

## THE FUTURE OF AUSTRALIAN LEGAL AID

### Executive Summary

In 1997, expenditure by the Federal government for Australian Legal Aid was cut by a significant margin, leading to a reduction in services.

Since that time, the original budget has not been reinstated and there have been continual objections from Senate Committees, State governments, the legal profession, the judiciary and the Legal Aid Commissions that Legal Aid funding is inadequate and should be reinstated to pre-1997 levels.

In our view, the 1997 cuts in funding were a watershed because the cost of the system had become untenable : the Legal Aid budget had to have a limit, just as all government expenditure for whatever purpose, has to have a limit.

In 1975, agencies such as Legal Aid were the recipients of increased expenditure year on year. By 1995, the ever-increasing cost could not be justified. Whatever amount of funding was available from government would never have been enough. Both of the major political parties now accept this. When there is not enough money to go around, health and education should have higher priority than paying lawyers.

As government expenditure on Legal Aid is not a bottomless pit, we believe that the system could be supplemented by non-governmental alternatives.

Our Submission is that the Productivity Commission recommend to the Federal Government that the budget allocation for Legal Aid be linked to reforming the system if proposals from the private sector are deemed appropriate for achieving this.

### Legal Aid / Access to Justice : Options Available To Government

Governments have five main options in relation to Legal Aid :

- i. to maintain the status quo and continue to do nothing
- ii. to pursue savings in existing funding levels by re-structuring Legal Aid
- iii. to reinstate Legal Aid's pre-1997 funding
- iv. to abolish Legal Aid altogether or
- v. to supplement or replace government funding on a gradual, long term basis

If governments pursue option (i), this would continue the post-1997 emasculation of services and be contrary to election promises to improve services.

Option (ii) would involve high cost with enormous waste : it would be extremely difficult to get all governments to agree on one combined approach ; any savings gained from rationalisation of the different Legal Aid Commissions into one entity would result in further severe budget cuts ; there would be mass redundancies, office closures and scaling back in operations : the network infrastructure built over the last 38 years would end up being dismembered.

Governments would be unlikely to pursue either of options (iii) or (iv) as the former would involve an increase in government spending when savings are being pursued. Option (iv) would mean throwing away billions of dollars in government investment over the past 38 years and widespread redundancies.

In our view, the optimum and most viable course over the long term is option (v) which requires a commercial solution to a commercial problem.

### Legal Aid Today

Nothing has changed in response to the Senate Committee for Legal & Constitutional Affairs' two Reports into Legal Aid and Access to Justice in June 2004 and June 2009 when it recommended that the pre-1997 funding model be reinstated.

No action was taken by the Howard or Rudd governments in response to this recommendation and the dire situation affecting Legal Aid as confirmed to the Senate in 2009 has only deteriorated further. Obviously any further Senate Enquiries into the same subject will make the same recommendations and continue to be ignored.

Extensive statistical and other evidence was provided to the Senate Committees and the reader is referred to the voluminous Submissions made during both enquiries.

Legal Aid is currently used by a very small percentage of the population, despite \$750M of funding. Most taxpayers would question whether the system offers real value for money on that basis. A large percentage of income earners fall outside the means-test eligibility for Legal Aid but do not earn enough to afford exorbitant legal charges from law firms. Their taxes help to subsidise Legal Aid but they do not receive any of its benefits.

### The Downward Trend In The Australian Economy

The non-mining sector of the Australian economy is subdued and in some areas of the country, at recession level. This may last for several years. In addition, the Federal government has a large budget deficit which may expand out to \$400BN by the end of the decade and is seeking ways of reducing expenditure.

During the next 1 to 5 year period, the Federal government will have to deal with austerity conditions. Australia has a mountain of foreign debt to re-pay. Australia's AAA rating may be downgraded if the deficit appears to be out of control.

With the likelihood of a budget deficit of \$200BN in the next four years, the pressure on the Legal Aid budget will intensify as time goes on with further cuts to services being made.

### Legal Aid Unable To Be Replaced By Pro Bono

The Howard government attempted a variety of band-aid solutions to fill the post-1997 vacuum in Legal Aid services. The most prominent of these was the emphasis on pro bono work by law firms across the country.

Pro bono has no effect on reducing excessive legal charging or its affordability. While some benefit is passed on to a very small number of persons in need, no benefit at all is received by the general income-earning public who are taxpayers and are the vast majority of the population. Pro bono achieves its objective by diverting attention away from the crucial issue of how the pricing of legal costs can be reduced generally rather than in negligible, isolated cases. On this, there is no real commitment at all by the national legal profession to reduce its charges to affordable levels.

As the downward trend for legal charging increases, law firms will find it difficult to continue offering pro bono while staying profitable.

### Legal Aid In the Future

Based on events to date, what will Legal Aid look like in the future ? In the absence of any alternative approach :

- government funding of Legal Aid will remain frozen or be reduced further
- all of the Legal Aid Commissions will remain under pressure to reduce spending
- this will result in further cuts in services (this is already happening)
- the national Legal Aid network may be curtailed
- office closures and services vacuums may occur in some areas
- low to middle income-earners will still miss out (and continue to be litigants in person) or go on paying unreasonable amounts to high-charging law firms
- a national legal profession will not produce any reductions in charges

In the absence of a new raison d'être for Legal Aid, not a lot will have changed, only that most of the infrastructure built up over almost 40 years will have been cut back or lost. The essential issues – Legal Aid's lack of direction, the high cost of legal services and access to the law by income-earners will remain unresolved.

### A Commercial Approach

Legal Aid's reversal into a dead-end during the past 20 or more years is a sign of governments' inability to deliver a viable alternative model.

The real issues are deficient government expenditure, budgetary constraints, the high cost of legal services and the uncompetitive pricing practices of the legal market place : all of these are of commercial importance, requiring a commercial solution.

If the Federal government will not provide any additional subsidies for Legal Aid, the only alternatives are to maintain the existing level of spending (ie continue to do nothing), reduce costs and overheads by further savings (ie withdrawing services), close the system down or secure some alternative way of giving the system a new lease of life into the future.

All governments owe a duty to taxpayers to obtain the best return on spending on public services, to offer the greatest benefits within those services using the funds spent and to ensure that the relevant services answer the needs of the public. On all of these criteria, successive Federal, State and Territory governments have failed to deliver an optimum way of securing the highest benefits from the system : if Legal Aid was a company, it would have been wound up long ago.

The time for reform is now at the start of a period when the Federal government deficit is expected to expand significantly and when the government is actively seeking savings in expenditure and improved services.

A solution specific to Australian conditions is required. There is no existing international model for Legal Aid in any other country which could recommend itself, therefore the reform process in Australia will be unique. This would be in line with the global innovations developed in Australia in other legal services areas. We are confident that several viable models for supplementing the status quo exist.

In our view, there is no need for lengthy (and expensive) studies by academia, management consultants, the legal profession or the Legal Aid community which already exist ad infinitum.

What has been lacking to date is any willingness to consider a commercial solution.

Instead, the same circuitous demands since 1997 have been made for more money to be spent even though the threadbare concept of 1970s Legal Aid belongs to another era.

### Legal Aid At A Cross-Roads

The original mandate in 1975 for Legal Aid services to be subsidised by government for all time did not fully appreciate the realities of the legal market place and the general economy with service costs going up year after year. Australian Legal Aid was not alone in this ; other Legal Aid authorities around the world experienced the same problem.

Legal Aid in Australia is at a critical juncture : the infrastructure which has been built up over the past 38 years is outdated and requires a new approach.

The question is whether the Federal government can continue subsidising Legal Aid services and infrastructure even on a reduced basis in a recessionary environment with a huge deficit and when only 2.5% of the population has access to it.

### Submission

Our Submission is that the Federal government should liase with the State and Territory governments (if appropriate through COAG and/or the Standing Committee on Law & Justice) to review commercial proposals from the private sector which could bridge any gaps in Federal funding for Legal Aid. If the Federal government is satisfied that any commercial proposal could work successfully, the States and Territories should be invited to implement those proposals subject to an agreed timetable and without delay.

Reform of the Legal Aid system should be linked to funding allocations as an incentive to introduce change.

We are ready to submit an Unsolicited Private Sector Proposal to any interested government in Australia, the contents of which are commercially confidential and include our Intellectual Property. As these Submissions are to be posted on the internet, we reserve all our rights in relation to the contents of this Submission.

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