NEW LEGAL AID ARRANGEMENTS FOR QUEENSLAND: THE LEGAL AID QUEENSLAND BILL 1997

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1. INTRODUCTION

On 4 March 1997, Attorney-General and Minister for Justice, Denver Beanland MLA announced that the Queensland Legal Aid Commission (The Legal Aid Commission), will change from a joint Commonwealth/State commission to a State Commission. This change to the future direction and structure of Queensland’s Legal Aid Commission follows the Federal Government’s threatened $4.9 million cut to legal aid funding.¹ The Minister promised no reduction in funding for State matters such as criminal and civil cases and no closure of offices.

The Minister said the State Government had a clear commitment to Legal Aid and had injected an extra $2.6 million into the Commission in the last budget. He also said that the Government

...will look to improve the efficiency of Legal Aid and investigate ways of delivering the service more effectively.²

These aims will be achieved through the enactment of the **Legal Aid Queensland Act 1997**. When introducing the **Legal Aid Queensland Bill 1997** (the Bill) into the Legislative Assembly of Queensland on 30 April 1997 the Minister said

This Bill is about maintaining the delivery of legal aid services throughout Queensland under new funding arrangements and the management of a restructured legal aid organisation.³

### 2. BACKGROUND

#### 2.1 OBLIGATION OF THE GOVERNMENT TO PROVIDE LEGAL AID

In a submission prepared in March 1994 the Law Council of Australia identified the two main bases for the Government’s obligation to provide legal aid:

1. the responsibility for the maintenance of the rule of law
2. the responsibility to protect fundamental human rights.⁴

#### 2.1.1 The Responsibility for the Maintenance of the Rule of Law

Implicit in the government’s role in enacting legislation which provides for legal rights and responsibilities is the responsibility of Parliament to ensure that the legal advice and representation necessary to defend legal rights is also available to the community.⁵

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² Hon Denver Beanland MLA, 4 March 1997.


⁵ *Legal Aid Funding in the 90’s*, p 8.
2.1.2 The Maintenance of Fundamental Human Rights

Legal aid for those unable to afford the cost of legal representation in criminal proceedings is acknowledged as a civil and political right in modern law and government.6

**International Obligations**

Under international treaties to which the Commonwealth is signatory, the Australian Government has taken on responsibilities and duties giving rise to an obligation to provide legal assistance.7

Australia is a signatory to the **International Covenant on Civil and Political Rights** (ICCPR). **Article 14** of the ICCPR includes the following provisions:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

... 

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

... 

   d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing: to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have the means to pay for it.

The ICCPR does not specifically require that government funded legal assistance be provided for persons unable to afford their own legal representation. However there is an argument that if a defendant was deprived of legal assistance in a matter involving a serious criminal offence, Australia would be in breach of its obligations.

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6 D Fleming, ‘Legal Aid’, *The Laws of Australia*, Chapter 3, LBC Information Services, (Online service, at 17 April 1997.)

under the covenant.\textsuperscript{8} There is also an argument that the right implied by Article 14(1) of the ICCPR providing for a fair hearing extends an obligation to ensure persons have legal representation.\textsuperscript{9} Other international conventions to which Australia is a party arguably place an obligation on the Commonwealth Government to provide a level of funding for representation of persons otherwise unable to afford their own legal representation. These include the United Nations Convention of the Rights of the Child\textsuperscript{10}; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of the Discrimination Against Women; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The Commonwealth is a signatory to these conventions.\textsuperscript{11} The decision of the High Court in Teoh v Minister for Immigration and Ethnic Affairs\textsuperscript{12} has the effect that even if the terms of a treaty have not been incorporated into Australian law by legislation, administrative decision makers are required to take the provisions of the treaty into account in their decision making process. The responsibility of the Commonwealth for matters in relation to which they have entered international treaties would arguably extend to matters of State law where the Commonwealth has ratified a treaty.\textsuperscript{13}

\textit{The Dietrich Decision}

Although the development of common law in Australia has not seen the emergence of a right to legal aid in criminal proceedings\textsuperscript{14}, the prospect of people facing imprisonment or other serious penalties without adequate legal representation is

\textsuperscript{8} Legal Aid Commission of Queensland, \textit{Submission to the Senate and Legal Constitutional References Committee, Legal Aid Inquiry}, Vol 3, Submission No 80, pp 697-773 (710).

\textsuperscript{9} Legal Aid Commission of Queensland, \textit{Submission to the Senate and Legal Constitutional References Committee, Legal Aid Inquiry}, Vol 3, Submission No 80, p 711.

\textsuperscript{10} Article 37(d); Article 40.

\textsuperscript{11} See New South Wales Bar Association, \textit{Submission to the Senate and Legal Constitutional References Committee, Legal Aid Inquiry}, Vol 3, p 59.

\textsuperscript{12} \textit{Teoh v Minister for Immigration and Ethnic Affairs} (1995) 183 CLR 273.

\textsuperscript{13} Legal Aid Commission of Queensland, \textit{Submission to the Senate and Legal Constitutional References Committee, Legal Aid Inquiry}, Vol 3, Submission No 80, p 713.

\textsuperscript{14} Fleming, p 2; \textit{McInnes v The Queen} (1979) 143 CLR 575; \textit{Dietrich v The Queen} (1992) 177 CLR 292.
The decision of *Dietrich v The Queen* illustrates this. The effect of the High Court decision in Dietrich is that in cases of a serious crime alleged against an accused person who is unable to afford his or her own legal representation, the court should ordinarily order a permanent stay of proceedings until the person can secure legal representation on the basis that legal representation is essential if the trial is to be fair.\(^\text{17}\)

As a consequence of *Dietrich v The Queen*, an unrepresented person accused of a serious crime is likely to have his or her conviction overturned. The Australian Institute of Criminology has expressed the view that in the absence of adequate levels of funding, offenders who are charged with serious crimes and who are unable to afford legal representation will now not be brought to trial, a situation which will tend to “…bring the criminal justice system into disrepute.”\(^\text{18}\)

### 3. HISTORY OF LEGAL AID IN QUEENSLAND

Until 1973 the legal aid services were provided on a piecemeal basis in the various states and territories. In Queensland, funding to aid people in legal proceedings began with the *Legal Assistance Act 1965*. The funding was sourced from interest on monies held in solicitors’ trust accounts. In 1973 the Australian Legal Aid Office (ALAO) was established and for the first time legal aid services became available nationally.\(^\text{19}\) The ALAO commenced in Queensland in 1975. Initially the ALAO dealt only with people with problems that related to Commonwealth laws. Consequently there existed two separate schemes which provided the significant portion of legal aid funding in Queensland.

In 1977, after a review of Commonwealth-funded Legal Aid, the Commonwealth Government enacted the *Commonwealth Legal Aid Act 1977* (The Commonwealth

\(^{15}\) Justice Toohey AC (as he then was), ‘Broad Factors Affecting Legal Aid in the 90’s’ (paper presented at the inaugural National Legal Aid Conference: *Legal Aid and Legal Access*, 20-21 February 1992, p 5, cited in *Legal Aid Funding in the 90’s*, p 9.

\(^{16}\) *Dietrich v The Queen* (1992) 177 CLR 292.

\(^{17}\) His Honour Mr Jeffrey Miles, Chief Justice, Supreme Court of the ACT, *Submission to the Senate and Legal Constitutional References Committee, Legal Aid Inquiry*, Vol 1, pp 267-269, (268).

\(^{18}\) Australian Institute of Criminology, *Submission to the Senate and Legal Constitutional References Committee, Legal Aid Inquiry*, Vol 3, p 733.

The Commonwealth Act provided for a co-operative legal aid scheme with agreements between the Commonwealth and the states for provision of legal aid funding.\footnote{Legal Aid Commission of Queensland, Submission to the Senate and Legal Constitutional References Committee, Legal Aid Inquiry, Vol 3, Submission No 80, p 733.} Pursuant to this legislation the Commonwealth entered into agreements with the states and territories for the provision of legal aid funding.\footnote{Commonwealth Legal Aid Act 1977, s 21.}

### 3.1 **COMMONWEALTH APPROACHES TO LEGAL AID FUNDING**

The first funding arrangements were based on the \textit{numbers system}\footnote{Churchman, p 18.}. This meant that funding was provided by the Commonwealth based on a predetermined number of cases.

By the end of the 1980s, the Commonwealth had moved towards a \textit{dollars funding} of legal aid. New funding agreements between the Commonwealth States and Territories were negotiated. The initial agreements based on the dollars funding provided for a share of the funding between the Commonwealth and the States in a ratio of 55:45.\footnote{Churchman, p 18. In Western Australia, South Australia, Tasmania, the Northern Territory, the ratio was 60:40.}

### 4. **THE LEGAL AID ACT 1978 (QLD)**

The \textit{Legal Aid Act 1978} (Qld) was enacted principally to amalgamate the Legal Assistance Scheme that had been established by the \textit{Legal Assistance Act 1965} (Qld) and the Australian Legal Aid Office Scheme.\footnote{Hon W D Lickiss MLA, Minister for Justice and Attorney-General, Legal Aid Bill 1978 (Qld), Second Reading Speech, Queensland Parliamentary Debates, Vol 275, 1978-79, p 1164.} The \textit{Legal Aid Act 1978} (Qld) established the \textbf{Legal Aid Commission of Queensland} (The Legal Aid Commission).\footnote{Legal Aid Act 1978 s 7.} The main function of the Legal Aid Commission is to provide legal assistance under the \textit{Legal Aid Act 1978} (Qld).\footnote{Legal Aid Act 1978, s 9.}
4.1 **The Legal Aid Fund**

There is provision under section 42 of the *Legal Aid Act 1978* (Qld) for the establishment of **The Legal Aid Fund**. The Legal Aid Fund consists of moneys paid to the Legal Aid Commission for the purpose of provision of legal assistance. It is from this Fund that the Legal Aid Commission discharges its obligations and liabilities arising in or in connection with the provision of legal assistance under the *Legal Aid Act 1978* (Qld). Moneys made available by the Commonwealth for the purpose of the provision of legal assistance are paid into the Legal Aid Fund.

5. **The Legal Aid Commission of Queensland**

The main source of legal assistance for persons unable to afford the cost of their own legal representation is currently through the **Legal Aid Commission**. Limited other funding for legal aid is available through the Commonwealth statutory and administrative schemes, a network of Aboriginal and Torres Strait Islander Legal Services (ATSIL), the Appeals Cost Fund legislation, community legal centres and professional schemes.

The Legal Aid Commission was established by the Legal Aid Act on 3 December 1979. The *Legal Aid Act Amendment Act 1991* and *Public Defence Act Repeal Act 1991* merged the Legal Aid Commission and the Public Defender’s Office. The merger was effected to save costs and to increase efficiency in the delivery of these services.

The Legal Aid Commission is constituted by 11 commissioners, including the Director of Legal Aid. The function of the Legal Aid Commission is to provide legal assistance through staff employed by the Legal Aid Commission or by funding

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27 *Legal Aid Act 1978*, s 42.

28 *Legal Aid Act 1978*, s 44.

29 *Legal Aid Act 1978*, s 42(d).

30 *Legal Aid Act 1978*, s 7(1).


32 *Legal Aid Act 1978*, s 8.
private legal practitioners to provide such assistance.\textsuperscript{33} As part of its duties, the Legal Aid Commission is required to perform its function by providing legal assistance:

- to people who are unable to afford the costs of obtaining legal services from private practitioners\textsuperscript{34}
- in the most effective and economical manner\textsuperscript{35}
- consistent with, and without prejudice to, the independence of the private legal profession.\textsuperscript{36}

The Legal Aid Office is accountable to the Legal Aid Commission through its Executive.\textsuperscript{37}

\textbf{5.1 \ FUNDING OF THE LEGAL AID COMMISSION}

Funding of the QLAC comes from six sources:

- Commonwealth Government grants;
- State Government grants;\textsuperscript{38}
- statutory interest;
- recoverable costs;
- client contributions; and
- interest on investments.


\textsuperscript{33} Legal Aid Act 1978, s 9.

\textsuperscript{34} Legal Aid Act 1978, s 29(1).

\textsuperscript{35} Legal Aid Act 1978, s 11(1)(a).


5.1.1 Commonwealth Government Grants

Funds are made available to the Legal Aid Commission pursuant to an arrangement or agreement made between the Commonwealth and Queensland. The current Legal Aid agreement is discussed at Section 6 of this Bulletin.

5.1.2 State Government Grants

State government funding has increased significantly from $2.8m in 1988/89 to $9.732m in 1995/96. The State Government has increased its contribution in 1996/97 to $12,550m. A diagram illustrating the growth in State Government funding is contained in Appendix A.

5.1.3 Statutory Interest

Statutory interest revenue is derived from a distribution from interest on solicitors’ trust accounts and from the General Trust Accounts’ Contribution Fund.

5.1.4 Client Contributions

Client contributions have never been a significant source of revenue for the Legal Aid Commission.

5.1.5 Recoverable Costs

The Legal Aid Commission no longer provides funding for property settlement applications in the Family Court nor for civil law matters where there is a power in the court or tribunal to award costs. Consequently there has been a sharp reduction

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39 Legal Aid Commission of Queensland, *Submission to the Senate and Legal Constitutional References Committee, Legal Aid Inquiry*, Vol 3, p 743. A further $0.281m was appropriated for community legal centre funding.

40 Legal Aid Commission of Queensland, *Submission to the Senate and Legal Constitutional References Committee, Legal Aid Inquiry*, Vol 3, p 743.

in recoverable costs in the last few years. In 1991/92 the recoverable costs were $7.9m compared with a budgeted amount of $3.441m in 1995/96.

5.1.6 Interest on Investments

The financial reserve necessary for maintenance of a cash flow for the Legal Aid Office has declined in recent years. The interest on the cash reserve has had a corresponding decline. A diagramatical representation of this decline is contained at Appendix B. An amount of $1.2m in investment interest was received in 1995/96.

6. THE LEGAL AID AGREEMENT

The current agreement between the Commonwealth and the State concerning the provision of Legal Aid funding in Queensland was concluded on the 30th January 1990 and commenced operation on 1 July 1989. The agreement covers the following matters:

a) the monies to be made available by the Commonwealth and by the State for the purposes of legal assistance;

b) the basis upon which monies will be made available;

c) the priorities to be observed in relation to monies made available by the Commonwealth and the State, in the provision of legal aid assistance; and

d) the sharing of costs incurred in the provision of legal aid by the Public Defender and of legal assistance by the Legal Aid Commission of Queensland.

The arrangements for the provision of funding are set out in the schedule to the agreement. The level of funding is determined in accordance with the Schedule,

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42 Legal Aid Commission, Submission to the Senate and Legal Constitutional References Committee, Legal Aid Inquiry, Vol 3, p 745.

43 Legal Aid Commission, Submission to the Senate and Legal Constitutional References Committee, Legal Aid Inquiry, Vol 3, p 746.


which provides that the total amount of funds to be provided to the Legal Aid Commission is determined in each year by adjusting the net operational expenditure in the base year of 1987/88 by a weighted average of movements in the Average Weekly Earnings and the Consumer Price Index for the previous year.\(^{47}\)

### 6.1 Matched Funding

The *Legal Aid Act 1978* makes no provision for funding increases based on workload increases, population growth or demographic changes.\(^{48}\) However commencing in 1991/92 the Commonwealth offered to provide additional funding to the Legal Aid Commission on the basis that the State *matched* the funding in proportion to the funding split under the agreement (55:45). **Matched funding** became a permanent arrangement in 1994/95.\(^{49}\)

### 6.2 Eligibility Levels for Legal Aid

In March 1994, the Law Council of Australia released their report entitled *Legal Aid Funding in the 90’s*. The aim of the investigation was to establish what level of funding would be necessary to restore eligibility level for legal aid to the levels set when the current Commonwealth/State funding agreements were concluded. The main findings of the report were:

- the demand for legal aid had increased significantly;
- the level of funding of legal aid had not increased with that demand but had remained constant in real terms; and
- that to restore funding to levels which would provide legal aid in 1994 to those who were eligible in the period 1987-1988 required a real increase in funding of not less that $50 million.

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\(^{49}\) Legal Aid Commission of Queensland, *Submission to the Senate and Legal Constitutional References Committee, Legal Aid Inquiry*, p 741.
National Legal Aid, the Commonwealth agency, has estimated that restoring legal aid to 1991 levels would now require an additional $64.9 million.\textsuperscript{50}

There is a diagrammatical representation of Commonwealth/State funding pursuant to the Commonwealth/State Agreement from 1988/89 - 1995/96 at Appendix C.

\section*{6.3 Termination of the Current Commonwealth/State Legal Aid Agreement.}

The Commonwealth/State agreement provides that either the Commonwealth or the State may terminate the agreement by giving notice in writing to the other party of not less than 12 months from the date on which the notice is given. The Commonwealth gave such notice of termination to the State in July 1996. The Commonwealth Attorney-General wrote to his State and Territory counterparts on 26\textsuperscript{th} June 1996 advising

\begin{quote}
that the Commonwealth would exercise its rights under the existing legal aid agreements to give notice that they would terminate on 30\textsuperscript{th} June 1997, and that the Commonwealth would be looking to negotiate new agreements with the States and territories to come into effect from 1 July 1997.\textsuperscript{51}
\end{quote}

The forward estimates published in the 1996/97 budget cut $100 million from legal aid, commencing with a $33.2 million reduction (22\%) in 1997-98.\textsuperscript{52} As reported in Consuming Interest this means

\begin{quote}
approximately $40 million per year will be withdrawn from legal aid funding nationally- a cut of more than 22\% of the total Commonwealth funding of the legal aid system. This represents for most legal aid commissions an absolute 16\% cut in funds.\textsuperscript{53}
\end{quote}

The Australian Council of Social Service, whilst urging the States and Territories to increase their contributions, noted that there is “…no way they (states and

\begin{thebibliography}{99}
\item\textsuperscript{50} National Legal Aid, Meeting Tomorrow’s Needs on Yesterday’s Budgets: The Undercapacity of Legal Aid in Australia, July 1996, p 2;
\item\textsuperscript{52} Australian Council of Social Service,‘Legal aid cuts: policy reversal urged’ Impact, December 1996, p 1.
\end{thebibliography}
territories) could be expected to plug such a large shortfall”. Legal Aid pays the cost in about 90% of criminal cases in the Supreme Court and about a quarter of family law cases.55

6.3.1 Commonwealth Position

With the announcement of the 1996/97 Federal Budget the Commonwealth advised that from July 1997 it would only provide funding for “commonwealth matters”.56

On 20th August 1996, the Commonwealth Attorney-General announced that

Existing legal aid agreements do not achieve an appropriate balance between the responsibilities of the Commonwealth and the States. With a view to negotiating more effective arrangements, the Government has therefore given 12 months notice that it will terminate the previous agreements on 30 June 1997. The Commonwealth believes that it has a responsibility for matters arising under their laws. Put simply, if a government passes a law, it must be prepared to meet the legal aid costs arising in relation to that law. From 1997-98, the Commonwealth will no longer provide funds to support the growing demand for legal aid matters arising under State or Territory laws. The Government believes that a proper apportionment of responsibility between the Commonwealth and the States and Territories for legal aid will lead to a reduced requirement for Commonwealth funding: accordingly, the Commonwealth outlays will be reduced by $33.16 million from 1997/98.57

The Commonwealth government views the current funding arrangements as insufficient to ensure that the its duty to the taxpayer to account for the public funds that it uses is able to be discharged. The Commonwealth is of the view that whilst the funding provided to the state legal aid commission is spent on servicing legal aid clients, under the current arrangements the Commonwealth hasn’t been in a position to sufficiently influence the priorities with regard to the allocation of these funds.58


6.3.2 Definition of a ‘Commonwealth Matter’

The Commonwealth responsibilities as to the provision of legal aid are found in section 3(4) of the Commonwealth Legal Aid Act, 1977. That section provides:—

In this Act, a reference to the provision of legal assistance of a Commonwealth matter [emphasis added] shall be read as a reference to the provision of legal assistance:

a) in or in connexion with a claim, right or proceeding involving a matter arising under a law of the Commonwealth;

b) in a proceeding in a federal court or in a State court exercising federal jurisdiction; or

c) in any other case where it is in the power of the Parliament to provide for the giving of legal assistance.

There is general confusion about what constitutes a commonwealth matter. The First Report of the Senate Legal and Constitutional References Committee Inquiry into the Australian Legal Aid System identified a number of areas of law in which the definition of a matter into discrete commonwealth and state is difficult. Those areas identified included:

- **domestic violence** — victims of domestic violence can seek remedies under State Domestic Violence legislation or the Family Law Act 1975 (Cth);

- **cooperative scheme legislation** — The Consumer Credit Code and the Corporations Law provide examples of these. The Consumer Credit Code is nationally uniform legislation but it is enacted by the States. There is dispute between the State and Territory legal aid authorities and the Commonwealth Attorney-General’s Department as to whether Corporations Law prosecutions are Commonwealth or State;

- **mixed matters** — these are matters that comprise elements of both commonwealth and state law. Examples include criminal matters arising out of the same facts and presented in the one indictment but arising variously under state and commonwealth law;

- **matters arising under the common law**;

- **matters that have been cross-vested** from Federal to State courts or vice versa. The cross vesting legislation is parallel Commonwealth and State/Territory legislation that enables superior courts (the Federal Court of Australia, the Family Court of Australia, the Family Court of Western
Australia and the Supreme Courts of the States and Territories) to concurrently exercise both State/Territory and Federal jurisdiction.\(^{59}\)

The Commonwealth government has not clearly defined the term **commonwealth matter** but it has identified a number of priorities.\(^{60}\) These are listed at Appendix D.

### 6.3.3 State Government Responses

South Australia, the ACT and the Northern Territory are reported to have reached agreement in principal with the Commonwealth in regard to the levels for the legal aid funding arrangements operative from July 1 1997.\(^{61}\) Victoria, New South Wales or Western Australia have not reached an agreement with the Commonwealth. Tasmania is reported to have made some progress towards an arrangement with the Commonwealth concerning the level of funding.\(^{62}\)

### 6.3.4 Queensland Government Response

The Attorney-General Denver Beanland announced on 4 March 1997 that the joint Commonwealth/State Queensland Legal Aid Commission would be scrapped and replaced by a state body which would be funded by the state government and handle issues under Queensland law. The Queensland State Cabinet had decided that the Queensland Legal Aid Commission would become a ‘State Commission’. The Queensland Attorney General further noted:

> …means business as usual at the shopfront for Legal Aid, provided the Federal Government is willing to enter into some form of agency agreement directly with the Commission.\(^{63}\)

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The Commission could act as an agency for the Commonwealth if the Commonwealth Government was prepared to enter into such an arrangement to provide funding for Commonwealth legal matters such as Family Law.64

It was announced that legislation would be introduced to enable the Commission to be established from July 1 when the current agreement expires.65 The highlights of the proposed legislation are outlined in Section 7.

7 THE LEGAL AID QUEENSLAND BILL 1997

7.1 OBJECTIVES

The Legal Aid Queensland Bill 1997 (The Bill) has the following objects:

(a) To provide for giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way; and

(b) To pursue innovative commercial arrangements, including legal assistance arrangements, for giving legal assistance at a reasonable cost to the community and on an equitable basis throughout the State.66

The Bill repeals the Legal Aid Act 1978 (Qld) and abolishes the Legal Aid Commission of Queensland.67

7.2 LEGAL AID QUEENSLAND

Clause 41 of the Bill establishes a new legal aid body, Legal Aid Queensland. It is through this body that the objects of the proposed Legal Aid Queensland Act will be mainly achieved. The main functions of Legal Aid Queensland are set out in

64 Fran Metcalf, ‘Queensland geared to go it alone on legal aid’, Courier Mail, 5 March 1997, p 5.


66 Legal Aid Queensland Bill 1997, cl 3(1).

67 Legal Aid Queensland Bill 1997, cl 104,89.
43. Legal Aid’s main functions are—

(a) to ensure legal assistance is given to persons in the most effective, economic, commercial and efficient way; and

(b) to manage its resources so as to make legal assistance available at a reasonable cost to the community and on an equitable basis throughout the State; and

(c) to control and administer amounts given to it by the State or Commonwealth under a legal assistance arrangement or otherwise; and

(d) to pursue innovative ways of giving persons legal assistance to minimise the need for individual legal services in the community.

Legal Aid Queensland (Legal Aid) will be managed by the Legal Aid Board.68

7.3 THE LEGAL AID BOARD

The Bill establishes the Legal Aid Board.69 The Legal Aid Board will have the following functions:

(a) to responsibly manage Legal Aid and

(b) to ensure that Legal Aid achieves its objects under the act.70

The Legal Aid Board will be constituted by a chairperson and 4 other persons, all of whom will be appointed by the Governor in Council.71 The Legal Aid Board will be consequently much smaller than its predecessor, the Legal Aid Commission.72 The Governor in Council can only appoint a person to the Legal Aid Board if the person has expertise in commerce, economics, finance, management or providing legal

68 Legal Aid Queensland Bill 1997, cl 52(a).

69 Legal Aid Queensland Bill 1997, cl 48.

70 Legal Aid Queensland Bill 1997, cl 52.

71 Legal Aid Queensland Bill 1997, cl 49(1),(3).

72 Compare Legal Aid Act 1978, s 8: see also section 5 above.
services.\textsuperscript{73} A person can be appointed to the Legal Aid Board for a maximum term of 3 years.\textsuperscript{74}

The powers of the Legal Aid Board are set out in clause 54 of the Bill.

The board may—

(a) exercise a power that Legal Aid may exercise; and

(b) decide Legal Aid’s priorities and strategies; and

(c) issue guidelines about particular types of application that the board requires be referred to it for its decision; and

(d) issue standards about giving legal services under this Act; and

(e) deal with a matter under guidelines mentioned in paragraph (c).

On request from the Minister, the Legal Aid Board must give a report to the Minister on any issue relevant to its functions. However the Minister cannot ask the Legal Aid Board to report about legal assistance for a particular person.\textsuperscript{75}

7.3.1 Directions from the Attorney-General

The Attorney-General may give the Legal Aid Board written direction about the exercise of its powers and the functions of Legal Aid.\textsuperscript{76} However if the direction relates to legal assistance given “under an arrangement with the Commonwealth,” then the direction can only be given “at the request of the Commonwealth Attorney-General.”\textsuperscript{77}

The Legal Aid Board must comply with any direction given by the Attorney-General.\textsuperscript{78} If the Attorney-General gives any such directions to the Legal Aid Board, the Attorney-General must, within “10 sitting days after the direction is

\textsuperscript{73} Legal Aid Queensland Bill 1997, cl 49(2).

\textsuperscript{74} Legal Aid Queensland Bill 1997, cl 51(1).

\textsuperscript{75} Legal Aid Queensland Bill 1997, cl 53.

\textsuperscript{76} Legal Aid Queensland Bill 1997, cl 63(1).

\textsuperscript{77} Legal Aid Queensland Bill 1997, cl 63(2).

\textsuperscript{78} Legal Aid Queensland Bill 1997, cl 63(4).
given to the board” table the following in the Legislative Assembly:

- in the case of a direction given “at the request of the Commonwealth Attorney-General”, - a copy of that request;
- in the case of any other direction, - a copy of the direction given to the board.79

### 7.4 Chief Executive Officer

Clause 64 of the Bill provides for Legal Aid to have a Chief Executive Officer. The Chief Executive Officer will be appointed by the Governor in Council, on the recommendation of the Legal Aid Board. The responsibilities of the Chief Executive Officer are set out in clause 67:

67. The chief executive officer is, under the board, responsible for—

(a) controlling Legal Aid’s day to day administration in accordance with—

   (i) priorities and strategies decided by the board; and

   (ii) directions given to the chief executive officer by the board; and

(b) providing legal services to legally assisted persons under this Act; and

(c) arranging and supervising the provision of legal services to legally assisted persons by Legal Aid lawyers.

The transitional provisions in the Bill provide that the person holding the office of Director of Legal Aid under the Legal Aid Act 1978 (Qld) will, upon commencement of the section, be taken to have been appointed as the Chief Executive Officer for the remainder of the person’s term of appointment.80 The person’s service for all employment purposes will be taken to be continuous and the person will retain all existing and accruing rights of employment.81

The Chief Executive Officer must be a lawyer with at least five years experience.82 The Chief Executive Officer is appointed for a maximum 5 year term but is eligible for reappointment at the expiration of the term.83 There is no limit in the Bill on the number of terms a Chief Executive Officer may serve.

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79 Legal Aid Queensland Bill 1997, cl 63
80 Legal Aid Queensland Bill 1997, cl 99(1).
81 Legal Aid Queensland Bill 1997, cl 99(2),(3)
82 Legal Aid Queensland Bill 1997, cl 65.
83 Legal Aid Queensland Bill 1997, cl 66.
7.5 **LEGAL AID EMPLOYEES**

The Bill gives Legal Aid the power to:

- engage employees it considers necessary to perform its functions;
- decide its employees terms of employment.\(^{84}\)

The transitional provisions in the Bill provide for any person who is either an employee of the Legal Aid Commission or an Assistant Director of Legal Aid under the *Legal Aid Act 1978* to be taken to be a Legal Aid employee under the new legislation retaining “…all existing and accruing rights of employment.”\(^ {85}\)

In the provision of legal services, Legal Aid is taken to be a firm of solicitors and a Legal Aid lawyer is taken to be employed by the firm.\(^ {86}\)

7.6 **LEGAL ASSISTANCE**

The Bill is concerned with the provision of legal assistance. The Bill defines *legal assistance* as

> the giving of a legal service, including legal advice, free or on payment of an amount that is less than the cost of giving the service.\(^ {87}\)

The provision of *legal assistance* includes assistance to the court given by Legal Aid in circumstances where the Attorney General has referred a point of law to the Court of Appeal for its consideration and opinion under s 669A(2) of the Criminal Code, and having been acquitted or discharged of an offence, the person doesn’t appear.\(^ {88}\)

7.6.1 **Giving Legal Assistance**

The Bill provides for criteria for determining eligibility of a person for legal assistance to be

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\(^ {84}\) Legal Aid Queensland Bill 1997, cl 70.

\(^ {85}\) Legal Aid Queensland Bill 1997, cl 100(1),(2).

\(^ {86}\) Legal Aid Queensland Bill 1997, cl 73.

\(^ {87}\) Legal Aid Queensland Bill 1997, cl 5.

\(^ {88}\) Legal Aid Queensland Bill 1997, cl 47.
An inclusive list of relevant matters that Legal Aid may take into account in determining whether an applicant needs legal assistance is set out in clause 12. The provisions for the granting of legal aid are modelled on the provisions in Part 5 of the Legal Aid Act 1978. As under the Legal Aid Act 1978, if an applicant is seeking assistance for a court proceeding, Legal Aid is able to consider the likely outcome of the proceeding (a “merit test”). However clause 15 of the Bill enables Legal Aid to assess eligibility for legal assistance without applying a merit test to applicants charged with an indictable offence. This definition is wider than the term prescribed criminal proceedings in the Legal Aid Act 1978. It enables a wider class of persons to be exempted from the merit test in criminal proceedings.

7.6.2 Legal Assistance Arrangements

In the second reading speech, the Minister noted that

the establishment of legal assistance arrangements [emphasis added] will form the basis of an innovative funding mechanism in purchaser/provider arrangements [emphasis added].

Central to the Bill’s approach to the provision of Legal Assistance is the purchaser/provider arrangement where

- the purchaser is the agent who decides what will be produced and
- the provider is the agent who delivers the outcomes.

The purchase/provider concept is given effect to by the Bill in the form of a legal assistance arrangement. Clause 46 of the Bill empowers Legal Aid to enter legal

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89 Cl 11.

90 See Criminal Code Act 1899 (Qld). Indictable offences are those for which the offenders cannot unless otherwise provided be prosecuted before a court of summary jurisdiction (ie a Magistrates Court).

91 See J Hodgins, Director of Legal Aid, Bulletin to Staff, 1 May 1997.


93 Hodgins.
assistance arrangements. A legal assistance arrangement is defined in clause 7 of the Bill as

... an arrangement for giving legal assistance under which —

(a) the State, Commonwealth or another entity, as purchaser of Legal Aid’s legal services, decides what legal services are to be given by Legal Aid, as the provider of the legal services, to legally assisted persons and

(b) Legal Aid, as provider, gives the legal services, directly or indirectly, to legally assisted persons.\(^9\)

For the purposes of legal assistance arrangements, Legal Aid is the provider. Legal Aid could also act as a purchaser. In order to meet its obligations under a legal assistance arrangement, Legal Aid can enter into agreements with

- a private lawyer
- a community legal centre or
- other entity\(^9\)

to provide legal services as the agent of Legal Aid.\(^9\) The entity with whom Legal Aid enters into a legal assistance agreement is called a Legal Aid agent.\(^9\)

7.6.3 Legal Aid Agents

Clause 40 of the Bill provides that Legal Aid is responsible for determining and paying the fees to a Legal Aid agent for legal assistance given by the agent. Legal Aid sets fee levels which apply:

- generally to all Legal aid agents and matters
- to a particular Legal Aid agent or matter
- to particular classes of Legal Aid agents or matters

\(^9\) Legal Aid Queensland Bill 1997, cl 7.

\(^9\) Legal Aid Queensland Bill 1997, cl 7.

\(^9\) An ‘entity’ includes a person or unincorporated body, Acts Interpretation Act 1954 (Qld), s 36.

\(^9\) Legal Aid Queensland Bill 1997, cl 46(4).

\(^9\) Legal Aid Queensland Bill 1997, cl 46(4).
• by reference to specified exceptions or factors.

This provides flexibility in the delivery of legal assistance which could include the introduction of arrangements for contracting with private practitioners and other entities for the delivery of legal assistance to clients. This could allow the introduction of ‘preferred suppliers’ of services who are contracted to provide legal assistance and reimbursed at an agreed rate. Legal Aid may contend with private practitioners and other entities for the provision of legal assistance. It may be possible for Legal Aid to establish a system of preferred supplier to achieve efficient economical delivery of legal assistance.\textsuperscript{99}

\subsection*{7.6.4 Provision by Legal Aid Agents of Information to Legal Aid}

The \textit{Legal Aid Act 1978} contains provisions concerning the disclosure of information by a legal practitioner who is acting for a legally assisted person.\textsuperscript{100} The Bill contains similar provisions at \textbf{clause 29}. If a Legal Aid agent is performing services or has performed services for a person who is receiving legal assistance in a matter, Legal Aid is authorised to ask the Legal Aid agent for any

\begin{quote}
…\textit{relevant information}\textsuperscript{101} [emphasis added] \textit{or document about the matter that is within the agent’s knowledge, or to which the agent has access.}\textsuperscript{102}
\end{quote}

\textbf{Clause 29(5)} provides that

\begin{quote}
\textit{…the legally assisted person is taken to have waived any privilege or right, including professional privilege, that might otherwise prevent the agent giving the information or document.}
\end{quote}

The Bill provides for penalties to be imposed on the Legal Aid agent in the event that the Legal Aid agent fails to comply with a such a request for information.\textsuperscript{103}


\textsuperscript{100} \textit{Legal Aid Act 1978}, s 32(14)-s 32(16).

\textsuperscript{101} \textbf{Relevant information about a matter} is defined in subclause 29(8) of the Legal Aid Queensland Bill as information \textit{(a) relevant to giving legal assistance to a person for the matter, or(b) about the matter’s progress and disposal.}

\textsuperscript{102} Legal Aid Queensland Bill 1997, cl 29(2).

\textsuperscript{103} Legal Aid Queensland Bill 1997, cl 29(3).
7.6.5 Conditions on Grants of Legal Assistance

Legal Aid can provide legal assistance conditionally or unconditionally.\footnote{Legal Aid Queensland Bill 1997, cl 17(1)(a).} Clause 17 (a) of the Bill provides that Legal Aid can impose conditions on a grant of aid after having regard to

- the objectives of Legal Aid
- any relevant legal assistance agreement.

There is specific provision in the Bill for approvals of legal assistance conditional upon the legally assisted persons making contributions towards the cost of giving assistance.\footnote{Legal Aid Queensland Bill 1997, cl 17(2)(b).} Conditions of approval can include initial contributions or retrospective contributions comprising part or all of the cost of providing legal assistance.\footnote{Legal Aid Queensland Bill 1997, cl 18 (b) - (d) } Provision is made for the enforcement of conditions of approval in Clause 19.

7.6.6 Review of Legal Assistance Decisions

Unlike the current Legal Aid Act 1978 where the process for review and reconsideration to provide legal assistance is set out in the Act,\footnote{Legal Aid Act 1978, Part 6.} clause 21 of the Bill leaves it to the discretion of the Legal Aid Board to establish a review process for decisions made by Legal Aid about legal assistance.

7.6.7 Misrepresentation in Applying for Legal Assistance

Clause 84 of the Bill makes it an offence for an applicant for legal assistance to:

(a) make a false or misleading statement or

(b) give Legal Aid a document that is false or misleading in a material particular.

Clause 84(3) creates an offence for an applicant for legal assistance or a legally assisted person to withhold “…relevant information the person is required to give Legal Aid under this Act.”
7.7 **ALTERNATIVE DISPUTE RESOLUTION**

Clause 24 empowers Legal Aid to refer any matter in respect of which a person has made an application for legal assistance, to an alternative dispute resolution (ADR) process. A structured negotiation process termed *conferencing* in which a chairperson assists parties to a dispute to reach an agreement, is currently operating under the *Legal Aid Act 1978*. The Bill provides for *conferencing*\(^{108}\) as one of the ADR processes to which Legal Aid can refer legally assisted persons. There are provisions in the Bill protecting the evidence of anything done or said in a conferencing session from being disclosed without the consent of the parties.\(^{109}\)

7.8 **RECOVERY OF COSTS IN PROCEEDINGS**

As is the case under the *Legal Aid Act 1978*\(^{110}\), clause 30 of the Bill provides that a legally assisted person will be taken to be responsible for the legal costs and disbursements that arise out of a proceeding in relation to the determination of liability for costs of a court proceeding to which the legally assisted person was a party.

In the event that there is a costs award made in favour of a legally assisted person, Clause 31 enables Legal Aid to exercise the rights and remedies that would otherwise be able to be exercised by such legally assisted person to recover any such costs.

As in the *Legal Aid Act 1978*\(^{111}\), clause 32 of the Bill provides for circumstances in which Legal Aid may pay some or all of the costs ordered against a legally assisted person in a court proceeding. The definition of *legally assisted person* is widened to include “guardian, next friend, and the Legal Friend under the Intellectually Disabled Citizens Act 1985, acting for the legally assisted person”.\(^{112}\)

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\(^{108}\) Legal Aid Queensland Bill 1997, cl 23 defines *Conferencing* as “a structured negotiation process approved by Legal Aid in which the conferencing chairperson helps the parties to a dispute settle the dispute.”


\(^{110}\) *Legal Aid Act 1978*, s.34.

\(^{111}\) *Legal Aid Act 1978*, s.35.

\(^{112}\) Legal Aid Queensland Bill 1997, cl 32(6).
7.9  RESPONSIBILITIES OF LEGAL AID AGENTS FOR RECOVERY OF COSTS

Clause 33 of the Bill provides that in the event that a Legal Aid Agent comes into possession of an “amount actually recovered”113 by a legally assisted person, the Legal Aid agent must pay any outstanding amounts owing by the legally assisted person to Legal Aid. Clause 34 contains a similar provision requiring a Legal Aid Agent to retain possession or control of any “…property actually recovered by a legally assisted person…” until Legal Aid gives “…written notice that the possession or control of the property may be relinquished.”114

7.9.1 Recovery of Costs where Property is Recovered or Preserved

As in the Legal Aid Act 1978,115 clause 36 of the Bill contains provisions enabling Legal Aid to recover costs from a legally assisted person where in a proceeding the legally assisted person recovers property or has an entitlement to have property preserved. Clause 36(4) provides that the Consumer Credit (Queensland) Act 1994 does not apply to amounts payable under this provision. This makes clear that the controls placed on credit providers by the Consumer Credit (Queensland) Act do not apply to Legal Aid when it seeks contributions from legally assisted persons under clause 36.

7.9.2 Recovery of Amounts Due to Legal Aid

In the event that a legally assisted person fails to make payment of an amount due to Legal Aid under clause 36.

- **Legal Aid** may charge interest on the unpaid amount at the rate prescribed under the Supreme Court Act 1995 for a judgement or order of a court record116

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113 Legal Aid Queensland Bill 1997, cl 33(4) -“amount actually recovered includes any ex gratia payment received by the legally assisted person”.

114 Legal Aid Queensland Bill 1997, cl 34.

115 Legal Aid Act 1978 s 34A.

116 Legal Aid Queensland Bill 1997, cl 38.
• The amount owing to Legal Aid becomes a first charge in favour of Legal Aid over any property recovered or in which the person’s ownership is preserved as a result of the legal aid assisted proceeding\textsuperscript{117} and

• Legal Aid may take court proceedings to recover the debt.\textsuperscript{118}

7.10 SECRECY PROVISIONS

Part 6 of the Bill contains secrecy provisions relating to the disclosure of information by Legal Aid employees. Clause 82 provides that the secrecy provisions apply to a person who is or was

(a) a Legal Aid employee under this Act: or

(b) a commissioner, officer of the commission, or member of a legal aid committee, review committee or consultative under the former Act.\textsuperscript{119}

For the purposes of the proposed Legal Aid Queensland Act, the Chief Executive Officer is taken to be an employee. Clause 82 makes it an offence for a person to whom the secrecy provisions apply to do any of the following

• give a person information about a person’s affairs
• make a record of information about a person’s affairs
• use information about a person’s affairs
• give a person a document acquired about someone else’s affairs.

There are exceptions to the general prohibition in clause 82(5) which list a number of persons and entities to whom information or documents can be disclosed. Legal Aid may impose conditions on the disclosure of documents under clause 82(5), including restrictions on the use that may be made of the disclosed document or information.\textsuperscript{120} Clause 82(8) makes it an offence not to comply with any condition placed on the disclosure of documents or information.

\textsuperscript{117} Legal Aid Queensland Bill 1997, cl 39(3).

\textsuperscript{118} Legal Aid Queensland Bill 1997, cl 39(2).

\textsuperscript{119} Legal Aid Queensland Bill 1997, cl 82.

\textsuperscript{120} Legal Aid Queensland Bill 1997, cl 82(6).
7.11 **TRANSITIONAL PROVISIONS**

Any decision, direction of, or delegation by, the Director of Legal Aid under the *Legal Aid Act 1978* will be taken to continue unless

- the context doesn’t permit such continuation\(^{121}\)
- the decision or direction is inconsistent with a decision made by the transitional board.\(^{122}\)

7.11.1 **Rights of Review and Reconsideration of Grants of Legal Assistance Under Legal Aid Act 1978**

The Bill makes provision for rights to reconsideration or Requests for Review under *Legal Aid Act 1978*.

**Clause 93** of the Bill provides for the Legal Aid Board to reconsider or review certain applications as if the *Legal Aid Act 1978* had not been repealed and the Legal Aid Board was the reviewing authority. **Clause 93** also enables the Legal Aid Board to reconsider or review any decisions made under the *Legal Aid Act 1978* as if the reconsideration or review had taken place before the commencement of the **proposed s 93**. Clause 93 applies to

- any requests for review of decisions to grant legal assistance under the *Legal Aid Act 1978* that are still pending reconsideration or review by the “reviewing authority” under the *Legal Aid Act 1978* at the time of commencement of the proposed section 93; and
- any entitlement that a person had under the *Legal Aid Act 1978* to request a review or reconsideration of a decision made under that Act before the commencement of the **proposed s 93**.

7.12 **ASSETS OF THE LEGAL AID COMMISSION OF QUEENSLAND**

The Minister in his Second Reading Speech referred to the transitional arrangements ensuring that

... *there is a timely and effective mechanism which ensures that the assets, rights and liabilities of the current Legal Aid Commission are vested in the new legal aid body*\(^{123}\)

\(^{121}\) Legal Aid Queensland Bill 1997, cl 92(1).

\(^{122}\) Legal Aid Queensland Bill 1997, cl 92(2).
The Bill provides for the vesting of all assets of the Legal Aid Commission of Queensland in Legal Aid.\textsuperscript{124} This includes the reserve in the Legal Aid Fund established under the \textit{Legal Aid Act 1978}.

The vesting of these moneys will not affect the rights of any entity in respect of the \textbf{Legal Aid Fund} immediately before the commencement of the proposed section 94. The Bill provides that any such asset or liability can be revested, by regulation, in an entity, within 6 months of the commencement of the \textbf{Legal Aid Queensland Act 1997}.

\textbf{Clause 95} of the Bill provides that the rights and liabilities of the Legal Aid Commission vest in Legal Aid. There is also provision for the continuation by \textbf{Legal Aid} of any proceedings commenced against or in the name of the \textbf{Legal Aid Commission}.\textsuperscript{125} Likewise provision is made for contracts to which the \textbf{Legal Aid Commission} was a party to continue with Legal Aid taken to be the party in place of the \textbf{Legal Aid Commission}.\textsuperscript{126}

\textsuperscript{123} Queensland Attorney-General and Minister Justice, Hon Denver Beanland MLA, Legal Aid Queensland Bill 1997, Second Reading Speech, Queensland Parliamentary Debates, 30 April 1997, p 1174.

\textsuperscript{124} Legal Aid Queensland Bill 1997, cl 94.

\textsuperscript{125} Legal Aid Commission Queensland Bill, cl 97

\textsuperscript{126} Legal Aid Commission Queensland Bill, cl 98.
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**NEWS ARTICLES**

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• Metcalf, Fran, ‘Queensland geared to go it alone on legal aid’, *Courier Mail*, 5 March 1997, p 5.

**RADIO INTERVIEW**


**LEGISLATION**

• *Acts Interpretation Act 1954* (Qld).
• *Commonwealth Legal Aid Act 1977* (Cwth)
• *Legal Aid Act 1978* (Qld)
• Legal Aid Queensland Bill 1997 (Qld).

**MINISTERIAL STATEMENTS**


**ANNUAL REPORTS**


**CASES**

• *Dietrich v The Queen* (1992) 177 CLR 292.

• *McInnes v The Queen* (1979) 143 CLR 575

APPENDIX A


Graph 1 illustrates the growth in State Government funding.
APPENDIX B

Source: Legal Aid Commission of Queensland, Submission to the Senate and Legal Constitutional References Committee, Legal Aid Inquiry, Vol 3, (Submission No 80), pp 697-773, (746).

Interest on Investments

A financial reserve is necessary for cash flow and to meet liability on grants of legal aid. As the reserve has declined, so has the interest earned on investments. The State Government provided $2M in 1993-94 on a one-off basis to restore the reserve to an acceptable level. An amount of $1.2M in investment interest was received in 1995-96.

Graph 4 illustrates the decline in monies received from interest on investments.
APPENDIX C 1

Source: Legal Aid Commission of Queensland, *Submission to the Senate and Legal Constitutional References Committee, Legal Aid Inquiry, Vol 3*, (Submission No 80), pp 697-773 (739).

Annexure 1

**Commonwealth/State Agreement Funding Formula**

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APPENDIX C 2

Source: Legal Aid Commission of Queensland, Submission to the Senate and Legal Constitutional References Committee, Legal Aid Inquiry, Vol 3, (Submission No 80), pp 697-773 (738).

Annexure 2

Commonwealth/State Revenue

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</table>
APPENDIX D


27. For the purpose of provoking discussion with the States and Territories the Commonwealth has identified its broad priorities as follows:

- Commonwealth family law (including comparable matters to be agreed which arise under Western Australian law)
  - matters involving children (including separate representation and child support scheme matters)
  - matters dealing with violence issues
  - matters relating to income support
- Commonwealth crime
  - matters in which the defendant could be imprisoned is convicted
  - matters which could result in a loss of capacity to earn a livelihood
- Commonwealth civil law
  - matters relating to the receipt of a specified Commonwealth pension or benefit
  - matters relating to decisions of Commonwealth authorities which could lead to a loss of capacity to earn a livelihood
  - matters under Commonwealth discrimination legislation
  - specified Migrant Act matters
  - consumer protection matters in which the primary cause arises under the Trade Practices Act.