

29 AUG 2008

Committee Secretary  
Senate Standing Committee on Legal and  
Constitutional Affairs  
Department of the Senate  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Our Ref: 08/452

**LEGAL AID NSW RESPONSE TO INQUIRY INTO  
SEX DISCRIMINATION ACT 1984 (Cth)**

Dear Committee Secretary

Legal Aid NSW welcomes the opportunity of making a short submission to the Committee in relation to this reference. This submission focuses on the terms of reference inviting comment on the procedural and technical issues affecting the access of clients to legal aid for Commonwealth discrimination matters under the *Sex Discrimination Act*.

**Scope of Legal Aid NSW's interest and involvement**

The focus of this submission is primarily on an issue which affects legal aid commissions in providing assistance to disadvantaged citizens under the *Sex Discrimination Act* – the current limited Commonwealth legal aid guidelines which limit the provision of legal aid in matters arising under Commonwealth law.

The Australian Law Reform Commission's (ALRC's) *Equality Before the Law: Justice for Women* report 69 (1994) observed that one of the major problems facing women in accessing justice involved their very limited access to legal aid for civil and family law matters.

In the 2006-2007 financial year Legal Aid NSW assisted more than 162,736 clients with civil law matters through information, advice or representation. While research by the Law and Justice Foundation<sup>1</sup> found that gender cannot

<sup>1</sup> Coumarelos, C, Wei, Z & Zhou, AH, *Justice made to measure: NSW legal needs survey in disadvantaged areas*, Law and Justice Foundation of NSW, Sydney, 2006: 26, 166. Also note that 81 per cent of complaints to the Human Rights and Equal Opportunity Commission (HREOC) are related to employment; see *HREOC Annual Report 2006/07 (Commonwealth)*: 67.

be reliably related to the incidence of legal events, Legal Aid NSW is aware that civil and family law services remain of particular relevance and importance to female clients.

In particular, Legal Aid NSW receives numerous applications for legal aid each year in which women seek assistance with discrimination claims that involve what is referred to as 'multiple discrimination'. Arguably, instances of multiple discrimination represent a practical barrier to the favourable application of the Legal Aid Guidelines to women in the Commonwealth jurisdiction.

### **Provision of legal aid for Commonwealth discrimination matters in NSW**

Legal aid for discrimination matters under the *Sex Discrimination Act* is funded pursuant to an agreement between Legal Aid NSW and the Australian Attorney-General's Department. The current agreement will expire on 31 December 2008 and discussions will soon commence regarding a new National Partnership agreement, which is currently intended to commence on 1 January 2009. The Commonwealth has indicated in its Budget Papers 2008/09 and through recent speeches by the Attorney-General that the new agreements will have a different form and focus, although it is not yet clear whether the proposed changes to the agreement will address the problems described in this submission.

Legal Aid NSW provides aid in Commonwealth discrimination matters pursuant to the Civil law guidelines which are an attachment to the current agreement. The relevant guidelines are 1.2 and 4.1 which are attached.

For an applicant for legal aid to be eligible for assistance, Legal Aid NSW is required to satisfy itself that:

1. there is a strong prospect of substantial benefit<sup>2</sup> being gained by the applicant and by the public or a section of the public; and
2. if the legal action may result in an award of damages –
  - a) the applicant is likely to receive damages; and
  - b) the action could not reasonably be expected to be conducted under a conditional costs agreement (or similar arrangement) with a private practitioner; and
  - c) the applicant cannot obtain appropriate legal assistance from another source.

---

<sup>2</sup> Also note that an applicant is required to show both substantial private benefit and substantial public benefit. Legal Aid NSW believes that this is an unduly high threshold for remedial or beneficial legislation. It creates a situation in which the test for Commonwealth discrimination matters is substantially higher than for discrimination matters arising under NSW law. Sexual harassment cases, by their nature, involve private rights and frequently do not raise issues of wider public benefit because the law is largely settled in the area of sexual harassment. Legal Aid NSW's view is that it is very undesirable not to litigate these matters when it seems clear that these are issues routinely faced by women in the workplace.

### *Substantial benefit*

Legal Aid NSW has drawn the Attorney General's Department's attention to the problems associated with the way in which 'substantial benefit' is defined, and how one might assess whether the public obtains a benefit from pursuing a particular form of discrimination complaint. Taken at the highest level of satisfaction, all but public interest test cases might be excluded.<sup>3</sup> On the other hand, it is arguable that the public has an interest in ensuring that any unlawful breach of discrimination laws receives a sanction.

Legal Aid NSW continues to act for and represent women in relation to sexual harassment cases, for example, many of whom develop psychological injuries as a result of harassment. In some cases, such injuries are serious enough to develop into disabilities such as depression, post-traumatic stress disorder, severe anxiety, personality disorders and other diagnosed mental illnesses, which may, in the employment context, lead to termination.

Applicants who suffer from recognisable psychological conditions often find it difficult to relate all the details of their experiences for the purposes of establishing the merit of their claims.

#### **Example**

A recent case run by Legal Aid NSW settled for over half a million dollars.

The Applicant claimed against multiple Respondents including the Chief Executive Officer and the Directors of the employing Company. It was alleged that one Director of the Company knew of systemic harassment by the CEO but told her to 'go and dye her hair blonde.'

The Applicant was unable to fully recall and reconstruct particular conversations which evinced aspects of discrimination until half way through preparation for hearing.

In assessing the merit of the Applicant's case, Legal Aid NSW considered its public benefit which, in the context of the matter, involved seeking declarations about the Directors' behaviour and thereby dissuading other Company Directors from sanctioning discrimination by their employees.

On a strict interpretation of the legal aid guidelines, the public benefit could not be deemed as having a strong prospect of 'substantial benefit' where the evidence supporting such a claim was uncorroborated and subject to a motion to strike out.

<sup>3</sup> Legal Aid NSW has only a very limited role in determining whether a matter meets the requirements of the Commonwealth public interest and test cases scheme. Guideline 5(2) requires:

If the Commission does not make a Grant of Legal Assistance for an application for assistance that it considers may be a test case within the meaning of the Commonwealth Public Interest and Test Cases Scheme, the Commission should refer the matter to the Commonwealth Attorney-General's Department for consideration in accordance with the Scheme.

The double effrontery and humiliation of being sexually harassed and then (arguably) unlawfully terminated for being 'unable to work due to sickness', when the sickness was itself caused by the harassment, presents a systemic issue with respect to the equitable application of the legal aid guidelines.

### *Damages*

As to the second restriction, it is unclear:

- whether compensation is 'damages';
- whether the likelihood of receipt of damages refers only to the possibility of an order being made, or additionally to the prospect of recovery from the opponent;
- how, in reasonably practicable terms, one could assess the prospect of obtaining a retainer with a solicitor under a conditional costs agreement; and
- how, in reasonably practicable terms, one could assess whether legal assistance is obtainable from another source.

As a consequence of the above, taken at their most demanding level, in the view of Legal Aid NSW the requirements of the second restriction could exclude the availability of legal aid to nearly all applicants.

### **Standing to commence proceedings and onus of proof**

Legal Aid NSW notes and supports the comments of Associate Professor Rice in his submission concerning the issue of onus of proof in direct discrimination matters.

In addition, Legal Aid NSW would support proposals to broaden the basis on which interested people and organisations may have standing to bring actions under the Sex Discrimination Act. The effect of the High Court's holding in *Australian Conservation Foundation v Commonwealth of Australia and Others* (1980) 28 ALR 257 is that an ordinary member of the public has no standing to sue to prevent the violation of a public right unless he or she had, at the same time, a private right of his own interfered with or at the same time suffered special damage peculiar to himself. This is a very significant limitation, which in the context of limited access to legal aid, exacerbates the actual effects of its limited availability, so that only people of significant means are able to bring actions.

### **Other submissions**

Legal Aid NSW has reviewed submissions provided by the National Association of Community Legal Centres, the Public Interest Law Clearing House, Associate Professor Rice, Legal Aid Queensland and the National Foundation of Australian Women in preparing this submission. Legal Aid NSW supports the concerns identified in those submissions.

Thank you for the opportunity to make this submission. For further information or discussion of any of the issues raised in this paper, please contact Alex Grosart, Solicitor, Civil Law Practice on 9219 5830 (or via email at [alexander.grosart@legalaid.nsw.gov.au](mailto:alexander.grosart@legalaid.nsw.gov.au)) or Christopher Paul, Solicitor, Legal Policy Branch, on 9219 5882 (or via email at [christopher.paul@legalaid.nsw.gov.au](mailto:christopher.paul@legalaid.nsw.gov.au)).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Alan Kirkland', with a long horizontal stroke extending to the right.

Alan Kirkland  
**Chief Executive Officer**