

LEGAL AID QUEENSLAND BILL 1997

EXPLANATORY NOTES

GENERAL OUTLINE

Objectives of the Legislation

The main objects of this Bill are:—

- (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.

These objects are to be achieved mainly by establishing Legal Aid Queensland.

Reasons for the objectives and how they will be achieved

In view of the fact that the Commonwealth Government has given notice of the termination of the Commonwealth/State Legal Aid Agreement on 30 June 1997, and the development of innovative management practices for the delivery of government services between clients and service providers, it is appropriate to reconsider the current framework for the provision of legal aid in this State. Consequently, the main objects of this Bill will be achieved by the establishment of a new legal aid body which will be tasked with the main function of ensuring that legal assistance is given to persons in the most effective, economic, commercial and efficient way.

Administrative cost to Government of implementation

Not unlike the current funding mechanism for the provision of legal services throughout the State, the Government will continue to incur significant administrative costs in the provision of legal assistance throughout the State. However, it is envisaged that such administrative costs will be more effectively controlled and monitored by the Government entering into an arrangement with the new legal aid body which will clarify the Government's role as a purchaser and the legal aid body as a provider of legal services throughout the State.

Fundamental legislative principles

Section 4(4) of the *Legislative Standards Act 1992* ("LSA") sets out criteria for determining whether a Bill has sufficient regard to the institution of Parliament and that one of these criteria is that the Bill only authorises the amendment of an Act only by another Act.

Clause 46 of the Bill enables Legal Aid Queensland to enter into legal assistance arrangements with the Commonwealth, the State or other entities and that such arrangements may provide for the amounts to be made available for, and the priorities to be observed in providing, legal assistance. Clause 11(2) of the Bill enables a regulation or a publication of criteria to be made or published to give effect to conditions of a legal assistance arrangement. It may be argued that the content of these legal assistance arrangements may be seen to be overriding provisions in the Bill. This is neither the case nor the intention. The purpose of clauses 46 and 11(2) of the Bill is to provide flexibility in the making of these legal assistance arrangements from time to time and the fact that the Commonwealth and Queensland governments will be providing the funds and setting the priorities and policies for the provision, and direction, of legal assistance.

Section 4(3)(i) of *LSA* provides that one of the fundamental legislative principles is whether legislation provides for the compulsory acquisition of property only with fair compensation.

Clauses 94 and 95 provide that the former entity's assets, rights and liabilities vest in Legal Aid Queensland. It is recognised that some of these assets may be Commonwealth property and so clause 96 of the Bill enables a regulation to be made to re-vest an asset or liability in a stated entity [such as the Commonwealth government].

It may be argued that this clause 96 is an inappropriate delegation of legislative power and therefore in breach of Section 4(4) of the *LSA*. In view of the current state of negotiations between the Commonwealth and Queensland governments on future arrangements for the provision of legal aid services in this State after 1 July 1997 and the fact that it is not possible to adequately determine the exact nature and extent of those assets and liabilities, it is considered that the use of clause 96 provides flexibility and is an appropriate delegation of power.

Consultation

The content of this Bill has been discussed with all current members of the Legal Aid Commission Queensland, the Chief Justice, the Chief Judge of the District Courts, the President of the Court of Appeal, the Senior Judge Administrator of the Supreme Court of Queensland, the Queensland Law Society Inc, the Queensland Bar Association, the Commonwealth Attorney-General's Department, and the State Public Services Federation Queensland—Union of Employees.

The Department of Justice has also consulted relevant government departments such as Queensland Treasury.

NOTES ON PROVISIONS

PART 1—PRELIMINARY

Clause 1 sets out the short title of the Act.

Clause 2 is the commencement provision which provides that the Act commences on 1 July 1997 except for Clause 90 which commences on assent.

Clause 3 outlines the main objects of the Act.

Clause 4 provides for a dictionary in the Schedule to the Act which defines particular words.

Clause 5 defines the fundamental term, “legal assistance” and how a legal service may be given.

Clause 6 defines the term “legally assisted person”.

Clause 7 defines the fundamental term “legal assistance arrangement” which is the basis for the use of innovative management practices called “purchaser-provider arrangements”. A purchaser-provider arrangement is one in which:

- (1) the purchaser is the agent who decides what will be produced; and
- (2) the provider is the agent who delivers the agreed outputs or outcomes.

PART 2—LEGAL ASSISTANCE

Division 1 —Preliminary

Clause 8 sets out the types of legal services to which Part 2 applies.

Division 2—Giving legal assistance

Clause 9 enables a person to apply for legal assistance

Clause 10 states that an application for legal assistance be made in the approved form.

Clause 11 provides that legal assistance may be given to a person only if the person satisfies certain criteria.

Clause 12 enables Legal Aid Queensland to consider relevant matters before deciding whether to grant legal assistance to the person.

Clause 13 provides that Legal Aid Queensland have regard to anything that would be a relevant matter if the application were made by persons who are the corporation’s directors and members.

Clause 14 sets out the conditions for providing legal assistance if the applicant does not ordinarily reside in the State.

Clause 15 requires Legal Aid Queensland to consider various matters if the request for legal assistance relates to a court proceeding.

Clause 16 enables Legal Aid Queensland to provide assistance for a matter even though the person's interests are adverse to the interest of Government.

Clause 17 enables Legal Aid Queensland to approve or refuse an application and sets out the manner of how Legal Aid Queensland may give the legal assistance.

Clause 18 sets out some of the conditions that may be imposed by Legal Aid Queensland providing legal assistance.

Clause 19 enables Legal Aid Queensland to enforce those conditions.

Clause 20 provides that if Legal Aid Queensland refuses an application, it must give the applicant written notice of its decision.

Division 3 —Reviews and court recommendations

Clause 21 enables the Legal Aid Board to establish a review mechanism if it considers appropriate to review decisions made by Legal Aid Queensland about legal assistance.

Clause 22 enables a court to recommend legal assistance to a person in specified criminal proceedings if it considers it appropriate to do so.

Division 4 —Alternative dispute resolution

Clause 23 sets out relevant definitions for the provisions in this Part dealing with alternative dispute resolution.

Clause 24 enables Legal Aid Queensland to require the applicant or legally assisted person to participate in alternative dispute resolution processes.

Clause 25 provides that any evidence from a conferencing session is admissible in court proceedings only if all parties to the conferencing session agree.

Clause 26 enables a conferencing chair to disclose information obtained at a conferencing session under certain circumstances.

Clause 27 provides that a conferencing chairperson has the same protection and immunity as a judge, and sets out the protection and immunity attaching to conference parties and witnesses.

Division 5 —General duties of lawyers and Legal Aid agents

Clause 28 requires the legally assisted person's lawyer to give notice to the other parties to a proceeding that the person is legally assisted.

Clause 29 empowers Legal Aid Queensland to request Legal Aid Queensland's agent to give relevant information or documents about the provision of legal assistance in a particular matter.

Division 6 —Costs of proceedings

Clause 30 is concerned with a legally assisted person's entitlement to costs in a proceeding.

Clause 31 provides that Legal Aid Queensland is subrogated to the rights and remedies of the legally assisted person in a court proceeding, where a court makes an order for costs in favour of a legally assisted person.

Clause 32 sets out the mechanism enabling Legal Aid Queensland to pay costs awarded against a legally assisted person.

Division 7 —Other provisions about Legal Aid’s recovery of its costs and expenses

Clause 33 sets out how a Legal Aid agent must deal with an amount actually received by a legally assisted person where that person is required to pay a sum to Legal Aid.

Clause 34 deals with the situation where the Legal Aid Queensland agent comes into possession or control of particular property.

Clause 35 requires the Legal Aid agent to deal with an amount given to the agent by the legally assisted person, as directed by Legal Aid Queensland.

Clause 36 enables Legal Aid Queensland to seek repayment of costs if the legally assisted person recovers property.

Clause 37 enables Legal Aid Queensland to direct that the legally assisted person take action to recover particular property, or assign their right to recover property to Legal Aid.

Clause 38 authorises Legal Aid Queensland to charge a legally assisted person interest on an unpaid amount payable by that person to Legal Aid Queensland.

Clause 39 enables Legal Aid Queensland to recover unpaid amounts by way of debt recovery in a court or creating a charge over the property belonging to the legally assisted person.

Division 8 —Legal Aid agents’ fees

Clause 40 provides for the mechanism for deciding how much is payable to a Legal Aid agent. *Clause 40(4)(c)* enables Legal Aid to authorise legal aid agents to act on a speculative basis, subject to conditions imposed by Legal Aid.

PART 3—LEGAL AID QUEENSLAND

Division 1—Establishment

Clause 41 provides for the establishment of Legal Aid Queensland.

Clause 42 sets out the legal characteristics of Legal Aid Queensland such as the fact that it does not represent the State.

Division 2—Functions and powers

Clause 43 outlines the main functions of Legal Aid Queensland.

Clause 44 provides for other functions for Legal Aid Queensland.

Clause 45 sets out the general powers of Legal Aid Queensland such as the ability to acquire, hold or dispose of real and personal property and to establish a superannuation scheme for its employees.

Clause 46 is a pivotal provision in the Act in that it enables Legal Aid Queensland to enter into innovative management practices. This clause enables Legal Aid Queensland to enter into legal assistance arrangements [which are defined in *clause 7*]. The matters to be covered in these legal assistance arrangements may provide for the amounts to be made available by the Commonwealth, the State or another entity for legal assistance and the priorities to be observed in providing that legal assistance. Moreover, this clause enables Legal Aid Queensland to enter into agreements with private lawyers, community legal centres, or other entities (such as the Public Trustee) to provide legal services as its agent throughout this State.

Clause 47 sets out the situations in which Legal Aid Queensland may appear on its own behalf and assist the court.

PART 4—LEGAL AID BOARD

Division 1—Establishment, composition, etc

Clause 48 requires that there be established a Legal Aid Board of Legal Aid Queensland.

Clause 49 provides for the composition of that Board and the qualifications of its members.

Clause 50 enables the Governor-in-Council to appoint persons under various conditions.

Clause 51 provides for the term of appointment of a member of the Legal Aid Board and the situations which result in a member's office becoming vacant.

Clause 52 sets out the functions of the Board.

Clause 53 enables the Minister to request the Board to give a report on any issue relevant to its functions except the Minister can not ask the Board to give a report about legal assistance for a particular person.

Clause 54 sets out the powers of the Board such as deciding Legal Aid Queensland's priorities and strategies.

Clause 55 enables the Board to delegate its powers under the Act to the Chief Executive Officer and that such powers may be subdelegated to other appropriately qualified persons.

Division 2—Procedure

Clause 56 sets out the time and place of meetings of the Legal Aid Board.

Clause 57 provides that three Board members constitute a quorum of the Board.

Clause 58 outlines the level of voting to enable the Board to make a decision.

Clause 59 enables the Board to make decisions without the need to hold a Board meeting.

Clause 60 requires the Legal Aid Board to keep minutes.

Clause 61 enables the Legal Aid Board to decide its own procedures.

Clause 62 sets out the procedure for conflicts of interest where a Board member has a direct or indirect pecuniary interest in a matter being considered by the Board.

Division 3—Attorney-General’s directions

Clause 63 authorises the Attorney-General to give written directions to the Legal Aid Board about the carrying out of its functions or exercising its powers and its policies, priorities or guidelines. It also enables the Commonwealth Attorney-General to give the Attorney-General a written request for a direction (relating to legal assistance given under a legal assistance arrangement with the Commonwealth) which the Attorney-General must give to the Legal Aid Board. Such written directions must be tabled in the Legislative Assembly within ten sitting days after those written directions are given to the Legal Aid Board.

PART 5—OTHER PROVISIONS ABOUT LEGAL AID QUEENSLAND***Division 1—Chief executive officer and employees***

Clause 64 provides for the appointment of a Chief Executive Officer by the Governor-in-Council on the Legal Aid Board’s recommendation.

Clause 65 sets out the qualifications of the Chief Executive Officer.

Clause 66 sets out the Chief Executive Officer’s term of appointment.

Clause 67 sets out the Chief Executive Officer’s responsibilities.

Clause 68 provides that anything done in the name of, or for, Legal Aid Queensland by its Chief Executive Officer is taken to be done by Legal Aid Queensland.

Clause 69 allows the Chief Executive Officer to delegate his or her powers to an appropriately qualified person.

Clause 70 enables Legal Aid Queensland to engage employees under various terms of employment to perform its functions.

Division 2—Legal practice

Clause 71 provides that a Legal Aid lawyer may practise as a lawyer, or engage in paid employment, other than for Legal Aid Queensland, only with the Board's written approval.

Clause 72 states that certain provisions of the *Legal Practitioners Act 1995* and the *Queensland Law Society Act 1952* do not apply to Legal Aid lawyers.

Clause 73 gives Legal Aid Queensland the status of performing the function of a solicitor and being a firm of solicitors in that its in-house lawyers are taken to be employed by Legal Aid Queensland as a firm of solicitors.

Clause 74 requires Legal Aid Queensland and its lawyers to observe the professional standards and obligations of a private lawyer engaged in legal practice.

Clause 75 provides that legal professional privilege applies to certain communications made by Legal Aid Queensland.

Clause 76 sets out the characteristics of a Legal Aid lawyer performing the function of a solicitor under certain conditions such as requiring a Legal Aid lawyer to hold a current practising certificate.

Clause 77 provides for the application of various parts of the *Queensland Law Society Act 1952* (these parts deal with complaints against solicitors for malpractice, professional misconduct or unprofessional conduct) to a Legal Aid Queensland lawyer.

Clause 78 provides for the application of any law, written or unwritten, about the conduct of barristers apply to a Legal Aid Queensland lawyer who is a barrister.

Clause 79 provides that Legal Aid Queensland is a solicitor on the record.

PART 6—MISCELLANEOUS

Clause 80 gives Legal Aid Queensland employees protection from civil liability under certain conditions.

Clause 81 provides that Legal Aid Queensland is not liable for particular acts or omissions of Legal Aid agents.

Clause 82 sets out the requirement for confidentiality by Legal Aid Queensland employees and other persons.

Clause 83 enables the Legal Aid Queensland or the Board to require a Legal Aid Queensland employee to give relevant information to it so as to enable the exercise of its functions under the Act.

Clause 84 sets out an offence for a person who makes a misrepresentation in applying for legal assistance without reasonable excuse.

Clause 85 sets out the proceedings for any offence under the Act.

Clause 86 sets out various evidentiary requirements.

Clause 87 enables the Legal Aid Board to approve forms under the Act.

Clause 88 sets out the regulation making power.

PART 7—TRANSITIONAL PROVISIONS AND REPEAL

Division 1—Transitional provisions

Clause 89 states that the former entity (Legal Aid Commission of Queensland) is abolished and its members go out of office.

Clause 90 enables the Governor in Council to establish a transitional board to deal with certain matters.

Clause 91 provides that the consultative committees, Legal Aid Committees and Review Committees established under the former Act are abolished and the members go out of office.

Clause 92 provides that the existing decisions and directions of, and delegations by, the former entity's director are taken to continue as decisions or directions of, or delegations by, the Chief executive Officer.

Clause 93 preserves any current requests by persons who have sought to have the decisions in respect of their applications for legal aid funding reconsidered or reviewed by a review committee or legal aid committee and that the Legal Aid Board may reconsider or review the decision of the previous entity as if the former Act had not been repealed and the Legal Aid Board had such power to reconsider and review.

Clause 94 deals with the assets of the former entity and how they are to be dealt with under the Act. This clause also states that the legal aid fund established under the former Act is an asset and deals with any reserve remaining in that fund.

Clause 95 provides that the former entity's rights and liabilities vest in Legal Aid Queensland.

Clause 96 enables the making of regulations to re-vest (transfer back) any asset, right or liability to a stated entity. This clause has a sunset provision of one year after commencement of the Act.

Clause 97 deals with proceedings by or against the former entity that have not ended.

Clause 98 deals with existing arrangements or contracts with the former entity.

Clause 99 deals with the position of the former entity's director.

Clause 100 provides that the existing employees and Assistant Directors of the former entity become employees of Legal Aid Queensland and that they are entitled to all existing and accruing rights of employment.

Clause 101 provides that any reference in a document or an Act to the *Legal Aid Act 1978* is a reference to the new Act.

Clauses 102 and *103* provides that a reference to the former entity and former director is a reference to Legal Aid Queensland and the chief executive officer respectively.

Division 2 — Repeal

Clause 104 provides for the repeal of the *Legal Aid Act 1978*.

SCHEDULE

MINOR AMENDMENTS

The Schedule to the Act provides for the dictionary which sets out definitions of particular words used in the Act.