom is to be a nominee of the Federation of Community Legal Centres and the other a person representing staff of Victoria Legal Aid. No provision is made for representatives of the private legal profession to be on this committee.[30]

At a national level there is no longer any formal mechanism for input from the legal profession. The National Legal Aid Advisory Committee was the successor of the Commonwealth Legal Aid Council and existed from 1987 to 1994.[31] It comprised 7 members, the majority of whom were legal practitioners, including a Law Council nominee. This body advised the Minister for Justice on matters related to legal aid. The Committee was replaced in 1995[32], as a result of recommendations in the Access to Justice Advisory Committee's report, by the National Legal Aid Board. But it too was dissolved in December 1996.[33] There is now no formal body that advises the Attorney on legal aid matters and consequently no formal mechanism for consultation with the profession about Legal Aid.

At a forum, sponsored by the Law Council, called in response to the Commonwealth action in 1996, the Australian Legal Assistance Forum was formed. This is a body with representatives of the Law Council, directors of Legal Aid Commissions, Aboriginal and Torres Strait Islander Legal Services and community legal centres. The aim of this body is to promote cooperation and communication between service providers, to enhance service delivery and response to client needs, and to develop and promote policies regarding access to justice issues.[34] This forum represents a strengthening of the alliances between the members in the face of a hostile Commonwealth Government (which is obviously not included in this group). However the opportunity for the legal profession to influence government policy on legal aid has been substantially diminished by the abandonment of any formal advisory body.

Paradoxically whilst the Commonwealth government and some State governments have moved to distance the private profession from legal aid policy making and

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27 *Legal Aid Queensland Act* 1997 (Qld) and *Legal Aid Commission(Amendment) Act* 1995 (Vic).

28 Attorney-General's Department, `Renegotiation of the Commonwealth-State/Territory Legal Aid Agreements' Oct 1996 , appendix 3 in Senate Legal And Constitutional References Committee, *Inquiry into the Australian Legal Aid System, First Report,* (1997) p, 4

29 In response to the Commonwealth changes in 1997, three commissions (Victoria, Queensland and NSW) also removed any Commonwealth representation on the Commissions. For further discussion of this change see Noone, n.2 p 44

30 *Legal Aid Act 1978 (Vic)* s.12K

31 For a short history of these previous bodies see NLAAC report, p28-30. NLAAC provided annual reports from 1987- 1995

32 The relevant legislation has not been repealed - Commonwealth Legal Aid Act 1978 *check*

33 Fleming, n.11 p131 n 35

34 Australian Legal Assistance Forum, *Media Release* 22 April 1999

management of legal aid commissions, they have supported the private legal profession in establishing other schemes to provide legal assistance. For instance legislation to establish the Victorian `Law Aid' scheme (described below) was contained within the amending legislation that changed Legal Aid Commission of Victoria to Victoria Legal Aid and reduced the board from twelve to five, excluding stakeholders representatives. [35]

Supplementary legal aid schemes

The lack of legal aid in civil law matters[36] and the severe restrictions on the availability of legal aid generally has prompted, the private legal profession often with government support, to establish supplementary legal aid schemes or pro bono programs. Different schemes are launched within State jurisdictions by law societies, bar associations, the courts and others. As a consequence the objective of cohesive and consistent provision of legal aid services across the States, managed by the legal aid commissions, is lost. For instance the proliferation of pro bono schemes raises concern about "fragmentation, lack of co-ordination and the difficult task citizens face when they try to find pro bono schemes when they need them".[37]

Contingency Legal Aid Funds

Contingency Legal Aid Funds (CLAF) have been operating in some states since the early 1990s. A contingency legal aid fund provides financial assistance to civil litigants who cannot afford to obtain legal assistance but who do not qualify for legal aid.[38] With the withdrawal and/or reduction in civil legal aid, CLAFs have continued to develop to supplement the legal aid system. For example "Law Aid" was launched in Victoria in March 1997.[39] The aim of the scheme is to assist people in civil litigation. The Queensland Government established a similar scheme, called Civil Law Legal Aid Scheme.[40] Voluntary participation by legal practitioners is central to the schemes. The Victoria Law Aid is established by Trust Deed and administered by the Law Institute and the Victorian Bar. Unlike Victoria Legal Aid there is no statutory requirement for an annual report on the activities of the scheme or any published guidelines about eligibility.

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35 *Legal Aid Commission (Amendment) Act 1995 (Vic)*

36 Most legal aid Commissions wound back the provision of services in civil law. For example, the Civil Law Section of the Legal Services Commission of South Australia (LSCSA) ceased to operate as a separate casework section with its own manager. LSCSA made a decision in 1997/98 to limit civil law matters to those in non-costs recovery jurisdictions. The majority of civil grants are now for representation in Youth Court protective hearings. There is a large unmet need for civil law services. LSCSA notes that 42% of all advices (a free 30-minute consultation with a legal or para legal staff member), were for civil maters. Only 5% of all grants for 1998/99 were for civil matters. LSCSA Annual Report 1998/99 at 18.

37 Regan, F., "Legal Aid without the State; Assessing the rise of pro bono schemes" in O'Reilly J., Paterson, A. & Pue, W. (Eds), *Legal Aid in the New Millennium* (1999) p 56.

38 Access to Justice Advisory Committee, n 4, at 259.

39 The 1995 Act provided the legislative framework for a Law Aid Scheme. The scheme is a joint undertaking between the Law Institute, Victorian Bar and the Victorian government. Under the scheme Law Aid pays for all disbursements (except counsel's fees) while the legal practitioners agree not to charge until the litigation has been successfully concluded.

40 The scheme pays for court preparation outlays such as court filing fees, the production of specialised reports (ie-medical reports) and expert witness fees. It does not pay for solicitors or barrister's fees "...as they are primarily required to speculate their professional fees." The Public Trustee of Queensland provides funds for the scheme: Legal Aid Queensland *Annual Report 1998/99* (1999) at 16.

Pro Bono Schemes

In addition to the various contingency legal aid funds established there is also a growth in Pro Bono schemes. These are schemes, usually administered by a section of the legal profession, where private legal practitioners perform legal work for free. This type of work has always occurred within the legal profession but in the last decade there has been a growth in the number of organised schemes.[41]

In August 2000, the Commonwealth Attorney-General hosted a `Pro Bono' conference.[42] He addressed the issue of the promotion of pro bono being a substitute for legal aid in these words:

> The issues of equity of access to legal representation and support cannot be solved by any single approach. What is needed is a range of responses...Pro bono, legal aid, community legal services and fee for service all contribute to this system……We need to work in partnership- to form if you will, a social coalition of the legal profession, the community legal sector, welfare groups and the Government working together to identify and tackle pro bono issues. [43]

The Attorney General's comments suggest that he has not appreciated the extent of the profession reaction to his government's decisions on legal aid. Despite the Law Council and several large law firms being supporters and sponsors of the conference, there was a deal of scepticism about the conference from legal practitioners. These comments from Michael Gawler, immediate past president of Law Institute of Victoria, appear to summarise the reaction of many practitioners from smaller firms:

> The capacity of suburban and country lawyers to provide more pro bono work than at present is severely limited by the decrease in profitability of suburban and country practice over the last 15 years…..It is unreasonable for lawyers to have to carry the burden of inadequate legal aid by doing more work on a pro bono basis. The demand for pro bono work has increased massively as a result of the Commonwealth government cuts to legal aid three years ago. It is suburban and country lawyers, not top tier firms, who bear the brunt of inadequate legal aid….Lawyers in Victoria have done their part through the Law Institute by organising their own pro bono scheme. [44]

Despite this type of reaction, the Attorney-General announced in May 2001 that the budget contained a commitment of $1 million to establish a pro bono taskforce whilst providing no additional funding for legal aid. In contrast to his reported comments in 1997 (see above), the Attorney-General said this:

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[41] Robertson D., "Pro bono - New Strategy for public interest litigation?" (1994) 19 *Alternative Law Journal* 15 and for a brief summary of schemes see Regan, F., "Legal Aid without the State; Assessing the rise of pro bono schemes" in O'Reilly J., Paterson, A. & Pue, W. (Eds), *Legal Aid in the New Millennium* (1999); Herron, M., `Let's get organised – overview and comment' (2001) 75(1) *Law Institute Journal* 25

[42] Brown, M., `Historic conference examines pro bono' (2000) 74 (9) *Law Institute Journal* 29

[43] William, D, *Opening Address,* For the Public Good: the First National Pro Bono Law Conference, 4 August 2000, Canberra available at <http://www.law.gov.au/attorney-general/speeches>

[44] Gawler,M., `Pro bono in the Suburbs and Country' in *For the Public Good: The First National Pro Bono Law Conference – Abstracts and Briefing Papers* 2000 p.17;

> The best way to increase access to justice for all Australians is to strengthen and enhance a social coalition – the existing network of community groups, government agencies, court services, volunteers and the legal profession who work together to provide legal assistance to people most in need….This significant Budget measure will provide guaranteed ongoing support to develop a strong and coordinated approach to pro bono activities in Australia.[45]

Provision of legal services - private legal profession and legal aid commissions

The private legal profession has always played a central role in the provision of legal aid services in Australia. Between 60% to 70% of legal aid expenditure consists of payments to private practitioners. The system currently relies on the involvement of private practitioners to deliver legal services to a range of people and areas not serviced by legal aid commissions and community legal centres.

Flight of legal practitioners

However, a range of current research verifies a trend that fewer legal practitioners are prepared to do legal aid work. Although the actual numbers of practitioners performing legal aid work has always been a small percentage of practitioners generally, this current research highlights the contracting nature of private practitioner providers and a "noticeable exit from legal aid work by private legal practitioners in Australia".[46]. The reasons behind this phenomenon are varied but appear to be a consequence of successive changes to the legal aid system. A Queensland study concluded that a `significant causative factor" in the `flight" of experienced legal practitioners from legal aid work (particularly in family law) in recent years was the perceived worsening of the legal aid system.[47] The reasons given by practitioners include the low level of fees paid, the number of grants decreasing and simultaneously, in many cases, the amount spent per case reducing. In particular research suggests that the legal profession reacted adversely to fee ceilings[48] particularly in the family law area where caps came into immediate effect.[49]

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45 Williams, D., `Budget 2001-2002: Government enhances access to justice' *News Release – Attorney-General* 22 May 2001

46 National Legal Aid Survey of legal firms doing legal aid family law work January 1999 as quoted in Australian Law Reform Commission, *Managing Justice: a review of the federal civil justice system*, Report No 89 (2000) at p 345.

47 Dewar, J., Giddings, J. & Parker S., *The Impact of Changes in Legal Aid on Criminal and Family Law Practice in Queensland* (1998) This perception is shared by the Chairman of Victorian Criminal Bar Association who stated that "junior barristers are taking work that should be done by much more senior barristers to the detriment of the client": Innes, P. "Does legal aid have a future in Victoria?" (1998) 72(3) *Law Institute Journal* 10. In response to concerns from the private profession VLA increased certain payments to private practitioners in 1998/99. Family law matters in particular attracted higher fees for certain stages of proceedings. In July 1998 LACSA ceased its interim "rationing" of expenditure in family law matters.

48 Although legal practitioners have always accepted a reduced fee (80%) for legal aid work, in the last decade, limits have also applied to the amount of legal aid expenditure for any one case. These limits are described as "caps" or "fee ceilings". The rationale of "caps" is to spread the legal aid dollar further and to encourage the efficient conduct of legal cases .Capping" was introduced by various commissions prior to the Commonwealth funding cuts but fee ceilings are now included in the Guidelines of the Commonwealth-State agreements. The advantages and disadvantages are discussed in detail in Senate Legal and Constitutional References Committee,

Other research found that `there was an absolute decline in the number of experienced family law practitioners doing legal aid work. but among those doing legal aid work, there was no decline in the proportion of experienced solicitors.[50] The responses to a question about change in amount of legal aid work performed indicates

> "that successive changes to legal aid funding have had an adverse impact on the supply side of the legal aid market in family law. Not all the effects are attributable to the changes introduced in July 1997. However this does seem to have been some kind of tipping point, speeding up the rate of exit from legal aid work, and producing a clear trend for fewer firms to do more legal work while the majority of firms do none or very little. This raises concerns about client access, particularly in rural and regional areas'. [51]

The "flight" of legal practitioners is an indication of the growing alienation of the legal profession from the legal aid system. The implication is that the private legal profession is no longer prepared to subsidise and support a failing legal aid system. Whilst the elite of the legal profession are advocating for more funds and support for a legal aid scheme, those on the ground are retreating.

In December 1999, the Federal Attorney-General announced an additional $63 million for legal aid commissions over the next four years. One of the areas he wanted to address was this flight of practitioners but at least anecdotally in Victoria(which received none of this extra money) the trend continues.

Reduced "solicitor of choice"

A consequence of declining numbers of private practitioners performing legal aid work is that applicants for legal aid have limited choice of practitioner. Two other related developments that affect the solicitor of choice approach are preferred supplier schemes and the growth of in-house counsel. The fact of these developments is an illustration of the declining influence of the legal profession within legal aid policy. Both a client's right to solicitor of choice and concern about salaried lawyers were the dominant concerns of the legal profession in legal aid debates of the 1980s.

The principle of "solicitor of choice" was influential in the development of the Australian `mixed model' legal aid system. The 1987 Law Council of Australia's policy on legal aid said:

> It is a fundamental that every person has the right to choose his own lawyer. Accordingly, the economically disadvantaged must have the same ability to

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n.13 at 79-95 and for details of the fee ceilings see Senate Legal and Constitutional References Committee, n.13, Appendix 4

49 Dewar, J., Giddings, J. & Parker, S., `The Impact of Legal Aid Changes on Family Law Practice' (1999) 13 *Australian Journal of Family Law* 33; Springvale Legal Service, *Hitting the Ceiling: Springvale Legal Service Report into the Impact of Funding Limits in Legally aided Family Law Matters which came into Effect on 1 July 1997* (August 1998)

50 Hunter, R., *Legal Services in Family Law* (2001) Justice Research Centre p. 119

51 Hunter, n.50 p.248

> choose an acceptable and competent lawyer as other persons and must be clearly informed of that right.[52]

Despite, the National Legal Aid Advisory Committee, in 1990, declining to accept that this should be an underlying principle for the management of the legal aid system,[53] legal aid commissions did not, until recently, take any dramatic action to undermine the sentiment behind the Law Council's approach.

However the Commonwealth, in the process of renegotiating the 1997 funding agreements, indicated it was seeking to achieve the most efficient form of service delivery and said:

> the Commonwealth perceives that this is likely to involve working with expert panels to undertake matters, with the legally assisted client no longer having unfettered choice of solicitor.[54]

In reality, applicants for legal aid, together with other consumers of legal services, have never really enjoyed having their `solicitor of choice'. Until relatively recently, legal practitioners were not allowed to advertise and the information available to consumers, on which to base a informed choice, was limited. Additionally, there have always been a large proportion of legal practitioners who have never done legal aid work so the range of practitioners from which to choose was also limited.

Preferred supplier schemes

Restricted panels(or expert panels) of legal practitioners reduces the number of practitioners eligible to accept legal aid referrals. In order to perform legal aid work, a legal practitioner must be on a legal aid panel. In the past this panel has usually included almost all practitioners. Several States have legislation in place that permits the legal aid commission to refer work to restricted groups of legal practitioners but success in introducing limited panels has varied between the States.

Legal Aid Queensland (LAQ) commenced a preferred supplier scheme in February 1998.[55] Although the Chief Executive officer of LAQ indicates that this decision was made after consultation with the legal profession, a Senate Committee report suggests that the preferred supplier model was implemented against the wishes of the legal profession.[56] In August 1999, LAQ introduced a Model Service Agreement for the firms on the list. The three year agreement requires adherence to Practice and Case Management Standards and the firms agree to lodge applications for legal aid electronically and to communicate electronically with LAQ. The Preferred Supplier Agreement is described as a "cut down version of the Franchise Agreements applied by the Untied Kingdom Legal Aid Board".[57]

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52 Law Council of Australia quoted in National Legal Aid Advisory Committee, n.1, p 233-4.
53 National Legal Aid Advisory Committee, n.1, p 233-5.
54 Attorney-General's Department, n.12, at 8.
55 Hodgins, J., "Provider Paradigm and Beyond" in O'Reilly J., Paterson, A. & Pue, W. (Eds), *Legal Aid in the New Millennium* (1999) at 64
56 Hodgins, n.55 and Senate Legal and Constitutional References Committee, n.13, p 140
57 Hodgins, n.55. For a detailed discussion of the issues involved see Giddings, J., "Legal Aid Franchising: For Thought or Production Line Legal Services?" (1996) 22 (2) *Monash Law Review* 344

In contrast VLA announced in 1997 that they proposed to establish limited panels of legal practitioners eligible to conduct legal aid criminal law cases but the negative reaction of the local legal profession meant that they did not eventuate. A set of draft performance standards for panel members was released for comment. The draft included that practitioners use their "best endeavours to assist Victoria Legal Aid to achieve its statutory object to provide effective, economic and efficient legal aid for Victorians at a reasonable cost". Additionally, the panel members would "as a general principle only conduct defences with a reasonable prospect of success" focusing on "those elements of the case which are likely to lead to a successful defence to the exclusion of peripheral or insignificant issues". [58]

Not unexpectedly these performance standards prompted a spirited reaction from the local professional organisations. The particular concerns were that the proposals undermined the professional independence of legal practitioners and would affect the nature of the client relationship and the attendant duties. The then Chairman of the Victorian Criminal Bar Association stated:

> the new system imposes a new duty on barristers, additional to those to the court and to the client, to help VLA achieve its statutory functions. This could put a barrister in an impossible conflict where he or she will have to weigh what is in the best interest of the client against what is in VLA's best interest.[59]

Despite legislation to clarify the powers of VLA in relation to the private practitioner panels the strength of the private legal profession's response has meant that to date preferred supplier panels in criminal matters have not been established in Victoria.

But in contrast a private practitioner panel of child representatives was established in 1998.[60] The practitioners on this panel are required to met their professional responsibilities as well as "assist Victoria Legal Aid to achieve its statutory objectives". There has been no concern expressed by the professional organisations about this panel. The difference in reaction most probably lies with the fact that child representatives are appointed by the Family Court and the specific wording of the agreement.

Recently a related proposal has been mooted at VLA. The proposal is to move to a risk based approach in the management of grants for legal assistance. This involves a system where applications for legal aid are assessed by the private profession and VLA's inhouse practice. They have to ensure that the merits and means test are complied with and the matter comes within the guidelines. Accompanying this proposal would be the creation of practitioner panels who sign a Service Agreement with VLA. An audit process will be put in place to ensure compliance together with electronic lodgement and communication between the practitioner and VLA. The reaction of the profession(solicitors) to date has been cautious support for the

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58 Giddings, J, "Legal Aid at the Crossroads again" in Giddings, J. (Ed) *Legal Aid in Victoria- at the crossroads again* (1998) at 7.

59 Innes, P. "Does legal aid have a future in Victoria?" (1998) 72(3) *Law Institute Journal* 10 at 11.

60 Child representation is ordered by the Family Court in complex cases. Child representation is a priority under the Commonwealth Priorities and Guidelines.

proposals especially if it reduces unnecessary paper work and administration.[61] Given the experience in 1997, the acceptance and support of the private profession may depend on the detail in the yet to be drafted service agreements.

Growth of In-house work

The use of "in house" salaried lawyers instead of private practitioners has been controversial since the establishment of ALAO in 1973.[62] The percentage of cases done in-house varies considerably between state commissions. It ranges from 13 % to 40% with most around 30%.[63] In more recent times, the trend in Government towards the privatisation of public services suggested that the use of salaried lawyers would decline[64] but in at least two commissions there is a growth of "in-house legal work".[65]

The Australian Law Reform Commission recently reviewed the merits of "in-house" lawyers, particularly in family law. The Commission concluded that there were a number of benefits (apart from cost) in inhouse representation and recommended that priority family law clients be assigned to in-house legal aid lawyers wherever possible.[66]

There is little doubt that the cost effectiveness of inhouse counsel will continue to be debated. But a trend towards in-house lawyers may be fuelled most by the increasing reluctance of the private legal profession to do legal aid work.[67]

Volunteers and partnerships - private legal profession and community legal centres

When community legal centres were first established they encountered strong opposition from the organised private legal profession. The mode of operation of centres was anathema to standard legal practice. Centres advertised, they were `free', informal and irreverent, and they talked explicitly about injustice and change. As mentioned above this hostility from the legal profession was not only directed at community legal centres but also at the establishment of public legal aid offices generally.

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61 `Plan for lawyers to OK clients' legal aid' *Age* 27/4/2001 p 3

62 Tomsen, S., "Professionalism and State Engagement: Lawyers and Legal Aid Policy in Australia in the 1970's and 1980's" (1992) 28 *Australian and New Zealand Journal of Sociology* 307 at 314.

63 Australian Law Reform Commission, *Managing Justice: a review of the federal civil justice system*, Report No 89 (2000) Recommendation 43 at 343-344.

64 Giddings, n 57, at 13.

65 In Victoria, the proportion of cases handled by in-house legal practitioners increased over the decade. In 1992/93, 26.70% of grants of legal assistance were to in-house legal practitioners and in 1999/00 this percentage has risen to 31.10%. Victorian Legal Aid *Annual Report 1999/00* (2000) at 12. In 1996, after a history of providing no legal assistance in civil law work, LACNSW introduced differential fee scales to encourage the private legal profession to take on more civil work. In 1997/98 only 4914 applications were received from the private profession of which 4,261 were granted. By contrast, LACNSW in house lawyers and advocates dealt with more than 7000 applications. For the first time in house lawyers accepted more cases than did the private profession. Slade, B. "Not Enough Lawyers Legal Aid and Civil Law Delivery" (1998) 12 *Law Society Journal of New South Wales* 58.

66 Australian Law Reform Commission, *Managing Justice: a review of the federal civil justice system*, Report No 89 (2000) Recommendation 43 at 343-348.

67 See discussion above

This conflict continued into the 1980s. When new community legal centres sought to establish themselves, there was often a negative reaction from the local private profession. The immediate concern seemed to be the threat of loss of work. As late as 1989, the Law Council of Australia denounced the use of legal aid monies for law reform and community legal education as `social engineering'.[68] This was particularly addressed at legal aid commissions but it was also an attack on the fundamental approach of community legal centres.[69] These concerns have lessened in the last decade and there is now strong organisational support from the legal profession.

There are over 160 community legal centres around the country.[70]. The Commonwealth's expenditure on the Community Legal Services Program is around $20 million. Spending on community legal centres has continued to increase whilst other legal aid funding has been reduced. Eleven new rural centres have been established in the last two years. Centres have performed a variety of innovative and challenging legal and related work but they are currently overwhelmed with an increasing demand for traditional individual legal services resulting from the funding cutbacks to legal aid.[71] Government funding (both State and Federal) usually provides a community legal centre with between one to three full time positions.[72]

Volunteers perform the bulk of advice and referral work done at community legal centres. Volunteers are drawn from students (law and non-law), private practitioners, both solicitors and barristers and others in the legal sector. Since the 1970s Governments have recognised the cost-effectiveness of community legal centres, primarily, because of the reliance on volunteer labour.[73] Hundreds of thousands of dollars worth of volunteer labour are contributed yearly by legal practitioners to the legal aid system via community legal centres.[74] This is a significant contribution by the private legal profession to the provision of legal aid services.

A recent survey conducted by the Federation of Community Legal Centres(Vic) indicates that most volunteers live within a 8 km of the centre where they work; most volunteer for altruistic reasons and not just work experience; and most would not volunteer for a for-profit organisation. Legal volunteers cite the ethos of the Centre and the opportunity to do work which is different to work in a corporate firm or their

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68 `Legal aid to help the needy – not for social engineering: LCA submission to Legal Aid Review' (1989) 24 (1) *Australian Law News* 6, 8

69 This was despite the 1987 Legal Aid Policy of the Law Council acknowledging that community legal centres fulfil a significant and innovative role, which should be encouraged by the private profession.

70 National Association of Community Legal Centres, *Community legal centres – the Australia New Zealand Directory* Sept 2000

71 Full discussion of impact of funding reductions see Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System –Third Report,* June 1998.

72 Some NSW centres have up to five full time positions. Centres may obtain funding from other sources to employ more workers.

73 Attorney-General Durack, *Commonwealth Record* 19-25 October 1981, 1360 as quoted in Tomsen, n.18 p.320

74 A survey of Victorian community legal centres conducted in 1998 found there were 745 volunteers contributing an equivalent of 69.95 effective full time positions and community legal centres estimated the contribution of volunteers to be worth $5m per annum. Coulson-Barr, *Volunteers in Community legal centres - Discussion Paper* Prepared for the Review of Victorian Community Legal Centre Funding Program: Implementation Advisory Group, September 1999

normal field of work as important motivating factors. A common motivation for volunteers is a commitment to the particular work of community legal centres.[75].

However there are substantial changes occurring to the way that community legal centres operate and are managed. A substantial change is that the Commonwealth now *purchases community legal services* instead of funding *community legal centres*. The Commonwealth is more concerned with the number and type of services provided rather than how or what organisation provides those services. The new community legal services established with Commonwealth funds in rural areas, have all been put out to open and competitive tender. A number of tenders have been awarded to large welfare organisations. Similarly, the South Australian government (with Commonwealth support) called for tenders to achieve the aim of reducing six existing centres to three.

It is argued that the current approach of government to increasingly specify to community legal centres what funds are to used for and the focus on the numbers of services delivered in community legal centres rather than the preventative and law reform work of centres may jeopardise the `pro bono' contribution of practitioner volunteers in community legal centres.

The possibility of declining volunteer support is supported by recent trends in volunteerism. In particular volunteers from professional backgrounds are less likely to volunteer or unable to devote a lot of time to volunteer work. Community legal centres have to date been relatively immune from this trend.[76] But as the research into the flight of legal practitioners from legal aid work suggests, the private profession can react adversely under pressure. This experience should suggest caution in tampering with the operating structures of community legal centres to prevent the exit of volunteer legal practitioners from community legal centres.

New `Partnerships'

A paradox in this arena is that while sections of the private profession are declining to do legal aid work other sectors are seeking to make a greater contribution. In particular large city firms are establishing or expanding their involvement in aspects of the legal aid system and pro bono work.

There is growing interest in the formation of `partnerships' between large legal firms and community legal centres. A variety of different arrangements have developed. These relationships include the secondment of solicitors from large firms to community legal centres, a large firm funding the employment of articled clerks in a community legal centre, assistance with legal research and the development of precedents, office management and provision of in-kind assistance such as furniture.[77]

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75 Coulson-Barr, n. 74, p 7
76 Coulson-Barr, n.74 p 16
77 For examples see Fitzroy Legal Service Inc, A*nnual Report 1999-2000* p 19 and *PIAC Bulletin* December 2000 p 8

But as a recent example illustrates[78], despite the best of intentions, partnerships require trust and an understanding of the nature of the organisation involved. The difference in cultures between a community legal centre and a large city firm is a hurdle, which may be difficult to overcome if true partnerships are to flourish.

It could be argued that these developments are in keeping with a private profession that no longer feels aligned with the government on legal aid issues. But the flaw in this argument is that the pursuit of individual arrangements comes from large firms who have never been involved in legal aid work. The rationale is more likely a concern to act `professionally' and to be good corporate citizens.

An additional related proposal is the formalisation of secondments from large legal firms to legal aid commissions and community legal centres. A number of community legal centres have established secondment programs but recently the Victorian's Attorney-General has requested advice on the formalisation of such a program. This proposal includes have seconded solicitors at Victoria Legal Aid.

Conclusion

The relationship between the stakeholders in the Australian legal aid system can no longer be described as a cooperative partnership. Although the terrain of the partnerships had been altering in the early part of the last decade, the Commonwealth's actions in 1996/97 severely transformed the nature of the relationships between the federal government and the other stakeholders. In particular the nature of the private profession's role within the legal aid system has altered. On the one hand, legal professional bodies have less opportunity to have input into formulation of legal aid policy and the management of legal aid organisations and individual private practitioners are no longer performing legal aid work. Conversely, small groups of practitioners are forming closer relationships with legal aid commissions and becoming preferred suppliers whilst new forms of partnerships are being forged between the private profession, government and community legal centres.

The Australian legal aid system is still accurately described as a mixed model. The providers of legal aid include private practitioners, salaried staff and community legal centres. But recent research suggests that the proportion of work performed by these providers is changing. In particular there appears to be a trend that the numbers legal aid cases going to the private profession is declining, the number of in-house matters are increasing and community legal centres are performing more individual casework. Additional research is required to confirm this movement. Certainly the development of preferred supplier panels will mean that the number of practitioners available to provide legal aid services will be increasingly limited.

While the research shows that fewer legal practitioners are prepared to take on legal aid work, a range of new schemes (including pro bono) have sprung up to address the legal needs of the population. These schemes are often initiated by the private

78 Negotiations between a national specialist community legal centre and a national legal firm concluded because agreement could not be reached on the crucial issue of governance.

profession because of the declining ability of legal aid to cater for all needs. So. paradoxically, at a time when government funding of legal aid is decreasing, various State governments have provided seeding grants for CLAFs and the Commonwealth government is actively promoting pro bono activities (see above)

The consequence of this proliferation of legal assistance programs is that there is no longer one organisation coordinating and managing the provision of legal services to those unable to pay. These developments add a new meaning to the `mixed model' concept. Rather than just a mixture of service providers, what is developing is a mixture of schemes managed by a range of different bodies: legal aid commissions; legal professional bodies; the courts and practitioners; and those established by the large law firms.

Further research is needed to assess whether these various developments provide greater access to legal services or whether they further exacerbate existing inequities, for example, in relation to people in need of legal assistance living in rural and regional areas.[79]

In assessing the health of the alliance between the legal profession and other stakeholders in the legal aid system, it becomes apparent that some relationships are healthier than others and that there are tensions and contradictions within the alliances.

Clearly the current federal government's actions in 1996/97 severed its relationship with the other stakeholders including the private legal profession. Fleming describes the result as a `loss of trust and confidence in the Commonwealth'.[80] The recent focus on pro bono and call for a `social coalition' by the current Attorney-General may be an attempt to restore this trust. But as a consequence of the actions in 1996/97, the elite of the profession, represented by the Law Council, became more allied to the other stakes holders in the legal aid system. The forming of the Australian Legal Assistance Forum exemplifies this alliance.

However, while the Law Council continues to advocate that a properly funded legal aid system is essential to a functioning democracy, legal practitioners at the coal face are retreating from the provision of legal aid. This apparent contradiction is an illustration that the legal profession itself is not heterogenous and is divided. In the last decade the legal profession has been challenged to live up to the concept of `professionalism' and not be subsumed by economic imperatives.[81] A focus on the provision of legal aid illustrates the tensions facing the legal profession. The elite of the profession relies on the concept of service to the community and defenders of equality before the law to claim a 'professional' status. It is from this premise that

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79 Giddings, J., Hook, B. & Nielsen J., `Legal Services in rural communities: Issues for clients and lawyers' (2001) 26(2) *Alternative Law Journal* 57

80 Fleming, n. 11, p136

81 Kirby, M., 'Billable Hours in a Noble Calling?' (1996) 21(6) *Alternative Law Journal* 257; Gobbo, J., `Idealism under stress – legal practice in Victoria' (2000) 74 (11) *Law Institute Journal* 85

they base their advocacy for legal aid. But in sharp contrast, significant numbers of legal practitioners who have performed legal aid work are saying that the commercial imperatives must dominant. They are ceasing to do legal aid work.

At one level the legal profession now provides greater support to the concept of legal aid and is actively engaged in lobbying and building alliances with other peak legal aid bodies. On another level, the legal profession is saying that they are no longer prepared to subsidise the legal aid system and have stopped performing legal aid work. This could lead to greater efficiencies in the provision of legal aid services but equally it has the potential to undermine the support given by the elite of the profession. Finally, another section of profession is saying that they want to expand their `community service' and are developing new partnerships outside the boundaries of the current legal aid system. Again there is a tension in this development. It is good to expand support for legal aid and the types of assistance available but this is futile if these schemes undermine the cohesiveness and co ordination of the current system.

It is clear that the nature and forms of the relationship between the legal profession and Australian legal aid are in transition but the long term prognosis is uncertain.