

# EXECUTIVE SUMMARY

This inquiry presented an opportunity for the Committee to re-examine the state of legal aid, following the previous Committee's report in June 1998. That report, the *Inquiry into the Australian Legal Aid System: Third Report*, was conducted following the introduction of the Commonwealth "purchaser/provider" funding agreements in 1997. At that time, the Committee was limited in its ability to assess the long-term impacts that those changes had on legal aid.

This inquiry allowed the Committee to survey the legal aid landscape after nearly eight years under the "purchaser/provider" funding model. In addition, some serious issues in relation to legal aid and access to justice more generally were drawn to the Committee's attention.

## **Funding**

This report begins with a consideration of the funding of legal aid, including the levels of Commonwealth and state/territory funding, the funding model used by the Commonwealth to allocate legal aid funding, and the implications of having a strict Commonwealth and state/territory divide for the application of legal aid funding.

The Committee heard significant criticisms of the current Rush/Walker funding model, particularly in relation to components such as the 'suppressed demand factor' which result in more funding for some jurisdictions. Accordingly the Committee recommends the model be reformed.

The Committee also recommends a return to the co-operative model of funding that was in place prior to the Commonwealth Government's introduction of the "purchaser/provider" model. A return to cooperation between the Commonwealth and states/territories would reduce administrative costs and bureaucratic difficulties that people face where matters do not clearly fall within one jurisdiction. More importantly, such a move signifies a cooperative approach to meeting the obligation that a civilized society owes to its citizens in providing access to justice, particularly to those who are already disadvantaged.

The Committee has also considered the role of some specialist legal services. During its previous inquiry the Committee heard that the Environmental Defenders Office, was prevented from using the Commonwealth funding it receives for litigation purposes. The Committee recommended that the restriction be removed, and in light of further evidence to this inquiry, repeats that recommendation.

The Committee also heard evidence suggesting there is a need for a national forensic institute to ensure defendants in criminal cases have access to forensic services, and supports that proposal.

Finally, the Committee was concerned that when new legislation increases the emphasis on crime and law enforcement, there appears to be no supplementary funding to legal aid commissions to counter increased demand for their services. The Committee considers that a legal aid impact statement should be required for such legislation and that supplementary funding should be provided.

### **The lack of data on demand and unmet legal need**

In order to ensure that funding is being distributed in an equitable and efficient manner, there needs to be an understanding of the demand and unmet need for legal services that exists across Australia.

One of the key findings of the *Third Report* was the need for the Commonwealth to collect, analyse and publish more meaningful data on the impact of recent changes to the legal aid system and on the continuing operation of the system. The Government undertook a two stage Legal Assistance Needs study between 1997 and 1999, that study forming the basis of the current Rush/Walker funding model. In this inquiry the Committee heard criticism that this analysis had no regard to unmet need.

The Committee is concerned that in 2004 there is still a serious lack of appropriate data, and recommends that a national survey of both demand for legal aid services and an assessment of unmet need should be undertaken as a matter of urgency. Such research should be undertaken in conjunction with state/territory legal aid commissions and community legal centres.

### **Groups with particular needs**

During this inquiry there was much evidence to suggest that various groups are particularly restricted in gaining access to justice, due to such factors as socioeconomic disadvantage, cultural background and remoteness from mainstream legal services. The Committee examined the needs and concerns of some key groups and has suggested various strategies to address their needs.

#### *Women and family law*

The Committee heard evidence that current legal aid arrangements do not provide sufficient or uniform access to justice for women, particularly in relation to family law. Limited financial resources remain a major concern for many women, particularly in cases of family breakdown. More restrictive criteria in legal aid for family law matters, particularly in relation to the "cap" on legal aid funding, the more extensive merit tests and the need to engage in primary dispute resolution even in cases where domestic violence may be alleged, have had a significant impact since the last report.

The Committee considers that more funding is urgently needed for family law matters. Moreover, there should be a review of legal aid service provision more generally to ensure that the particular needs of women are addressed. Cases where domestic

violence or child abuse is alleged need particular attention, and the impact of new Family Court guidelines on child representatives must also be monitored.

The needs of women in other areas, including immigration law, civil law and the needs of women in prison, must also be addressed.

### *Indigenous Australians*

The Committee is particularly concerned about the state of legal service provision to Aboriginal and Torres Strait Islander people. The need for specialist culturally appropriate services, particularly in light of the over-representation of Indigenous people in the justice system, has been well documented in many other reports and studies. However, the Committee heard significant concerns about the current shortfall in funding of Indigenous legal services.

A particular issue which the Committee considers needs urgent attention is the need for increased services to Indigenous women. They remain chronically disadvantaged in terms of advice as to their legal rights, access to legal services and the high levels of violence which many of them experience within their communities. While eight Indigenous women's legal services have received funding from the Commonwealth and a number of Family Violence Prevention Unit programs appear to have been successfully established, the Committee considers that much more needs to be done for Indigenous women. Also of concern is the conflict of interest that arises where a local legal service cannot provide advice to both parties to a matter: evidence suggests that it is often the female victims of violence who miss out on assistance, and this must be remedied.

Another issue on which the Committee heard strong concern is the Government's recent decision to put Indigenous legal services out to tender. The Committee is strongly opposed to this course of action and considers that the exposure draft of the request to tender that is currently being circulated should be withdrawn and its underlying policy reconsidered.

Finally, the Committee is also concerned about the Government's recent decision, in light of the proposed abolition of the Aboriginal and Torres Strait Islander Commission, to "mainstream" Indigenous legal services. It must be ensured that the need for targeted, culturally sensitive and specialised Indigenous legal aid services is recognised by decision-makers.

### *People living in regional, rural and remote Australia,*

The *Third Report* identified various difficulties that people living in rural and remote areas face, including a lack of lawyers with particular expertise, conflicts of interest, high transport costs and the need to rely on telephone advice services rather than personal contact.

During this inquiry the Committee heard that the inadequacies in legal aid provision are greatly magnified in rural and remote areas. Large areas of Australia are not

covered by legal aid or free legal services. A number of initiatives are in place, including outreach programs, duty lawyer schemes and the use of videoconferencing or telephone advice services, such as the Government's Regional Law Hotline established in 2001. While the Committee supports such technological initiatives, they cannot take the place of face-to-face contact, particularly in sensitive or complex matters, and should be seen as an adjunct to them.

The Committee is also particularly concerned about the apparent shortage of lawyers in non-metropolitan areas. Incentives such as subsidies should be investigated by the Commonwealth, state and territory governments in consultation with the law societies.

As with other issues addressed during this inquiry, the Committee also recommends that research be conducted on the needs of people living in rural, regional and remote areas, and that consultation with local communities take place prior to the introduction of new or expanded services.

### *Migrants and refugees*

The Committee is concerned that the Commonwealth Priorities and Guidelines introduced in 1997 have resulted in reduced legal assistance to migrants and refugees. While there is specialist funding under the Immigration Advice and Application Assistance Scheme (IAAAS) administered by the Department of Immigration and Multicultural and Indigenous Affairs, legal aid commissions should be able to provide more assistance, particularly in the preliminary stages of matters. The Committee is also concerned that the increased demand caused by the introduction of temporary protection visas is not currently being met. The necessary funding should be provided to assist legal aid commissions in this task.

In addition, the Committee agrees with concerns that the administration of the IAAAS by the Department may cause a conflict of interest and for that reason recommends that the Attorney-Generals' Department assume that responsibility.

The Committee also recommends increased funding for interpreter services and that barriers to practice as non-feeing charging migration agents should be minimised, through such measures as reducing the costs of continuing professional development.

### *Other groups*

The Committee also heard evidence of the particular barriers to access to justice faced by homeless people, the mentally ill and young people.

Specialist programs for homeless people such as those run by the Public Interest Law Clearing House appear to be very valuable, but the Committee considers that the existing services provided by community legal centres and legal aid commissions should be supported in terms of ensuring they have adequate funding to address the demands of their clients.

There is often a link between mental illness and homelessness. The Committee did not receive sufficient evidence during this inquiry to enable it to assess the extent to which mentally ill people are deprived of legal representation throughout Australia, but views with great concern evidence from Advocacy Tasmania about the lack of representation for people who may be deprived of their liberty for extended periods. Vulnerable citizens need access to proper legal representation to protect and enforce their rights, whether that be in courts or other tribunals that can have a significant impact on their lives.

The Committee also heard of the barriers young people face in getting legal assistance, particularly the prohibitive costs, but also their lack of legal knowledge, the alien nature of the court system and the lack of knowledge of youth workers about legal issues. Preventing young people from becoming caught up in the criminal justice system is particularly important, and the Committee heard evidence of the valuable role that outreach services can play. This is another area where the Committee has recommended the Government consult with state and territory legal aid commissions about the need for increased funding to youth legal services.

### **Changing aspects of the system**

The Committee found that changes to legal aid funding and the unmet demand for legal assistance appear to have had a significant impact on particular components of the legal system since its last report. This report considers in some detail the provision of pro bono legal services, the increasing number of self-represented litigants and the increased demand on community legal centres.

#### *Pro bono services*

In the *Third Report* the Committee noted that the Government appeared to believe that more of the legal aid workload could be shifted to the private legal profession, and warned of the limited capacity of the private profession to take more responsibility.

Since 1998, there have been significant developments in pro bono service provision, particularly in terms of increased coordination of those services. Major initiatives include two national conferences on pro bono legal services and the establishment in 2002 of the National Pro Bono Resource Centre, partly funded by the Commonwealth over four years. However, data on the nature and extent of pro bono services nationally is still sparse. The Committee considers that the Government should commit itself to ongoing funding of the National Pro Bono Resource Centre past 2006 and should provide additional funding to allow it to develop better data.

Evidence to this inquiry also repeatedly warned that pro bono legal services should not be seen as a substitute for adequate legal aid funding. There are still areas where private law firms provide very limited assistance, particularly in some of the lower profile areas of law such as community law.

The Committee also considers that lawyers who provide pro bono services should be entitled to recover their costs in appropriate cases.

### *Self-represented litigants*

The Committee in the *Third Report* concluded that an indicator of how well the legal aid system was working was the number of litigants who appear before the courts without legal advice or representation. Evidence at that time suggested that this was occurring increasingly, although comprehensive data was not available. The Committee made various recommendations, including that the Government should analyse and publish annual data on unrepresented litigants in the various courts, and report on whether the savings made by denying legal aid were outweighed by the impact of unrepresented litigants on court time and resources.

Various reports and research projects, including those by the Australian Law Reform Commission and the Family Law Council, have established a strong link between cuts to legal aid funding and the rising incidence of self-representation, particularly in the Family Court. While some individuals may choose not to have a lawyer because, for example, they perceive they will have a tactical advantage, evidence to this inquiry suggests that reduced legal aid funding is directly responsible for the lack of legal representation for many others. This has potentially serious consequences for the enforcement of individual rights. The Committee also heard evidence of the adverse impact of self-represented litigants on other parties, court registries, judicial officers and the administration of justice generally.

While the legal community, including the courts and legal aid commissions, have introduced various initiatives to remedy those disadvantages, including the establishment of duty solicitor schemes at some courts and improving information services to the public, the Committee believes that more government support is needed. In particular, the effectiveness of legal information services should be evaluated, and duty solicitor schemes should be expanded for criminal, civil and family law matters.

### *Community legal centres*

The Committee heard significant evidence of concerns amongst community legal centres of the increased demand for their services. Throughout Australia there are over 200 centres that assist many disadvantaged clients who cannot afford legal representation but who are not eligible for legal aid. The Government provides approximately \$20 million in funding to over a hundred of these centres; however, there was compelling evidence that many centres are facing a funding crisis. It is difficult for them to attract and retain skilled staff, particularly legal staff. Moreover, the Committee heard that the condition of premises was so inadequate that competitions have been held for the worst office and some lawyers routinely interview clients in their cars. This cannot be allowed to continue.

The Committee considers that the community legal centre sector is a crucial part of providing access to justice for all Australians and is concerned that centres appear to be under extreme pressure. Consequently, an analysis of the impact of reduced legal aid funding on demand for their services, coupled with increased funding to this sector, is urgently required.

## **Conclusion**

The Committee believes that the recommendations contained in this report if implemented will play an important part in improving access to justice for all Australians and assist in the administration of legal aid.

