

1992

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

LEGAL AID (AMENDMENT) BILL (No. 2) 1992

EXPLANATORY MEMORANDUM

(Circulated by the Authority of
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Attorney-General)

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OUTLINE

The Legal Aid Act 1977 (the Principal Act) provides for the constitution, powers, functions, finances and administration of the Legal Aid Commission; criteria for provision of legal aid; review of Commission decisions on grant of legal aid; and the relationship between the Minister and the Commission.

The Legal Aid (Amendment) Bill (No. 2) 1992 (the Bill) amends the Principal Act to effect certain changes to the Commission's constitution, recovery measures and review machinery. One amendment reduces the membership of the Commission from 9 to 8, by reducing the number of specialist commissioners from 2 to 1. The Bill also envisages the Commission delegating its powers to grant leave of absence to a statutory officer of the Commission and to appoint persons to act as statutory officers.

Another amendment enables the Chief Executive Officer to constitute review committees by selecting persons from three panels comprising the nominees of the Bar Association and the Law Society and lay representatives, respectively.

One significant amendment empowers the Commission to secure contributions due to it by a charge over a property of a client, with a power of sale. The Commission is also to have the power to direct a solicitor to pay the amount due to it from a client out of the moneys recovered from legally assisted proceedings.

Another significant amendment provides general exceptions to the very strictly interpreted secrecy provision of the Principal Act.

FINANCIAL CONSIDERATIONS

The Bill is intended to be budget neutral.

CLAUSE NOTES

Clause 1: Short title

This clause provides that the proposed Act may be cited as the *Legal Aid (Amendment) Act (No. 2) 1992*.

Clause 2: Commencement

Clause 2 states that the proposed Act will commence upon notification in the *Gazette*. However, proposed provisions to reduce the number of specialist Commissioners from 2 to 1 and thereby the number of commissioners from 9 to 8 [subclause 4(b)] and to consequently reduce the number of Commissioners to constitute a quorum at a Commission meeting from 5 to 4 [Clause 16] become operative on 1 March 1993.

By this date, the term of the specialist Commissioner, whose office would become abrogated by the provisions, would have expired already, and therefore it would not become necessary to cause or seek premature retirement of that Commissioner.

Clause 3: Principal Act

This clause defines the term "Principal Act" to mean the *Legal Aid Act 1977*.

Clause 4: Constitution of Commission

This provision

- clarifies that a Commissioner appointed under paragraph 7(1)(a) of the Principal Act represents the Minister;

- enables one specialist Commissioner, instead of 2 as at present, to be appointed, thus in effect reducing the number of specialist Commissioners from 2 to 1.

Clause 5: Professional conduct by officers of the Commission

This amendment is related to the proposed insertion of section 92AA, which contains general exceptions to secrecy and the legal professional privilege. Proposed section 92AA is inserted by clause 22.

Clause 6: Determination of applications for legal assistance

This amendment is related to an amendment proposed in subclause 7(b).

Clause 7: Contribution towards costs and expenses

Subclause 7(a) is related to the amendment in subclause 7(b).

Subclause 7(b) adds a new condition which the Commission may decide to attach to legal assistance it charges for. On imposing this condition, the Commission would be able to secure an amount due to it from a legal aid client by a charge on his or her land.

Subclause 7(c) adds a new subsection to section 31 of the Principal Act which has the effect of empowering the Commission to direct a client's solicitor to pay a contribution towards its costs and expenses from any money recovered in legally assisted proceedings.

Subclause 7(d) adds a new subsection to section 31 of the Principal Act. It deals with the obligation of a solicitor in cases where the Commission has directed him or her to pay to it an amount due to it from a legally assisted person out of moneys recovered on behalf of the person. The solicitor must pay to the Commission the amount so recovered or the amount the Commission has directed him or her to pay, whichever is less.

The amount directed to be paid is to be a debt due to the Commission and is to be paid by the solicitor on behalf of the legally assisted person. This direction is a reviewable decision [subclause 10(a)].

Clause 8: Security for payment of contribution

This clause inserts a new section 31A. Where the Commission provides legal assistance on condition that the amount due to it would be secured by a charge over the client's land [subclause 7(b)], the Chief Executive Officer of the Commission may lodge with the Registrar of Titles a notice which would on registration be a charge on the land. This notice must specify

the land to be charged and certify the amount due to the Commission. The Registrar must notify the client of the lodgement of the notice.

The Commission has power of sale under the charge. Where a client has failed to pay the amount due to the Commission after receiving its direction to pay (subsection 31(2) of the Principal Act), the Commission may exercise the power of sale. Before exercising this power, the Commission must give 1 year's notice to the client, demanding payment of the amount together with interest until the day of payment. At least 2 months before exercising the power, the Commission must serve another notice on the client and on every person who has interest in the land. These notice conditions and the time involved are designed to make the exercise of this power a measure of last resort.

Where the amount secured is paid, the Commission has exercised the power of sale or the Commission determines that the charge is no longer required, the Commission must have a notice of discharge registered by the Registrar. Subsection 48(1B) of the Real Property Act 1925, which requires each instrument presented for registration to be attested by a witness, will not apply to the registration of a notice as a charge under these new provisions.

Clause 9: Entitlement of legally assisted person to costs in proceedings

This clause amends section 33 of the Principal Act to reduce to 28 days the period after which a legally aided person's right to recovery may be statutorily assigned to the Commission. The current period is 3 months.

Clause 10: Reconsideration of a decision

Clause 10 amends section 36 of the Principal Act. Section 36 enumerates the decisions in respect of which an aggrieved person may apply for reconsideration. Subclause 10(a) includes in the list of those decisions the Commission's direction to a solicitor [clause 7] to pay to it an amount due from a legally assisted client.

At present, an aggrieved person may apply for review or reconsideration within 3 months of receiving a notice of a reviewable decision. Ordinarily, the Commission may extend this application period [paragraph 36(4) (a) of the Principal Act]. However, it is not empowered to extend the period beyond 3 months [paragraph 36(4) (b) of the Principal Act] in relation to application for review of its direction to its client to assign his or her right to recovery of amounts due [subsection 33(5) of the Principal Act].

This clause reduces to 28 days the application period for review or reconsideration of a decision and, where the applicant shows reasonable cause, enables the Commission to extend that period up to another 28 days. This period applies to all reviewable decisions under the Principal Act without distinction.

- Clause 11: Establishment and constitution of Review Committees**
Clause 12: Repeal
Clause 13: Cessation of Committee

These clauses make certain changes to constitution of Review Committees which review the Commission's reviewable decisions under the Principal Act. At present the membership of the Committees is fixed, having been appointed by the Minister in accordance with section 38 of the Act.

Sections 37 and 38 are replaced with a more fluid arrangement which enables the Chief Executive Officer of the Commission to establish a new Review Committee for each review (or series of reviews) from three standing panels of 9 members each. These three panels are to comprise the nominees of the Bar Association and the Law Society and lay representatives, respectively. The lay representatives are to be chosen by the Minister and the members of other panels are to be approved by the Minister.

Transitional arrangements included in proposed section 37 enable existing Review Committee members and deputy members to continue to serve on transitional panels after the new procedures are in place.

- Clause 14: Limitation on contracts**

This clause amends section 44 of the Principal Act to increase to \$100,000 the monetary limit on contracts the Commission may enter into without the need for Ministerial approval. The present limit is \$50,000.

- Clause 15: Tenure of office**

This clause tidies section 48 of the Principal Act by removing the reference to subsection (2) which has already been repealed.

- Clause 16: Meetings**

This provision reduces the number of Commissioners required to constitute a quorum for a Commission meeting from 5 to 4. This is in keeping with the proposed reduction of the Commission membership from 9 to 8 [subclause 4(b)].

Clause 17: Leave of absence

This clause enables the Commission to delegate to the President its power to grant leave of absence to the Chief Executive Officer, and to the Chief Executive Officer its power to grant leave to an Assistant Executive Officer. The Commission may determine the terms and conditions subject to which the leave is to be granted.

Clause 18: Acting appointments

This clause enables the Commission to delegate to the President its power to appoint a person to act as Chief Executive Officer, and to the Chief Executive Officer its power to appoint a person to act as Assistant Executive Officer.

Clause 19: Membership of panel, resignation from panel, removal from panel

Clause 19 modifies the administrative provisions relating to Review Committees to suit the changes proposed in clause 11. Proposed sections 76, 77 and 78 apply also to "transitional panels" as defined in proposed section 37.

Clause 20: Meetings of Review Committee

This clause makes consequential amendments to the Principal Act to take account of the changes proposed in clause 11. The members of a Review Committee are to elect one of their number to preside at the Committee's meetings. Where the presiding member is absent, the remaining members are to elect one of their number in his or her place. The quorum at a Review Committee is to be 2 members, including a lay representative.

Clause 21: Secrecy

Clause 21 amends section 92 of the Principal Act (the secrecy provision). It removes references to section 47 and section 97. Section 47 was repealed earlier and section 97 has no relevance to the secrecy obligation after a previous amendment to it.

Clause 22: Exceptions to secrecy provision

This clause adds a new provision in the Principal Act that will provide exceptions to the legal professional privilege [section 13 of the Principal Act] and the secrecy obligation [section 92]. The disclosure of information relating to a legal aid client will be permitted for the purpose of facilitating the investigation or prosecution of an offence against the Act, with the express or implied consent of the person to whom the information relates, and for the purposes of a disciplinary inquiry under section 32 of the *Legal Practitioners Act 1970*.

Clause 23: Interest on amounts due to the Commission

Clause 23 provides for payment of interest on amounts due to the Commission upon its direction to pay [subsection 31(2) of the Principal Act]. The amount of interest is to be calculated at rates prescribed under subsection 227B(2) of the *Magistrate's Court (Civil Jurisdiction) Act 1982*. These rates are specified in the *Magistrate's Court (Civil Jurisdiction) Regulations*, and are updated from time to time.

Clause 24: Transitional

This clause preserves the application of the existing provisions to a limited extent. The President of the Commission and a member who is nominated by the Minister under paragraph 7(1)(a) of the Principal Act are to continue to hold their office for the remainder of the period of their appointments. The reduction of the reconsideration or review application period to 28 days and the application of that period to all reviewable decisions [subclause 10(b)] will not apply to decisions made before the commencement of the amendments. Matters part-heard before the old Review Committees (constituted before the amendments commenced) will continue to be reviewed by those Committees.