CHAPTER 2

LEGAL AID FUNDING

2.1 This chapter discusses:

- the recent history and levels of Commonwealth and State and Territory funding to Legal Aid;
- the funding model used to determine the distribution of Commonwealth funding;
- the application of Commonwealth priorities and guidelines in granting Commonwealth funds;
- the breakdown of funding by type of matter: criminal, family and civil;
- specialist legal services;
- the need to recognise the relationship between "law and order" legislation with the resulting increase in demand for legal aid; and
- the Commonwealth/State dichotomy.

Recent history of funding to legal aid

2.2 Prior to 1997 the legal aid commissions (LACs) of each state and territory were responsible for determining their own budget priorities and expenditure. The Commonwealth participated in such decisions through the Commonwealth Attorney-General's representation on the board of LACs. In 1996 the Commonwealth withdrew from this arrangement, and since July 1997 the state and territory legal aid commissions have been restricted to allocating Commonwealth funding to matters arising under Commonwealth laws.

2.3 This funding arrangement is referred to as a 'purchaser/provider' arrangement, as under the legal aid agreements the Commonwealth sets the priorities, guidelines and accountability requirements regarding the use of Commonwealth funds.

2.4 In its *Second Report*[1] the Committee expressed its basic disagreement with the Commonwealth Government's decision no longer to accept responsibility for the funding of any matters arising under state and territory laws. The Committee

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1 Senate Legal & Constitutional References Committee, *Inquiry into the Australian Legal Aid System: Second Report*, June 1997.

reiterated its concern in its *Third Report*.[2] The Committee also expressed concern at the level of Commonwealth funding for legal aid.[3]

2.5 In 1996/97 the level of Commonwealth funding for legal aid was $128.3 million. With the introduction of the new 'purchaser/provider' agreement Commonwealth funding was reduced to $109.68 million in 1997/98, and to $102.84 million in 1998/99.[4]

2.6 On 15 December 1999, the Commonwealth Attorney-General announced that the Commonwealth would provide $64 million in additional legal aid funding nationally over four years, commencing 2000/2001. Commonwealth funding for legal aid nationally in 2003/04 was $126.48 million.[5] The current legal aid agreements expire on 30 June 2004.

2.7 In the 2004/05 budget the Government increased Commonwealth funding of legal aid by $52.7 million over four years.[6] In a media release regarding the Budget, the Attorney-General announced:

> Additional funds will be available to State and Territory legal aid commissions when they enter new legal aid agreements – which are currently being negotiated – from 1 July 2004.
>
> In return, the Government will be seeking timely reporting and greater financial accountability from legal aid commissions.[7]

Levels of overall Commonwealth funding

2.8 The Law Council of Australia noted that although the current four year funding agreements included an increase of funding of $64 million over the four year period, the level of Commonwealth funding in 2003/04 ($126 million) was less than the level of funding in 1996/97 ($128 million), due to the massive cuts to Commonwealth funding in 1997.[8]

2.9 It should also be noted that in real terms, the level of funding in 2003/04 is substantially less than that provided in 1996/97. After taking account of inflation,

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2 Senate Legal & Constitutional References Committee, *Inquiry into the Australian Legal Aid System: Third Report*, June 1998, p.xvi.

3 ibid.

4 Correspondence from Commonwealth Attorney-General's Legal Assistance Branch to the Committee dated 9 February 2004.

5 ibid.

6 Portfolio Budget Statements 2004-05, Attorney General's Portfolio, Budget Related Paper No.1.2, p. 29.

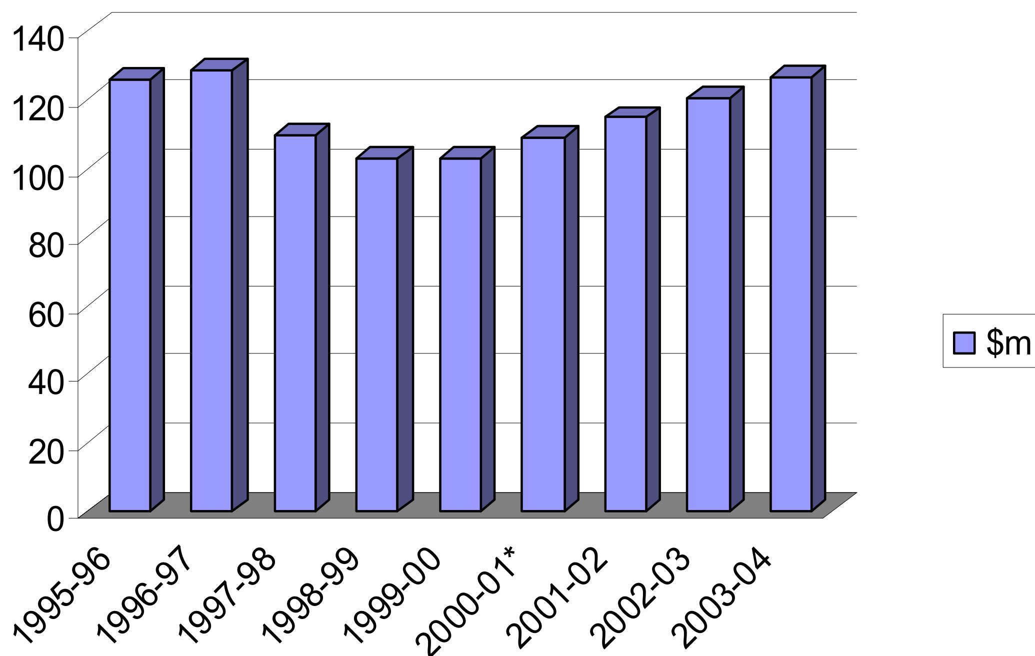
7 The Hon. Philip Ruddock MP, Attorney-General, *News Release*, "More Money for Legal Aid", 11 May 2004.

8 Law Council of Australia, *Submission 62*, p.5.

$128 million in 1996/97 is actually $153 million in real terms for 2003/04. This means that in real terms, the 2003/04 Commonwealth funding is $27 million less than it was in 1996/97.

2.10 Figure 1.1 below shows the history of Commonwealth funding for legal aid for the years 1995/96 – 2003/04.

Figure 1.1 – Commonwealth Funding for Legal Aid



Source: Based on figures provided in correspondence from Commonwealth Attorney-General's Legal Assistance Branch to the Committee dated 9 February 2004.

2.11 National Legal Aid (NLA), which comprises the Directors of each state and territory LAC also noted that funding had only returned to the levels of 1996/97. NLA argued further that due to increased costs of service delivery, there has actually been a decrease in the quantity of services being delivered:

> The additional $63m legal aid funding for 2000-2004, given CPI factors, was no more than an attempt to return to levels prior to the 1996 funding reduction. It should be noted that the $63m has not been indexed and, while the cost of providing legal services has and will continue to increase, the increased funding is not keeping pace with increases in these costs.
>
> Whilst the quality of legal service has not been affected by the cuts, the quantity and extent of that service has. The so called "purchaser/provider" approach has added an additional layer of administration and financial accountability for all Commissions.[9]

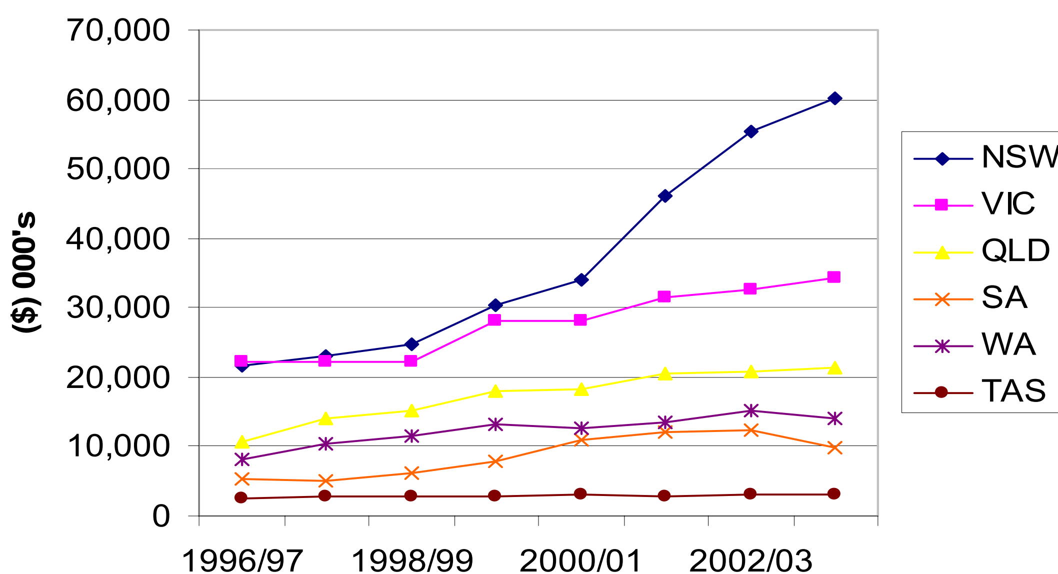
9 *Submission 81*, p.8-9.

Levels of state and territory funding to legal aid

2.12 In its response to the Committee's *Third Report*, the Government criticised the Committee's report for not adequately detailing the levels of funding contributed by states and territories to legal aid.[10]

2.13 As noted above in Figure 1.1, Commonwealth funding to legal aid dropped steadily from 1996 to 2000. The four year funding package implemented in 2000 has meant that in 2004, funding has returned to below what it was in 1996 (again, it should be noted that in real terms it is $27 million less than it was in 1996/97). In contrast State and Territory contributions to legal aid have, in the main, steadily increased from 1996 to 2004.

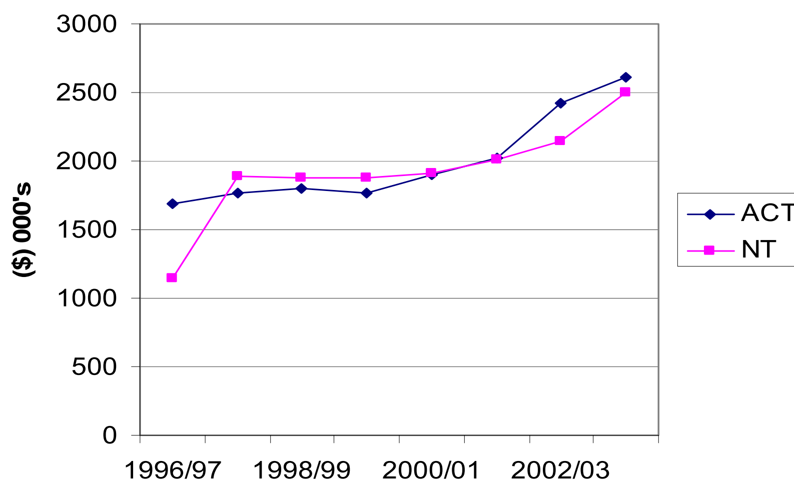
Figure 1.2 – State Funding of Legal Aid



Source: Based on figures from National Legal Aid website, accessed 10 March 2004: http://www.nla.aust.net.au

10 *Government Response to the Senate Legal and Constitutional References Committee Inquiry into the Australian Legal Aid System (3rd Report)*, p.3.

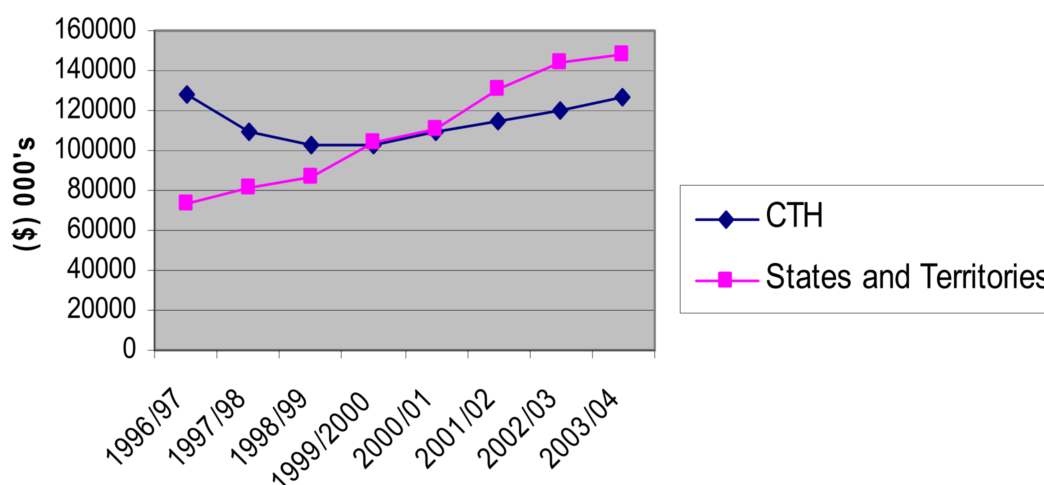
Figure 1.3 – Territory Funding of Legal Aid



Source: Figures for State and Territory Funding from National Legal Aid website, accessed 10 March 2004: http://www.nla.aust.net.au, Commonwealth funding figures from correspondence from Commonwealth Attorney-General's Legal Assistance Branch to the Committee dated 9 February 2004

2.14 The Government's introduction in 1996 of the Commonwealth/State funding dichotomy was intended to move funding responsibilities to the jurisdiction within which a matter arose. The Commonwealth would only fund matters arising under Commonwealth law, whilst the States and Territories would fund matters arising under their laws. Prior to 1996 the Commonwealth made a proportionately greater contribution to legal aid than the States and Territories, since that time this has been reversed, as the following figure shows.

Figure 1.4 – State vs Commonwealth funding of legal aid



Source: Based on figures from National Legal Aid website, accessed 10 March 2004: http://www.nla.aust.net.au

Differences in Commonwealth funding to each State and Territory

2.15 Funding between the state and territory LACs is currently distributed under a 1999 funding model that was based on research conducted by John Walker Consulting Services and Rush Social Research. Submissions from each state and territory LAC lamented that there is an insufficient level of Commonwealth funding.[11] Some commissions also commented on the model used (discussed in more detail in the next section) and the inequality of Commonwealth related legal aid services that are available to citizens in each state and territory.

2.16 Legal Aid Western Australia argued that in per capita terms, 25% fewer people obtain legal representation to resolve a family law matter in Western Australia than do the national average.[12] It also noted that Western Australia is the lowest funded state or territory on a per capita basis, and as a result has the highest refusal rate on applications received.[13] It also pointed out that in real terms, per capita Commonwealth funding to Western Australia has decreased by 28% over the last ten years.[14]

2.17 The Victorian Department of Justice explained that in 2003/04 NSW can expect to receive 50% more funding than Victoria, despite only having a 36% greater population, and that Victoria can expect only 8% more funding than Queensland, despite the fact that Victoria has 31% more people.[15]

2.18 Victoria Legal Aid commented that in addition to different funding levels, the different practices of each Commission (in relation to debt recovery and in the way they apply the Commonwealth guidelines) can mean that citizens in each state and territory face unequal chances of receiving Commonwealth related legal aid:

> Victoria Legal Aid has a very strong capacity to fund family law matters, whereas other states, such as Western Australia and Tasmania, on a regular basis have to say to applicants for aid for family law matters: 'I'm sorry. Your application meets the means test, the merits test and the guidelines test, but we just do not have the money to fund you.' So if you are a Victorian with a family law matter you are in luck, but if you are in Western Australia you may well be in trouble.[16]

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11 Legal Aid Queensland, *Submission 31*, p.3; Legal Aid Commission of New South Wales, *Submission 91*, p.2; Legal Services Commission of South Australia, *Submission 51*, p.3; Legal Aid Western Australia, *Submission 44*, p.1; Northern Territory Legal Aid Commission, *Submission 82*, p.10.

12 Legal Aid Western Australia, *Submission 44*, p.1.

13 ibid.

14 ibid, p.3.

15 Department of Justice, Victoria, *Submission 97*, p.8.

16 Mr Tony Parsons, *Committee Hansard*, 12 November 2003, p.32.

The funding model

2.19 There were substantial criticisms of the model used to distribute Commonwealth funds. The criticisms involved both in-principal objections to its assumptions and methodology as well as specific errors in its application.[17]

2.20 The Victorian Department of Justice and Victoria Legal Aid criticised three aspects of the model, as well as general factors: unmet need, the 'suppressed demand' factor and the 'average case cost' factor.

2.21 The first criticism was that the model was based on the number of applications to LACs and hence assessed met need and did not attempt to assess unmet need.[18]

2.22 The second criticism related to the 'suppressed demand' factor used in the model. The 'suppressed demand factor' seeks to account for reductions in demand for legal aid, as a result of publicity regarding a lack of available funds:

> The philosophy behind that weighting was that in 1995, 1996 and 1997 the publicity in some jurisdictions about the drastic cuts to legal aid was so severe that the demand for legal aid in some jurisdictions was suppressed. It was an entirely speculative exercise that that was the case. To apply a demand suppression factor to only three of the eight jurisdictions was also entirely speculative and to apply the weighting according to 10 per cent was entirely speculative.[19]

2.23 A representative of the Attorney-General's Department explained the 'suppression factor' in the following way:

> I think it could be described this way: due to publicity about levels of legal aid, people may not have been making applications for legal aid in anticipation that they would not be successful. A suppression factor was built into the model to increase anticipated demand. It was adding in so you could anticipate that without that suppression factor more applications would have been coming in some jurisdictions.[20]

2.24 The third criticism made by the Victorian Department of Justice related to the ‘average case cost’ factor included in the model:

> The average case cost element beggars belief, in terms of its logical foundations. It runs according to this: if in a particular jurisdiction a legal aid commission has to pay a higher average case cost to buy the service for the legal aid applicant, then logically that commission can only afford to purchase fewer legal aid services. If a commission can only purchase fewer legal aid services it must have a lower level of demand, which therefore

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17 Department of Justice, Victoria, *Submission 97*, pp. 4-5.

18 Mr Tony Parsons, *Committee Hansard*, 12 November 2003, p. 33.

19 ibid.

20 Ms Philippa Lynch, *Committee Hansard*, 9 February 2004, p. 11.

> justifies lower levels of funding. That is the way the average case cost factor was applied in the 1999 funding formula, and it is a nonsense.[21]

2.25 In evidence, the Attorney-General's Department explained the 'average case cost' factor in the following terms:

> The cost per case factor was included because it was felt at the time that it reflected a significant inverse statistical correlation of the cost per case with demand for legal aid and as costs go up, depending on the cost per case, a legal aid commission would be able to meet less demand and that would have an ongoing impact on demand. The rationale for it is set out in the report of the model.[22]

2.26 Mr Tony Parsons, Managing Director of Victoria Legal Aid, argued that the model included substantial errors. He pointed out that where the model sought to include population figures of women, it erroneously included the population figures of men.[23] He also pointed out the population figure of people from non-English speaking backgrounds was not based on Australian Bureau of Statistics figures, and hence underestimated the population.[24] Victoria Legal Aid expressed concerns over the model and noted the reduced funding that Victoria had suffered as a result:

> We have contacted the creators of the model—Rush-Walker developed the model for the Commonwealth in 1999—and they have confirmed those errors. So in the last four years, the Commonwealth has distributed something like $450 million nationally for legal aid according to a flawed funding distribution formula. Victoria takes a very strong stance on this because Victoria was the great loser from that distribution model. In the last four years—the life of the agreement that was controlled by that funding distribution model—Western Australia’s funding increased by 30 per cent, South Australia’s by nearly 20 per cent, Queensland’s by 33 per cent, New South Wales’s by 62 per cent and Victoria’s by zero per cent. So we have grave concerns about that model and we urge the Senate committee to seriously review its application.[25]

2.27 Victoria Legal Aid provided the Committee with a version of the Rush/Walker model with the following amendments (see Table 1.1):

- removal of the suppression and cost per case risk factors for 2003/04 funding;
- inclusion of 2001 Census Data for all states and territories in the relevant demographic field - state and territory populations by sex and age, non-

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21 Mr Tony Parsons, *Committee Hansard*, 12 November 2003, p.33.

22 *Committee Hansard*, 9 February 2004, p.11.

23 Mr Tony Parsons, *Committee Hansard*, 12 November 2003, p.33.

24 ibid.

25 ibid, p.34.

English speaking background persons aged 10 and over and Aboriginal and Torres Strait Islander persons aged 10 and over;

- inclusion of new data for divorces involving children aged under 18 years for the 2001 calendar year; and
- inclusion of new data for the proportion of households earning less than $300 per week.[26]

Table 1.1 – Original Rush-Walker funding model compared to 'updated' model for 2002-03 and 2003-04

Distribution of Commonwealth Funding for the two years to 30 June 2004 based on the original Rush-Walker funding model					Calculated Distribution of Commonwealth Funding for the two years to 30 June 2004 based on the updated Rush-Walker funding model				
State	2002-03		2003-04		State	2002-03		2003-04	
	$m	%	$m	%		$m	%	$m	%*
NSW	38.956	32.31%	41.574	32.87%	NSW	32.699	27.12% (-5.19)	34.302	27.12% (-5.75)
Vic	27.75	23.02%	27.75	21.94%	Vic	29.648	24.59% (1.57)	31.102	24.59% (2.65)
Qld	23.709	19.66%	25.612	20.25%	Qld	24.801	20.57% (0.91)	26.017	20.57% (0.32)
SA	10.351	8.59%	10.802	8.54%	SA	12.286	10.19% (1.6)	12.889	10.19% (1.65)
WA	10.486	8.70%	11.232	8.88%	WA	12.684	10.52% (1.82)	13.306	10.52%(1.64)
Tas	3.88	3.22%	3.934	3.11%	Tas	3.569	2.96% (-0.26)	3.744	2.96% (-0.15)
ACT	3.104	2.57%	3.137	2.48%	ACT	3.448	2.86% (0.29)	3.617	2.86% (0.38)
NT	2.334	1.94%	2.441	1.93%	NT	1.435	1.19%(-0.75)	1.505	1.19% (-0.74)
Total	120.57	100.00%	126.482	100.00%	Total	120.57	100.00%	126.482	100.00%
					* Same Percentage Values used as for 2002-03 Data				

Source: Victoria Legal Aid, *Submission 97B,* Attachment 1, p.2.

2.28 If the model were to be subjected to the changes outlined above, the dramatic changes in funding that would occur are a considerable reduction of funding to New

26 Victoria Legal Aid, *Submission 97B,* Attachment 1, p.2.

South Wales, a reduction in funding to Northern Territory, and an increase in funding to Victoria.

2.29 However it was not this model that Victoria Legal Aid put forward as its preferred model.

The Commonwealth Grants Commission model

2.30 Mr Parsons on behalf of Victoria Legal Aid suggested that the current funding model should be replaced with a Commonwealth Grants Commission model. He pointed out that the Commonwealth Grants Commission had developed a simple model in conjunction with the Attorney-General's Department and National Legal Aid.[27]

2.31 Victoria Legal Aid gave the Committee a copy of this model which is shown below at Table 1.2. The basis for this model is different from the Rush-Walker Model, in that it does not rely on LAC data, but bases its calculations on Grants Commission assessment methods and relativity factors relating to (amongst other things) the relative cost of delivering legal services in each state and territory.[28]

2.32 The most obvious difference between the current funding model (or even the amended one provided by Victorian Legal Aid) and this 'Grants Commission' model is the funding to the Northern Territory and the ACT, which would receive dramatically less funding under the Grants Commission model.

2.33 Victoria Legal Aid explained that the Commonwealth has been provided with all the work that Victoria Legal Aid and National Legal Aid have done in relation to developing a new model. Mr Parsons also told the Committee that the Commonwealth had committed to having discussions with the LACs before the end of 2003, before the new funding agreements are due to be signed off by the end of the financial year 2003-04.[29]

2.34 Victoria Legal Aid's criticisms of the model were echoed by the Legal Aid Commission of New South Wales, who also commented on the fact that the model does not account for unmet legal need. It also confirmed it had consulted with the Commonwealth about their concerns with the model:

> [W]e are talking with the Commonwealth, but not so much about the details of the model because, to be perfectly honest, they are all flawed. The Commonwealth Grants Commission have done some great work for us, but their work is not definitive either. The real problem with all of that is: there is no way at the moment you can get an accurate gauge of legal need;

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27 Mr Tony Parsons, *Committee Hansard*, 12 November 2003, p.35.

28 For further detail on the basis for the 'Grants Commission' model, see Victoria Legal Aid, *Submission 97B*.

29 Mr Tony Parsons, *Committee Hansard*, 12 November 2003, p.41.

therefore you cannot factor that very important point into these formulas—because we simply do not know how to measure legal need or unmet need at the moment. That is the difficulty.[30]

Table 1.2 – A Commonwealth legal aid funding model based on Commonwealth Grants Commission assessment methods, and application of estimated state relativities to an illustrative 2002-03 funding pool

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust
General legal aid expenditure component (99.9%)									
2000-01 input costs factor (a)	1.01355	0.99773	0.98285	1.00804	0.98190	0.98243	1.01549	0.99924	1.00000
Dispersion factor (b)	0.99936	0.99525	1.00278	1.00694	0.99755	1.00770	0.98567	1.04242	1.00000
Cross border factor (c)	0.99304	1.00000	1.00000	1.00000	1.00000	1.00000	1.13985	1.00000	1.00000
Low income socio-demographic composition factor (d)	0.98405	0.97364	1.05089	0.94433	1.13019	1.18670	0.64655	0.85119	1.00000
Component factor (e)	0.99171	0.96868	1.03775	0.96039	1.10917	1.17710	0.73908	0.88834	1.00000
Contribution to relativity (f)	0.99072	0.96771	1.03671	0.95943	1.10806	1.17592	0.73834	0.88745	
Isolation related expenditure component (0.1%)									
2000-01 isolation factor (g)	0.00000	0.00000	0.00000	0.00000	0.00000	0.00000	0.00000	98.10726	1.00000
Component factor (h)	0.00000	0.00000	0.00000	0.00000	0.00000	0.00000	0.00000	98.10726	1.00000
Contribution to relativity (f)	0.00000	0.00000	0.00000	0.00000	0.00000	0.00000	0.00000	0.09811	
State relativity (i)	**0.99072**	**0.96771**	**1.03671**	**0.95943**	**1.10806**	**1.17592**	**0.73834**	**0.98556**	**1.00000**
Estimated State funding ($m) (j)	**40.28**	**29.06**	**23.33**	**11.39**	**10.40**	**3.46**	**1.44**	**1.21**	**120.57**

(a) Sourced from CGC 2002 Update Working Papers (Vol. 4) for Administration of Justice assessments. Assumes wages account for 60 per cent of expenditure assessed in 'General legal aid expenditure' component.

(b) Sourced from CGC 2002 Update Working Papers (Vol. 4) for Administration of Justice assessments. Based on ABS 1996 Census data.

(c) Sourced from CGC 2002 Update Working Papers (Vol. 4) for Administration of Justice assessments. Based on ABS 1996 Census data.

(d) For each State, factor based on the proportion of low income persons (of all ages) in the 1996 Census population, as set out in CGC 1999 Review Working Papers (Vol. 3) for major factor assessments. In the 1999 Review, the CGC defined low income persons as those living in family households with an annual income of less than $26 000 or in single person households with an annual income of less than $15 600. Data sourced from ABS 1996 Census of Population and Housing.

(e) For each State, derived by multiplying the factors at (a), (b), (c) and (d), and then rebasing the product using 2000-01 Mean Resident Populations to ensure the factor for Australia is 1.00000.

(f) For each State, component factor multiplied by the relevant component weight (99.9 per cent or 0.1 pert cent).

(g) Based on professional infrastructure isolation assessments as set out in CGC 2002 Update Working Papers (vol. 3) for major factor assessments.

(h) Identical to factor at (f) as based on 2000-01 Mena Resident Populations.

(i) For each State, the sum of the two weighted component factors (the contribution to relativity rows) at (f).

(j) Estimated State relativities applied to illustrative 2002-03 legal aid funding pool of $120.57 million.

30 Mr William Grant, *Committee Hansard*, 13 November, 2003, p.12.

Source: Victoria Legal Aid, *Submission 97B*, p.4, based on Commonwealth Grants Commission 2002 Update and 1999 Review Working Papers; ABS *Legal Services Industry*, Cat 8667.0, 1998-99.

2.35 The Attorney-General's Department confirmed that it is aware of some errors in the model, and that it has been reviewing the model in consultation with the Commonwealth Grants Commission and the Legal Aid Commissions:

> In addition to the cost per case factor and the suppression factor there were issues discussed in the course of the review about whether the model should use actual rather than projected population statistics. There were issues raised about whether it was a demand driven model or a need driven model. There were also issues raised about the use of Commonwealth Grants Commission factors and indices, which I understand have since been changed. I think there were comments made about the risk factors that were used in the model at the time. There were also what might be described as technical criticisms of the methodology that was used, on a more econometric basis.
>
> …
>
> …we have been discussing those concerns with the Commonwealth Grants Commission staff in the course of the review and we have put a number of reworked models back to the commission for comment along the way.[31]

2.36 Victoria Legal Aid explained that a serious impediment in finding consensus in consultations between the Commonwealth and the Legal Aid Commissions is that in any change to the formula there will be winners and losers:

> National Legal Aid will never reach a unanimous view on a funding distribution model, because a funding distribution model is always going to involve winners and losers. No-one wants to go to their board and say, 'I have just agreed to a model that is going to reduce the funding of our state legal aid commission—and here is my resignation.' We rely on the Commonwealth to show leadership in this area. We want them to show leadership by adopting a model based on solid empirical data; not the smoke and mirrors of the Rush-Walker model of 1999.[32]

2.37 The Attorney-General's Department told the Committee that it was preparing a report of the review of the model for the Attorney-General, and that a decision as to whether the model will be changed is a decision that will be made by Government.[33]

Committee view

2.38 The Committee is concerned by evidence that the model the Commonwealth currently uses to distribute funding between states and territories contains errors and does not account for unmet legal need.

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31 Ms Philippa Lynch, *Committee Hansard*, 9 February 2004, p.12.

32 Mr Tony Parsons, *Committee Hansard*, 12 November 2003, p.41.

33 *Committee Hansard*, 9 February 2004, p.13.

2.39 The Attorney-General's Department has confirmed some of the errors pointed out by the Victorian Department of Justice. A separate issue is the methods or factors used in the model such as the 'suppressed demand factor' and the 'average case cost factor'. Both of these factors appear to be arbitrary and without sufficient foundation.

2.40 The Committee notes that the Commonwealth Grants Commission has developed a basic alternative funding model that utilises Commonwealth Grants assessment methods. Whilst the Committee acknowledges that the Grants Commission model accounts for the relative costs of delivering legal services in each State and Territory, the Committee believes that a funding model should account for the levels of demand and need for legal services in each state and territory. For example, the Committee is not satisfied that the simple 'Grants Commission Model' supplied by Victoria Legal Aid sufficiently takes into account the specific challenges faced in the Northern Territory, particularly amongst Indigenous Australians. The Committee believes that a new funding model based on the Grants Commission model would be appropriate if it were adjusted to acknowledge the special challenges faced by the Northern Territory in providing legal services and access to justice in light of its high Indigenous population and remoteness. These issues are discussed further in Chapter 5.

2.41 The Committee is concerned that the current funding model (as well as the 'Grants Commission model') does not account for unmet need for legal services. The Committee notes that the Law and Justice Foundation of NSW is conducting an assessment of legal need in that State, and commends this. At the time of writing, Stage 2 of that assessment had just been released, which involved a quantitative legal needs survey for disadvantaged people in NSW.[34] These issues are discussed in more detail in Chapter 3.

2.42 Clearly the unmet need for legal aid cannot be included in the funding model until an assessment of unmet need has been made. Assessing the level of unmet need for legal aid in Australia is clearly a priority if the Commonwealth is to be able to develop a funding model that optimises the level of access to justice for all Australians.

2.43 The Committee notes that the Attorney-General's Department is reviewing the current funding model in consultation with the LACs. The Committee also notes that the Government's 2004-05 Budget proposes to increase Commonwealth funding for legal aid by $52.7 million over four years. The Portfolio Budget Statements 2004-05 for the Attorney-General's portfolio notes that this increase will enable 'redistribution of legal aid funds across jurisdictions to meet demographic changes'.[35]

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34 *Access to Justice and Legal Needs, Stage 2: Quantitative Legal Needs Survey, Bega Valley (Pilot).* Law and Justice Foundation of New South Wales. November 2003.

35 *Portfolio Budget Statements 2004-05, Attorney General's Portfolio*, Budget Related Paper No.1.2, p. 29.

2.44 The Committee supports increasing Commonwealth funding for legal aid, however it is not clear how 'demographic changes' will be determined, and as a result it is unclear on what basis the increased funding will be redistributed. The Committee is concerned that despite an increase in funding, there does not appear to be provision for an assessment of unmet need in each state and territory.

2.45 The Committee believes that a new funding model needs to be developed to ensure that increases in Commonwealth funding to legal aid are distributed in an equitable and effective manner. As part of developing a new model, the Committee recommends that the Government undertake or commission an assessment of both demand for legal aid services and unmet need in relation to legal aid (discussed further in Chapter 3).

Recommendation 1

2.46 The Committee recommends that the Government reform the funding model for legal aid, taking into account concerns raised by legal aid commissions in the recent review of the model. The Committee is not satisfied with the justifications that have been offered regarding the 'suppressed demand factor' and the 'average case cost' factor, and recommends that they be removed.

Recommendation 2

2.47 The Committee recommends that the Commonwealth Government develop a new funding model to ensure a more equitable distribution of funding between the State and Territories. This model should be based on the work of the Commonwealth Grants Commission model, but with increased funding for the Northern Territory to account for the special challenges it faces in light of its high Indigenous population and remoteness.

Application of Priorities and Guidelines

2.48 The Commonwealth Priorities and Guidelines are set out in the legal aid funding agreements between the Commonwealth and each state and territory. The Commonwealth's "Priorities" outline the broad areas which should be given priority in using Commonwealth funds and are contained in Schedule 2 of the funding agreements.

2.49 The "Guidelines" are the tests that are to be applied by Commissions when assessing legal aid applicants for Commonwealth related matters. They are contained in Schedule 3 of the agreements and are made up of four parts. Part 1 contains the 'means' and 'merits' tests that are to be applied to applicants, and parts 2-4 identify the types of family, criminal and civil matters for which Commonwealth funds may be granted.

2.50 Various comments were made in submissions and evidence about the different way that these priorities and guidelines are implemented in states and territories.

The means test

2.51 The 'means test' set out in the guidelines assesses an applicant's assessable income and assets. Applicants must qualify on both aspects, but if either is exceeded, a grant may be made if the applicant makes a contribution.[36]

2.52 There are two types of means test that can be used in assessing applicants for legal aid. These are the National Legal Aid Means Test and the Simplified Legal Aid Means Test. The two tests have the same assets test component, but assess income in a different way. The Simplified Legal Aid Means Test varies from the National Legal Aid Means Test in that it uses a formula that takes into account the number of dependant persons in the applicant's household as well as the employment status of the applicant and partner (if applicable).[37]

2.53 Currently, all LACs except Queensland and Tasmania use the National Means Test. The Attorney-General's Department noted that the Commonwealth preferred the use of the Simplified Means Test because it considers it easier to administer than the National Means Test, and therefore more cost efficient.[38] The Committee did not receive evidence from the LACs on the two tests.

2.54 In relation to the means test, National Legal Aid argued that many people who presently do not qualify for legal aid are unable to afford the services of private lawyers to conduct their cases, or are unable do so without undue hardship.[39]

2.55 National Legal Aid argued that Commonwealth funding should be increased to allow the means test to be adjusted to improve access to legal aid for those unable to afford private representation.[40] It also noted that it had recently commissioned research by Griffith University which indicated that there was a relationship between the level at which the means test was set and self-representation in the Family Court: ‘It would not be unreasonable to speculate that the situations identified in this research are likely to be paralleled in other areas of the law.’[41]

2.56 A submission from Professor Rosemary Hunter and Associate Professor Jeff Giddings of Griffith University, who conducted the research commissioned by National Legal Aid, noted that their research showed a significant income difference between those who met the means test and those who were able to afford private

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36 Attorney-General’s Department, *Submission 78*, pp. 4-5.

37 Attorney-General’s Department, *Submission 78*, p. 4.

38 Attorney-General's Department, *Submission 78F*, p. 2.

39 National Legal Aid, *Submission 81*, p. 11.

40 ibid.

41 ibid. The research referred to is R Hunter, J Giddings & A Chrzanowski, *Legal Aid and Self-Representation in the Family Court of Australia,* Social Legal Research Centre, School of Law, Griffith University, May 2003.

representation.[42] Those eligible for legal aid earned less than $25,000 p.a. after tax, yet people only became able to afford private representation once they earned over $45,000 p.a. after tax. Professor Hunter and Associate Professor Giddings noted that those between these income levels may have had financial commitments that were not taken into account in the income test. They also pointed out that low income people often met the income test but failed the assets test, despite not having access to those assets being assessed.[43]

2.57 The Hon. Justice Alastair Nicholson, Chief Justice of the Family Court, also referred to this gap:

> There is undoubtedly a gap, if you like, between qualification for legal aid and the ability to fund your own legal proceedings. Too many people fall into that gap… A lot of these people have no hope of being able to pay for legal expenses, yet the means test is set at such a level that they are excluded.[44]

2.58 The Welfare Rights Centre argued that this issue was particularly relevant to low income defendants in welfare fraud prosecutions, who may have no income other than welfare, but may own their family home, and hence fail the assets test:

> There should be no regard to the value of their principal home, if the person is on low income. A classic example is someone [who] is on a disability support pension and all they have is their principal home, who is charged with an offence in relation to a $20,000 social security debt. There should be accessible legal aid for that person, because they are not going to get legal representation anywhere else. A disability support pension recipient may have an intellectual, psychiatric disability or a brain injury that may be slightly relevant in that person having incurred the debt in the first place and also highly relevant in them not having chosen to access admin review of the debt before it got to that point.[45]

2.59 The Welfare Rights Centre explained that in NSW a person's equity in his or her own home is disregarded up to $195,200. In non-criminal matters the Commission is given the discretion to disregard a person's home equity, however for criminal matters there is no such discretion.[46] The Welfare Rights Centre argued that for criminal matters the means test for low income earners or those on social security should be disregarded and for non-criminal matters the threshold at which home value is considered should be raised significantly.[47]

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42 *Submission 24*, p.4.

43 ibid.

44 *Committee Hansard*, 10 March 2004, p. 5.

45 Ms Linda Forbes, *Committee Hansard*, 13 November 2003, p. 73.

46 Welfare Rights Centre, *Submission 55*, p. 3.

47 ibid.

2.60 Professor Hunter and Associate Professor Giddings submitted that their research suggests a correlation between the application of the means test (particularly the assets test) and increasing levels of self-representation.[48] They suggested three reforms to the means test which they argue would reduce the levels of self representation in the Family Court:

> These are:
>
> > 1. take into account the question of whether the litigant has realistic access to assessable assets
> >
> > 2. take into account previous attempts to pay for private legal representation and existing debts to previous legal representatives
> >
> > 3. extend eligibility to include a higher proportion of clients earning less than $30,000 after tax.[49]

2.61 However, if the means tests used by the LACs were modified in such a way without increasing funding, it may simply lead to a more stringent application of the merits test, as the Northern Territory Legal Aid Commission noted:

> Without a substantial increase in funding, the NTLAC is unable to increase the means test to enable more people to qualify for legal aid. If the means test limits were to be increased on existing funding, the NTLAC would have no choice but to read the merits test more narrowly to exclude enough applicants for the NTLAC to remain within budget. The number of self-represented litigants would therefore not be reduced but would simply be caused by other reasons.[50]

The merits test

2.62 The 'merits test' essentially comprises three elements:

- a legal and factual merits test;
- a prudent self funding litigant test; and
- an appropriateness of spending limited public funds test.[51]

2.63 The legal and factual merits test looks at whether the applicant has a reasonable prospect of success. The prudent self funding litigant test is met if the Commission considers that a prudent self funding litigant would risk their own funds in the

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48 *Submission 24*, p.4.

49 *Submission 24*, p.5.

50 Northern Territory Legal Aid Commission, *Submission 82*, p.15.

51 Attorney-General's Department, *Submission 78*, p.4.

proceedings. The final element of the test is whether the Commission considers the costs involved are warranted by the likely benefit to the applicant or the community.[52]

2.64 The Committee heard various arguments that the elements of the merits test are substantially subjective. The Legal Aid Commission of NSW argued that the 'prudent self funding litigant' test should be abolished, on the grounds that it is subjective, ambiguous, and difficult to apply in a transparent manner.[53]

2.65 The difficulty in applying such a subjective test was echoed by the Combined Community Legal Centres Group of NSW (CCLCG). In regards to the 'prudent self funding litigant' test, Mr Simon Moran explained:

> Your guess is as good as mine as to what that means. We have ideas and ways of addressing the commission which we feel deal with that. Then there is this kind of catch-all test at the end, which is whether the case is an appropriate spending of limited public legal aid funds. Again, this leads to a sense of arbitrariness with the provision of legal aid, which does not assist clients or, particularly, solicitors when they are considering acting on a legal aid basis. That has led to an increase of those issues regarding eligibility. We have sensed their increase over the last five to seven years, and that has had an impact on community legal centres as well as other legal service providers.[54]

2.66 There were also concerns raised regarding the 'appropriateness of spending limited public funds test'. The CCLCG gave an example to illustrate the subjective or discretionary nature of the test:

> The [case was] a disability discrimination case that was brought by a man who had a disability and who could only have accessed the town centre using his wheelchair. He could not access the town centre as a result of various problems with footpaths, with paving and with access on and off buses. So he considered bringing a complaint of disability discrimination against the town council on the basis that he could not access the premises—the premises being the footpaths. We applied for legal aid there. Essentially Legal Aid said, 'It's going to cost too much to run; we can't fund this case,' even though that person fitted into the means test and there were reasonable prospects of success.[55]

2.67 There was concern that the merits test is applied in different ways between states and territories.[56] Quoting research by Griffith University,[57] National Legal Aid stated in its submission:

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52 Attorney-General's Department, *Submission 78* (Attachment), p.6 (see Schedule 3 of the Commonwealth's Legal Aid Guidelines).

53 Legal Aid Commission of NSW, *Submission 91*, p.27.

54 Mr Simon Moran, *Committee Hansard*, 13 November 2003, p.30.

55 ibid, p.33.

56 National Legal Aid, *Submission 81*, p.13.

> Amongst our concerns has been parity of eligibility across LACs. In this regard the report which states 'There were evident differences between Registries in both relative success rates in legal aid applications, and the reasons why applications were unsuccessful. These differences appear to reflect the respective family law funding positions of the Legal Aid Commissions. In Brisbane, where demand for family law legal aid funding considerably exceeds the available supply, applicants were more likely to be unsuccessful, and applications were more likely to be rejected on the basis of merits. In Melbourne, where the reverse situation applies, applicants were more likely to be wholly successful, and the applications were more likely to be rejected on the basis of means. In Canberra, and Perth, which fall somewhere in between, applications are more likely to be successful.'[58]

2.68 Legal Aid Queensland confirmed that the different application of the guidelines was due to different levels of available funds in each commission:

> Legal Aid Queensland applies the merit test with great rigour and reads it more expansively than do other legal aid commissions. This is due to the funding shortfall requiring funding constraints in the granting of legal aid for family law applications.[59]

Committee view

2.69 The Committee's *Third Report* noted that under the National Means Test the various jurisdictions were allowed to set different monetary limits to items allowed under the test. The Committee noted that this was to cater for both inter and intra-jurisdictional differences in economic conditions. Whilst the Committee noted that it did not oppose such variations in the means test levels if they were necessary in order to achieve equitable outcomes in the light of differing economic conditions, the Committee opposed such variations if based on inadequate provision of legal aid funds by governments.[60]

2.70 The Committee recommended that the Commonwealth Government ensure that the means test income and asset levels were set at the same amounts for all parts of Australia, unless regional variations could be shown to be justified by differing economic conditions. The Committee also recommended that the Government conduct a review of the appropriateness of the means test levels that currently apply.[61]

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57 R Hunter, J Giddings & A Chrzanowski, *Legal Aid and Self-Representation in the Family Court of Australia,* Social Legal Research Centre, School of Law, Griffith University, May 2003. p.iii.

58 National Legal Aid, *Submission 81*, p.13.

59 Legal Aid Queensland, *Submission 31*, p.13.

60 *Third Report*, p.64

61 *Third Report, Recommendation 8*, p.65.

2.71 The Government responded that it was unaware of any evidence that the legal aid commissions tighten the means test to limit eligible applications for assistance, and as a result it did not consider a review of the means tests was necessary. It also noted that the Commonwealth preferred the use of the Simplified Means Test.[62]

2.72 Regardless of whether legal aid commissions are using the means or merits test in order to limit applications by otherwise eligible applicants for budgetary reasons, the Committee is genuinely concerned by evidence that there is a considerable gap between those who qualify for assistance, and those who are able to afford private representation.

2.73 The Committee acknowledges that in many states, particularly New South Wales, the means test appears to place a large obstacle for many home owners. The Committee is concerned by evidence given by the Welfare Rights Centre that many of its clients, particularly those with intellectual disabilities, are stopped from accessing legal aid due to their levels of home equity, despite having a very low income or being reliant on social security.

2.74 The Committee is also concerned by comments from Professors Hunter and Giddings, as well as the Chief Justice of the Family Court, that there is a considerable gap between those eligible to receive legal aid, and those who are actually able to afford private representation.

2.75 However, the Committee is also aware that if the means tests are made too liberal, then Commissions may simply be forced to rely on arbitrary application of the merits test in order to distribute limited resources.

2.76 The Committee acknowledges the recommendations made by the Welfare Rights Centre and Professors Hunter and Giddings. The Committee believes that LACs should conduct an assessment of current applications, and consider what the increase in successful applications would be if those recommendations were implemented. This is necessary to be able to assess the increase in demand these changes would place on current legal aid resources.

Recommendation 3

2.77 The Committee recommends that the state and territory legal aid commissions conduct an assessment of current applications, to ascertain what increase in successful applications would occur if the following changes were made to the merits test:

(a) extend eligibility to those earning less than $30,000 after tax; and

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62 *Government Response to the Senate Legal and Constitutional References Committee Inquiry into the Australian Legal Aid System*, 3rd Report. p.9.

(b) in criminal matters, where a person passes the income test, disregard home equity.

Breakdown of funding by type of matter: criminal, family and civil

2.78 The Committee's *Third Report* noted that there had been concern that the Commonwealth Guidelines may cause criminal matters to be funded at the expense of family matters, and that both criminal and family matters may be funded at the expense of civil matters.[63] However the Committee noted that there was no support for a strict hierarchy in the Guidelines to ensure a particular distribution across the various types of matters, as the result may be that the system is too rigid.[64]

2.79 The Committee heard arguments that the funding priorities and guidelines favour criminal matters over family law matters (see further in Chapter 4). The Committee also heard that there are serious deficiencies in the level of legal aid available for civil matters as a result of the Commonwealth funding guidelines.

2.80 The Victorian Department of Justice explained that following the Commonwealth funding cuts and the introduction of the Commonwealth Priorities and Guidelines in 1997, funding for civil matters was almost abolished:

> The impact for Victoria was severe. It included the almost complete abolition of legal aid for civil matters so that now grants of legal aid are very rarely made for matters such as discrimination, consumer protection, tenancy law, social security law, contract law and personal injuries. Some of those matters have been picked up by the private profession on a 'no win, no fee' basis, but substantial areas of law, particularly poverty related law, have not been picked up.[65]

2.81 A similar assessment was provided by the Legal Services Commission of South Australia:

> There are major gaps in legal service available to the South Australian community. No legal representation is funded for any civil disputation—for example, householders versus builders, car dealers and insurance companies.[66]

2.82 Ms Zoe Rathus on behalf of the National Network of Women's Legal Services (NNWLS) also noted that funding to civil matters had resulted in a drought of services:

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63 *Third Report,* para 4.7, p.56.

64 *Third Report*, para 4.7 – 4.11, pp. 56-57.

65 Victorian Department of Justice, *Committee Hansard*, p. 32.

66 *Committee Hansard*, 11 November 2003, p. 11.

> I want to start by reminding the committee of the number of areas of law that are simply not covered anymore by legal aid and the concern amongst community legal centres generally that there are areas of law where people can say, 'There's no legal aid for that.' There seems to be a full stop, particularly in areas such as immigration law and large areas of civil law for which legal aid is simply not available anymore. We do not consider it acceptable for those kinds of areas to exist.[67]

2.83 Whilst the news from LACs was bleak in relation to the effect of the Commonwealth Guidelines on assistance in civil matters, there was praise for the way that NSW Legal Aid was providing assistance in civil matters:

> The Legal Aid Commission of New South Wales has a very innovative, very highly skilled inhouse civil law program. Our experience as community legal centres is that they are very highly skilled. They are very good at their job, and they have specialist skills that other solicitors do not have. I believe that is the only in-house civil unit in Australia, and it has been shown in New South Wales to be very valuable. I think other commissions throughout Australia would be wise to adopt a similar model.[68]

2.84 Despite the effectiveness of the civil unit administered by NSW Legal Aid, the Committee heard that there is still substantial unserviced demand for civil assistance in NSW, particularly in regional areas:

> We see clients who have problems with civil law, although New South Wales is one of the better states in its civil law funding. We find that there is a huge demand for legal assistance in employment law, particularly in the Blue Mountains, which is a tourist area and has a lot of parttime work and employment of young people in under award situations. We are finding that, with that, a deunionised work force and an increase in Australian workplace agreements, we are getting a lot of demand in the complex area of employment law. Our region needs either our centre or Legal Aid to fund an employment lawyer and possibly a discrimination lawyer as well.[69]

2.85 The Committee heard that Commonwealth funding for representation in Administrative Appeals Tribunal (AAT) matters is limited to certain areas. The Committee also heard that without free assistance in the non-cost jurisdictions of the AAT, many people will not proceed, as the costs will often outweigh the award. The Law Council of Australia explained that in the non-cost jurisdiction of the AAT, up to a third of people are unrepresented:

67 *Committee Hansard*, 10 March 2004, p. 9.

68 Mr Simon Moran, CCLCG, *Committee Hansard*, 13 November 2003, p. 29.

69 Mr Crozier, Blue Mountains Community Legal Centre, *Committee Hansard*, 13 November 2003, p. 94.

> … that is a lot of people. It is important to those people because they are often disputing employment problems or welfare problems and so on…. [70]

2.86 The Law Council of Australia argued that the solution, apart from increasing funding, is to relax the guidelines in relation to civil matters. [71]

2.87 Westside Community Lawyers suggested that another way to remedy the lack of legal aid for assistance and representation in civil matters was to provide duty solicitors for such matters and noted that a pilot study into such a service was being conducted with final year university students in the Adelaide civil registry.[72]

Committee view

2.88 The Committee is concerned that the Commonwealth Priorities and Guidelines deny adequate assistance in family and civil matters.

2.89 Whilst the Committee acknowledges the importance of representation in criminal matters, the Committee believes that adequate funding should be provided to legal aid such that less restrictive guidelines may be introduced.

2.90 The Committee is particularly concerned that adequate legal aid is not available to those appearing before the Commonwealth AAT, as a substantial proportion of such matters involve important issues such as employment and discrimination.

2.91 The Committee believes that a duty solicitor service should be available for the AAT.

Recommendation 4

2.92 The Committee recommends that the Commonwealth introduce a duty solicitor service for the Commonwealth Administrative Appeals Tribunal.

Specialist legal services

2.93 One way to ensure that traditionally neglected types of matters receive a minimum level of service is through the funding of specialist legal services. The Committee received evidence in relation to the Commonwealth funding of two particular services:

- the Environmental Defenders Offices; and
- an argument that the Commonwealth should create and fund a forensic science institute to provide services to defendants.

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70 Mr North, Law Council of Australia, *Committee Hansard*, 9 February 2004, p.50.

71 ibid.

72 Mr Bulloch, Westside Community Lawyers, *Committee Hansard*, 11 November 2003, p.43.

Environmental Defenders Office

2.94 The Environmental Defenders Office (EDO) was established to ensure there were legal services representing public interest environmental law. The EDO ensures that where a member of the public seeks to advocate an issue that is of environmental public interest (and as a result may be unable or not prepared to fund it themselves) the matter is accorded the necessary legal services.

2.95 In terms of Commonwealth funding, the EDOs are restricted from using their funding for litigation purposes. The Committee heard in its last inquiry that this restriction imposed a significant constraint on the EDO advocating to its full potential, and the Committee recommended that this restriction by the Commonwealth be removed.[73] Mr Mark Parnell on behalf of the EDO explained to the Committee the impact this restriction on Commonwealth funding had on them, and why it should be removed:

> To a certain extent, this inquiry today has an element of deja vu about it. It has very similar terms of reference to those of the inquiry back in 1997 and 1998, when the Senate last looked at this, and I am saying very similar things to what a colleague of mine said at that inquiry. We raised the issue of the litigation restriction. We made the point that it had no basis in policy and that it was politically motivated, and the Senate committee at that stage recommended that that condition be removed.
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> …
>
> The only policy grounds for not letting us litigate with legal aid money seems to be the inherently political nature of environmental law. We are very often challenging the decisions of the executive. We are challenging decisions of statutory authorities and of ministers. We are challenging them on the merits and on legality. The view seems to be that public funds should not be used to challenge those sorts of decisions. The argument that I would put is that that is like saying that we should not publicly fund criminal defence work because it simply suggests that our law enforcement officers do not get it right sometimes and that there should be no public funds used for defence. It is exactly the same in relation to environmental law.[74]

2.96 Fitzroy Legal Service also argued that the litigation restriction that is placed on the Environmental Defenders Office should be removed.[75]

Commonwealth funding for a forensic science institute

2.97 Liberty Victoria advocated the need for the Commonwealth to establish an independent forensic science institute to assist in the defence of those defendants who are facing charges supported by forensic evidence. Their argument was that a lack of

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73 *Third Report*, para 4.7, p.155.

74 Mr Mark Parnell, *Committee Hansard*, 11 November, 2003. p.35-36.

75 Fitzroy Legal Service, *Submission 48*, p.22.

resources means that many defendants are unable to afford the necessary defence to face charges that are supported by forensic evidence.

> Our principal concern is that the field is heavily weighted against accused persons because they simply do not have access to either the scientific or legal resources to enable them to be, in a sense, playing on an even field. It is Liberty's submission that, very rapidly, steps need to be taken to correct this situation.
>
> Liberty Victoria submits that it is necessary for a discrete institute to be established for the use of accused persons and that, being a scientific institute, it should have resources somewhat equivalent to those now available to the prosecution authorities. At the present time, if accused persons wish to challenge the scientific evidence relied upon by the prosecution, they have to go looking in appeal to see if they can find qualified experts who are not associated with the prosecution. That is very difficult. As DNA evidence in particular becomes increasingly relied upon by the prosecution, that is going to become an even more significant problem for accused persons.[76]

2.98 Liberty Victoria proposed that if such an institute were created, it would be able to attend major crime scenes and offer an effective check to ensure that forensic evidence is collected and processed in a proper manner.[77]

Committee view

2.99 The Committee believes that although criminal matters appear to be funded at the expense of family matters and that both criminal and family matters are funded at the expense of civil matters, the Commonwealth Priorities and Guidelines should not be amended to mandate a particular distribution of funding between types of matter.

2.100 The Committee reiterates the point it made in the *Third Report* that whilst attention must be paid to how funds are distributed between matters, it would not be of benefit to have a rigid or inflexible set of priorities for the purposes of funding allocation.

2.101 The Committee was disappointed to hear that the EDO is still facing operational difficulties because of contractual restrictions in its funding agreement with the Commonwealth. The rationale for having a Commonwealth funded EDO is to ensure that the area of public interest environmental law, which would otherwise have little priority for receiving legal aid, is effectively advocated. For the EDO to be able to effectively advocate, it needs to have the freedom to choose how it uses its funding in relation to litigation.

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76 Mr Greg Connellan, *Committee Hansard*, 9 February 2004, pp. 1-2.

77 ibid, p. 4.

2.102 The Committee repeats its recommendation that the Commonwealth remove the restriction on the EDO from using Commonwealth funding for litigation purposes.

Recommendation 5

2.103 The Committee recommends that the Commonwealth remove the restriction on the Environmental Defenders Office from using Commonwealth funds for litigation purposes.

2.104 The Committee was interested in the suggestion by Liberty Victoria that a national institute for forensic science be established to ensure defendants have equal access to such science as the prosecution does. Consequently the Committee considers that the Government should support the establishment of such an institute.

2.105 The Committee notes, however, that whilst it supports the idea in principle, it does not believe the funding of such an institute should be done at the expense of further funding to legal aid generally.

Recommendation 6

2.106 The Committee recommends that the Government fund the establishment of a national forensics institute to provide forensic opinions for defendants in serious criminal matters facing forensic evidence.

'Law and order' legislation and increased demand for legal aid

2.107 The Committee heard from LACs that when state governments engage in 'law and order' campaigns, and introduce corresponding legislation, there is an increase in demand for legal aid.

2.108 The Legal Services Commission of South Australia explained in evidence that the recent law and order campaign in that state, which manifested itself in the form of stricter criminal trespass legislation, has lead to a steady increase in demand for legal aid.

> Our hypothesis is that as the law and order campaign takes effect and new legislation is brought in for serious criminal trespass, which has elevated the penalties imposed by the courts on people trespassing on people's property when they are present … the number of matters going to the district court has increased significantly, they are being contested hard and, because the emphasis is on longer sentencing, the sentencing submissions are being fought much harder. Our statistics have borne that out. We are getting the Office of Crime Statistics and Research to validate the research we have done. At the rate we are going, we have had to ask the government for $1 million more in the next financial year just to maintain the rate at which we are currently expending funds in the criminal jurisdiction.[78]

78 Mr Gilmore, *Committee Hansard*, 11 November 2003, p.14.

2.109 This view was supported by Victoria Legal Aid. Mr Tony Parsons noted that as a result of a road safety campaign there has been an increase of applications for legal aid for road safety matters that involve the risk of prison. These have included third offences, driving over the legal limit (0.05) and dangerous driving. He noted that Victoria Legal Aid had been fiscally compensated for this impact by the Victorian Government.[79]

2.110 Victoria Legal Aid was asked in evidence for its views on a 'legal aid impact statement' when legislation is introduced. Mr Parsons supported the idea:

> It is a very sensible proposal. Obviously legislation can have ripple effects and it is very important that those ripple effects be taken into account so that the needs can be best met.[80]

2.111 The Committee asked Victoria Legal Aid whether the Commonwealth had undertaken such an assessment or consultation with LACs. Mr Parsons noted that Commonwealth legislation has had an impact on legal aid demand, and gave the specific examples of changes to the Family Law Act, social security provisions and changes to the migration law.[81] He noted that LACs are generally well consulted by the Commonwealth on reviews of legislation and have the opportunity to respond to proposed legislative programs. Despite such consultations, when a legislative program does proceed, there is no corresponding compensation given by the Commonwealth, even where an impact on legal aid demand is identified.[82]

Committee view

2.112 The Committee believes that state and territory governments should pay specific attention to the impact on legal aid demand when developing proposed legislation. This consideration could either be in the form of including a 'legal aid impact statement' in the explanatory memorandum to legislation, or through consultations with LACs.

2.113 However, the Committee notes Victoria Legal Aid's comments that although the Commonwealth consults over such proposed legislation, there is no corresponding compensation when an increase in demand for legal aid services is identified.

2.114 The Committee believes that state and territory and the Commonwealth Government must take responsibility for increases in demand for legal aid that result from its new legislation, and provide supplementary funding for LACs accordingly.

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79 Mr Parsons, *Committee Hansard*, 12 November 2003, p. 42.

80 ibid.

81 ibid.

82 ibid.

Recommendation 7

2.115 The Committee recommends that Commonwealth and state/territory governments should provide legal aid impact statements when introducing legislation that is likely to have an effect on legal aid resources.

Recommendation 8

2.116 The Committee recommends that Commonwealth and state and territory governments engage in consultations with legal aid commissions when introducing legislation that may increase demand for legal aid. If such an increase is identified, governments should provide corresponding increases in funding to compensate legal aid commissions for this increase in demand.

The Commonwealth/State dichotomy

2.117 There was substantial 'in-principle' opposition to the Commonwealth/State funding dichotomy. In addition to the in-principle opposition, there were criticisms that the separation increased administration costs and resulted in an inefficient use of what funding was available for Commonwealth matters.

In-principle opposition

2.118 The Committee heard argument that the insistence of the Commonwealth that Commonwealth funds only be used for matters arising under Commonwealth laws was inefficient, and resulted in the Commonwealth failing to meet its obligations to those for whom it has special responsibility.[83]

2.119 The Law Institute of Victoria argued strongly against the dichotomy:

> The rule that Commonwealth funds may only be applied to Commonwealth matters is illogical and arbitrary in its operation. It is this rule that has resulted in the legal aid system failing so abjectly to meet the needs of the very people that it is supposed to serve. We adopt the position that this rule should be abolished and that VLA [Victoria Legal Aid] should be allowed to allocate legal aid funding according to need. It should be left to VLA to determine where the interests of justice require that legal aid be made available. Distinctions between Federal and State laws are historical anomalies that are meaningless for present purposes. The cynical adoption of this arbitrary distinction operates to diminish the standing of the administration of justice in the eyes of those who come into contact with it. To adopt these distinctions as a basis for withholding funding encourages obfuscation of the issues by allowing the Federal and State governments to shift responsibility for the gaps in the legal aid system.[84]

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83 For example, Law Council of Australia, *Submission 62*, p.8.

84 Law Institute of Victoria, *Submission 88*, p.8-9.

2.120 There was a strong opposition to the dichotomy in submissions,[85] with no submissions supporting it.

Administration costs

2.121 Because the funding agreements first introduced in 1997 require that the LACs only use Commonwealth funds on matters arising under Commonwealth laws, the LACs are effectively required to maintain two sets of books.

2.122 Victorian Legal Aid explained that under the funding agreement they are permitted to, and do, spend five per cent of the Commonwealth allocation on administering the Commonwealth Priorities and Guidelines.

> The Commonwealth permits VLA to take five per cent of the annual Commonwealth funding to administer the Commonwealth's program in this state. We have provided them with financial data that indicates that that is about what it costs us to administer the Commonwealth program. A substantial part of that five per cent is having to effectively run two sets of books.[86]

2.123 The substantial administration costs that are created by maintaining separate accounts for funding was reinforced by the Legal Aid Commission of New South Wales, which explained they spend 4.5 per cent of their Commonwealth funding on administration.[87]

Inefficient use of Commonwealth funds

2.124 There was criticism that the restrictions imposed by the guidelines stopped commissions from using funds in matters that should rightly receive Commonwealth funding. The Legal Aid Commission of NSW argued that the restrictions imposed by the guidelines preclude those without dependant children from accessing aid in a property dispute. Furthermore the requirement that the applicant's equity in the matrimonial home be less than $100,000 precludes the vast majority of those in NSW from accessing legal aid:

> The range of family law areas, which LACNSW is permitted to undertake, is limited. Whilst it can undertake work in child-related matters including residence and contact, child support and certain maintenance areas, it is severely restricted in the types of property dispute matters it can undertake.
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> For example, Guideline 8.2 states that legal assistance for property matters may only be granted if the Commission has decided that it is appropriate for

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85 Queensland Legal Aid, *Submission 31*, p.17; South Australian Legal Services Commission, *Submission 51*, p.3.; National Legal Aid, *Submission 81*, p.9.; Northern Territory Legal Aid, *Submission 82*, p.9.; NSW Legal Aid, *Submission 91*, p.23.;Victoria Legal Aid, *Submission 97*, p.12.

86 Mr Tony Parsons, *Committee Hansard*, 12 November 2003, p.35.

87 Mr William Grant, *Committee Hansard*, 13 November 2003, p.5.

> assistance to be granted for other family law matters. The guidelines further state that legal assistance should not be granted if the only other matter is spouse maintenance, unless there is also a domestic violence issue involved.
>
> This guideline effectively precludes people who have not had children or whose children are adult, from obtaining a grant of aid. It also indirectly precludes aid for older people. This guideline is discriminatory and could be unlawfully so. If the guideline is changed as it should be, further funding will be required to support the likely increase in the number of cases which present.
>
> Another problem is that legal aid may only be granted in certain property disputes where the applicant's equity in the matrimonial property is valued at less than $100,000. Given real estate values in NSW, the effect of this restriction is to deprive many people who would otherwise be deserving of assistance.[88]

2.125 There was also criticism that Commonwealth funds were being applied inconsistently between each state and territory. The Victorian Department of Justice explained that as different Commissions apply the guidelines differently, and some engage in debt recovery processes that others do not, some LACs have scarce Commonwealth funds available whilst some have a surplus they are unable to use:

> The fact of the matter is that, in the course of the last five years, we have built up a $20 million-odd reserve of Commonwealth funds. I want to spend that money. You could never say that Legal Aid is meeting unmet legal need in the state of Victoria. The fact that the Commonwealth micromanage how we can spend their money means that we struggle to do that; we struggle to spend the money that we efficiently and rigorously collect from the community who can afford to repay it.[89]

2.126 Victoria Legal Aid explained that they regularly approach the Commonwealth for permission to use this surplus for matters that are arguably of Commonwealth responsibility, and are denied. When asked what the Commonwealth agreement said on the issue, Mr Parsons responded:

> That money is collected from clients who previously were given legal aid in Commonwealth law matters. So the money we have collected is identified as a Commonwealth asset in our bank account but the Commonwealth funding agreement says that we can only spend Commonwealth revenue on a limited range of Commonwealth law legal aid matters; that is, family law involving children and a very limited range of other matters—for example, veterans' affairs.[90]

88 Legal Aid Commission of NSW, *Submission 91*, p.31.

89 Mr Tony Parsons, *Committee Hansard*, 12 November 2003, p.36.

90 ibid, p.37.

2.127 When asked whether Victoria Legal Aid had sought permission to spend this surplus, he responded that they had 'constantly and regularly' and were always refused.[91]

2.128 The South Australian Legal Aid Commission proposed a compromise which would allow a more flexible and efficient use of Commonwealth funds. It proposed that the Commonwealth allow legal aid commissions to use 5-10 per cent of funding for state matters.[92] This would stand as a compromise, as the Commonwealth's desire to retain Commonwealth funding for Commonwealth matters would be retained, but Commissions would have the flexibility of using 5-10 per cent of funding for matters that may exist in the grey area of the guidelines or may be of particular need.

Committee view

2.129 The Committee believes that the Commonwealth/State funding dichotomy is arbitrary as many legal matters do not fall neatly in either category. Making such an arbitrary distinction not only inhibits the effective servicing of legal needs, it creates unnecessary administration costs for legal aid commissions. The Committee is concerned by evidence from commissions that between 4 per cent and 5 per cent of Commonwealth funding is spent in administration costs. Clearly the overall administration costs for Commissions would be reduced if they were not required to maintain two separate accounts for funding.

2.130 The Committee is also concerned by evidence from Victoria Legal Aid that it has a surplus of Commonwealth funds, but is unable to use it on cases that may not fall clearly within the Commonwealth Guidelines.

2.131 The Committee believes that the Commonwealth/State funding dichotomy (ie the 'purchaser/provider' model) should be abolished, and funding should be returned to the co-operative funding arrangements that were in place prior to the creation of the dichotomy.

2.132 However, if the current funding arrangements are retained, the Committee supports the recommendation by the Legal Services Commission of South Australia that Legal Aid Commissions be given a discretion of 10 per cent of Commonwealth funding, to be used at the discretion of the LACs. This would allow them some flexibility in accounting for demands for service that may not fall clearly within the Commonwealth guidelines, but should rightly be serviced by Commonwealth funds.

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91 ibid.

92 *Submission 51*, p.6.

Recommendation 9

2.133 The Committee recommends that the current purchaser/provider funding arrangement be abolished, and that Commonwealth funding be provided in the same 'co-operative' manner as existed prior to 1997.

Recommendation 10

2.134 If the current purchaser/provider funding arrangement is retained, the Committee recommends that the Commonwealth Government amend the funding agreements to allow the legal aid commissions to use 10 per cent of Commonwealth funding at their own discretion.