

**1997**

**THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**Legal Aid (Amendment) Bill 1997**

**EXPLANATORY MEMORANDUM**

**Circulated by authority of**

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## **Legal Aid (Amendment) Bill 1997**

The Legal Aid Commission was jointly funded by the Territory and the Commonwealth prior to the termination of the Legal Aid Agreement by the Commonwealth effective on 30 June 1997. The Commission applied common means and merits tests to applications for assistance whether those matters arose under Territory or Commonwealth laws.

The Commonwealth has now decided that it will separately fund legal assistance for matters arising under Commonwealth law in accordance with its own guidelines and priorities for the grant of legal assistance. For this purpose, the Territory has entered into a new Legal Aid Agreement with the Commonwealth, and this Bill is intended to implement that Agreement.

References to "the Act" in this Explanatory Memorandum are to the *Legal Aid Act 1977* and "the Commission" are to the Legal Aid Commission (A.C.T.).

### **Formal provisions**

**Clause 1** provides for the Act to be cited as the Legal Aid (Amendment) Act 1997.

**Clause 2** provides for the Act to commence upon its notification in the *Gazette*.

**Clause 3** defines the Act being amended, the *Legal Aid Act 1977*, as the Principal Act.

### **Funding agreements**

**Paragraph 4(a)** inserts two new definitions into subsection 5(1). A "Territory matter" is a matter arising under a law of the Territory. A "funding agreement" is defined as an agreement between the Territory and another jurisdiction for the provision of legal assistance by the Commission in matters arising under the laws of that other jurisdiction. An agreement must provide for the full costs, including overheads, of implementing an agreement to be payable by the other jurisdiction.

**Paragraph 5(a)** omits subsection 8(1) of the Act, which provides that the function of the Commission is to provide legal assistance in accordance with the Act, and substitutes a new subsection. The new provision makes it clear that the primary function of the Commission is to provide legal assistance in respect of Territory matters.

**Paragraph 5(b)** inserts a new subsection 8(3) which provides that where a funding agreement is in force the Minister may direct the Commission to apply the terms of an agreement and the Commission shall comply with the Minister's direction. This provision is necessary because the Commission will not be a party to a funding agreement and thus would not otherwise be bound by such an agreement. This paragraph also inserts new subsection 8(4) which requires the Minister to table in the Legislative Assembly, within 15 days, any direction issued pursuant to subsection 8(3) together with the relevant funding agreement.

**Clause 6** inserts a new section 8A. The new section provides that particular provisions of the Act will apply to legal aid matters which are funded under a funding agreement (that is, by another jurisdiction) only to the extent that they are

not inconsistent with the terms of the funding agreement. The specified provisions are:

- subsection 10(1)(j): the duties of the Commission;
- sections 11 and 12: guidelines for the allocation of work and for the provision of assistance; and
- Parts V and VI. provision of legal assistance and the reconsideration and review of decisions relating to the provision of legal assistance.

New section 8A is necessary because funding agreements may specify matters such as the criteria upon which assistance is to be provided which are different to those which are applied in respect of a grant of assistance in respect of a Territory matter. The section will prevent the Commission from prescribing and applying its own guidelines for the provision of aid in Commonwealth matters, where the Commonwealth has prescribed the relevant guidelines.

**Clause 7** omits paragraph 10(1)(g) which provides for statistical and other information to be given to the Commonwealth. This is dealt with in the new agreement with the Commonwealth.

**Clause 10** amends section 43 by inserting a new subsection (1A). The new subsection prevents funding provided to the Commission by the Territory from being used to fund matters which are intended to be funded under a funding agreement. It complements new subsection 8(1) which makes it clear that the primary function of the Commission is to provide legal assistance in respect of Territory matters. Only funding provided to the Commission under an agreement and derivatives of the funding - contributions, costs and investment income - is available for the provision of legal assistance for matters in respect of which there is a funding agreement. This will prevent Territory funds from being used to subsidise Commonwealth matters.

#### **Other substantive amendments**

**Paragraph 4(b)** omits subsection 5(3) which extends the operation of the Act to the Jervis Bay Territory.

**Clause 8** makes a minor correction to section 12 of the Act. Section 12(b) refers to "either or both of the conditions mentioned in subsection 31(1)". There are several conditions which may be imposed under subsection 31(1) and section 12 is amended to reflect this.

**Clause 9** omits subsections 32(4), (5) and (6) which provide for judicial review of decisions of the Commission in relation to maintaining a list of legal practitioners willing to undertake legal aid work. These subsections predate the *Administrative Decisions (Judicial Review) Act 1989* which provides for the judicial review of this type of decision.

**Clause 11** omits subsection 56(2) which prohibits the Chief Executive Officer and Assistance Executive Officer from holding office beyond 65 years. The discrimination on the basis of age is removed.

**Clause 12** substitutes a new section 69. Section 69 excludes the application of the indemnity insurance (Part IX), Fidelity Fund (Part XII), receivers (Part XIII) and costs (Part XV) provisions of the *Legal Practitioners Act 1970* to the Commission. The new section 69 continues these exclusions and extends them to include the appointment of managers (Part XIV) and investigators (Division 7 of Part XI).

**Subclause 13(1)** amends section 98, which provides for the staff of the Commission to receive superannuation benefits under the Commonwealth Superannuation Scheme, to include the Public Sector Superannuation scheme.

**Subclause 13(2)** validates any payment of superannuation benefits to staff under the Public Sector Superannuation scheme which may have been made before the amendment effected by subclause 13(1) takes effect.

**Formal amendments**

**Clause 14** provides for the Act to be amended as set out in the Schedule which makes a range of formal amendments to:

- remove spent provisions consequent upon the repeal of the Legal Aid Ordinance 1972;
- correct a reference to the *Legal Practitioners Act 1970* in section 9; and
- change references to "function" to the plural in the context of the Commission performing its functions.