

LEGAL AID COMMISSION BILL.

NOTES ON CLAUSES.

Clause 1 is a clause in the usual form, containing provisions relating to the short title, commencement and division of the Bill into Parts.

PART I.—PRELIMINARY.

Clause 2 is a general interpretation provision. While the various expressions defined in the clause do not require explanation, it is appropriate to draw attention to the distinction between “legal aid” and “legal assistance”. Legal aid covers the whole range of information, advice and services that are within the functions of the Legal Aid Commission. Legal assistance, on the other hand, has a more limited meaning—it does not include “duty lawyer services” and “legal advice” as defined, and in practical terms will usually mean legal services provided in relation to civil or criminal litigation and matters arising therefrom.

PART II.—LEGAL AID COMMISSION.

Clause 3 provides for the establishment of the Legal Aid Commission. It contains provisions in common form for incorporation of the Commission and judicial notice of its common seal.

Clause 4 deals with the appointment of the nine members of the Commission. The combined effect of *sub-clauses* (1), (2) and (3) is as follows:—

- (a) The chairman is to be a practitioner of not less than seven years' standing ;
- (b) Three members are to be nominated by the Attorney-General—one of these members is to be a person engaged or experienced in the provision of voluntary legal aid services in Victoria ; another is to be a lay person nominated by the Attorney-General to represent the interests of assisted persons ;
- (c) Two members are to be nominated by bodies representing practitioners—one each by the Law Institute of Victoria and the Victorian Bar Council ;
- (d) One member is to be nominated by the Commonwealth Attorney-General ;
- (e) One member is to be selected by the Minister of Social Welfare from a panel of names to be submitted by the Victorian Council of Social Service ;
- (f) The Director of Legal Aid is to be an *ex officio* member, and the other members are to be appointed by the Governor in Council.

Sub-clause (4) provides for the Attorney-General to nominate a practitioner if the Law Institute of Victoria or Victorian Bar Council fails to make a nomination, and for the Minister of Social Welfare to nominate such person as he thinks fit, if the Victorian Council of Social Service fails to submit a panel of names.

Sub-clause (5) enables the Governor in Council to appoint deputies to act in the absence of the member nominated by the Commonwealth Attorney-General.

Clause 5 deals with the terms of office of members of the Commission, and related matters.

Sub-clause (1) fixes 5 years as the maximum term of the chairman, and 3 years as the maximum in relation to other members.

Sub-clause (2) enables a member to resign in writing delivered to the Attorney-General.

Sub-clause (3) provides for the removal of a member from office by the Governor in Council on certain specified grounds.

Sub-clause (4) provides that the office of a member shall become vacant upon bankruptcy or similar occurrences or, in relation to members nominated by the Law Institute of Victoria or the Victorian Bar Council, upon the member ceasing to hold a practising certificate or having his name removed from the roll of counsel.

Clause 6 enables the Governor in Council to fix remuneration and allowances for members of the Commission.

Clause 7 provides for the appointment by the Governor in Council of an acting Chairman of the Commission for a period not exceeding twelve months, where the office of Chairman is vacant or while the Chairman is absent or unable to perform his duties.

The clause makes provision for the terms and conditions of office of an acting chairman, termination of his appointment by the Governor in Council or by resignation, and for the fixing of fees and allowances.

Clause 8 deals with meetings of the Commission. The substance of the sub-clauses is as follows :—

Sub-clause (1) : The Commission is to hold such meetings as are necessary to enable it to discharge its functions—the Attorney-General may require the Chairman to convene a meeting.

Sub-clause (2) : The Chairman is to preside at meetings and in his absence the members present are to appoint one of their number to preside.

Sub-clause (3) : Five members are required for a quorum.

Sub-clause (4) : Questions at meetings are to be decided by majority vote.

Sub-clause (5) : The member presiding is to have a deliberative and a casting vote.

Sub-clause (6) : Accurate minutes of meetings are to be kept.

Sub-clause (7) : The Commissioner may, subject to the Act, regulate its proceedings.

Sub-clause (8) : Subject to there being a quorum, members may act despite any vacancy in the office of member.

Sub-clauses (9) and (10) : A member having a direct or indirect pecuniary interest in a matter being, or about to be, considered by the Commission is required to disclose the nature of his interest at a meeting as soon as possible after the facts come to his knowledge. The disclosure is to be recorded in the minutes of the meeting, and the member is not to be present during any deliberation upon the matter after the disclosure.

Clause 9 describes the functions of the Commission—these are to provide legal aid in accordance with the Act, and to control and administer the Legal Aid Fund (referred to in clause 41). The clause also enables the Commission to provide legal aid either through its staff or by arranging for the services of private practitioners or by both such means.

Clause 10 is concerned with the manner in which the Commission is to discharge its functions. Its main provisions are summarized briefly as follows :—

Sub-clause (1) The Commission is to—

- (a) ensure that legal aid is provided most effectively, efficiently and economically ;
- (b) establish appropriate local offices and endeavour to make legal aid available throughout the State ;
- (c) subject to and in accordance with Commonwealth/State arrangements—
 - (i) determine or vary priorities in the provision of legal aid ;
 - (ii) have regard to recommendations of the Commonwealth Legal Aid Commission concerning legal aid for matters arising under Commonwealth law or within federal jurisdiction, or legal aid for persons in respect of whom the Commonwealth has a special responsibility ;
 - (iii) liaise and co-operate with the Commonwealth Commission in respect of its functions ;
- (d) determine guidelines in relation to the allocation of work between officers of the Commission and private practitioners ;
- (e) determine guidelines in relation to the provision of legal aid, having regard to funds available and recommendations of the Commonwealth Commission ;

- (f) co-operate with other legal aid commissions, bodies representing private practitioners and other bodies concerned with legal aid ;
- (g) make maximum use of services offered by private practitioners on a voluntary basis ;
- (h) inform the public of the services provided by the Commission and the conditions upon which they are provided ;
- (i) so far as practicable, encourage and permit law students to participate in the provision of legal aid on a voluntary basis under professional supervision.

Sub-clause (2) enables the Commission to—

- (a) make recommendations for law reform ;
- (b) carry out programmes to educate the public as to their rights and duties under the law ;
- (c) undertake research into all aspects of legal aid.

Sub-clause (3) enables the Commission, subject to Commonwealth/State arrangements, to provide financial assistance to voluntary legal aid bodies.

Sub-clause (4) requires the Commission, in performing its functions, to have regard to the moneys available to it.

Clause 11.

Sub-clause (1) authorizes the Commission to—

- (a) do anything necessary or convenient in connexion with the performance of its functions ;
- (b) delegate certain of its powers and functions to a member of the Commission, its officers or legal aid committees—the functions excluded are mainly those relating to the determination of priorities or guidelines in respect of legal aid ;
- (c) co-operate with social service or social welfare bodies ;
- (d) make arrangements with respect to any investigation, study or research that the Commission considers necessary or desirable for the purposes of the Act.

Sub-clause (2) provides that a delegation shall not prevent the Commission from exercising the power or carrying out the function that has been delegated.

Clause 12.

Sub-clause (1) provides for the Commission to provide the Attorney-General with an annual report, which is to be laid before both Houses of Parliament.

Sub-clause (2) enables the Commission to report to the Attorney-General whenever it considers necessary, and also requires the Commission to provide him with information in relation to matters it has dealt with.

Sub-clause (3), however, provides that information of the kind referred to in clause 43 is not to be provided without the consent of the assisted person.

PART III.—OFFICERS OF COMMISSION.

Clause 13 enables the Governor in Council to appoint a Director of Legal Aid. The main features of the provisions are—

- (a) The Director is to be a practitioner of not less than five years' standing.
- (b) He is to be appointed on the recommendation of the Commission for a period not exceeding seven years and shall be eligible for re-appointment.
- (c) The terms and conditions of appointment of the Director are to be specified in the instrument of appointment, remuneration being fixed from time to time by the Governor in Council.

(d) The Governor in Council may remove the Director for disability, neglect of duty or misconduct, or upon bankruptcy or a similar occurrence.

Clause 14 requires the Director, subject to the Commission, to administer the scheme of legal aid, and as required to provide legal assistance and to supervise the provision of such assistance by officers of the Commission.

The Director is empowered to do such things as are necessary or convenient in connexion with the performance of his functions, and to delegate any of his powers under the Act (except the power of delegation) to officers of the Commission.

Clause 15 deals with the Commission's staff.

Sub-clause (1) empowers the Commission to employ such staff as it considers necessary. The staff is not, by virtue only of employment by the Commission, subject to the *Public Service Act 1974*.

Sub-clause (2) Provides for the Public Service Board to determine the conditions of employment and approve the rates of remuneration of the Commission's staff.

Sub-clause (3) enables the Commission to make use of the services of persons employed in a Government Department, subject to consent of the Public Service Board and the Minister administering the department.

Sub-clause (4) requires the Commission, if practicable, to make reciprocal arrangements with other legal aid commissions for the transfer of staff between the commissions.

Clause 16 is concerned with the performance of professional functions by the officers of the Commission (including the Director).

Sub-clause (1) requires such officers to observe the same rules and standards of professional conduct and to be subject to the same professional duties as a private practitioner.

Sub-clause (2) provides that, for the purposes of sub-clause (1)—

(a) the Director shall be deemed to be a firm of solicitors lawfully practising in the State and retained to act on behalf of the assisted person ; and

(b) the members of the Commission's staff shall be deemed to be employed by that firm.

Sub-clause (3) requires an officer of the Commission who performs professional functions to hold a current practising certificate, but such officer is not required to pay a fee therefor.

Clause 17 provides, in effect, that the Director, or an officer of the Commission authorized by him, may sign documents as solicitor for an assisted person who is a party to legal proceedings.

PART IV.—LEGAL AID COMMITTEES.

Clause 18 empowers the Commission to establish legal aid committees.

Clause 19 deals with the constitution of legal aid committees.

Sub-clause (1) enables the Commission to appoint such number of members, not being less than 5, as it sees fit. The sub-clause also requires that at least two of the members shall be persons who are not practitioners, appointed after consultation with persons or bodies representative of the public in the locality or area with which the committee is concerned. If the number of members exceeds five, the number of lay persons shall be as nearly as practicable to two-fifths of the total number.

Sub-clause (2) provides for the period of appointment (not exceeding two years) of members of legal aid committees, eligibility for re-appointment removal and resignation from office.

Sub-clause (3) requires the Commission to appoint one of the members of a legal aid committee to be chairman.

Clause 20.

Sub-clause (1) sets out the functions of a legal aid committee, namely—

- (a) to exercise powers or carry out functions delegated to it by the Commission ;
- (b) to review decisions of officers of the Commission with respect to specified aspects of legal assistance ;
- (c) to consider complaints by assisted persons ;
- (d) to report to the Commission when so requested or when it thinks fit on legal assistance matters or other functions of the Commission.

Sub-clause (2) provides for a legal aid committee to vary or reverse its decisions.

Clause 21 provides for the payment of prescribed allowances to members of a legal aid committee.

Clause 22 makes provision for meetings of a legal aid committee. The clause is generally consistent with the provisions of clause 8 in relation to meetings of the Commission.

PART V.—PROVISION OF LEGAL ASSISTANCE.

Clause 23 deals with applications for legal assistance. Applications are to be in writing in the prescribed form, unless the assistance sought is of a class exempted from this requirement. They may be lodged at, or posted to, any Office of the Commission or the office of the clerk of a Magistrates' Court—in the latter case, the clerk is to forward applications to the Commission or as it may direct. (*Sub-clauses* (1)–(3)).

In special circumstances, the Commission may treat an application as duly made, even if it does not comply with the requirement that it be in writing in the prescribed form. (*Sub-clause* (4)).

An applicant is required to furnish any information, declarations or documents the Commission may require to enable a decision to be made whether legal assistance should be granted. (*Sub-clause* (5)).

Clause 24 sets out the circumstances in which legal assistance may be provided and the matters to be considered in making relevant decisions. The effect of the sub-clauses is as follows—

Sub-clause (1) : In essence, the tests are whether the applicant is unable to afford the full cost of obtaining the legal services from a private practitioner, and whether having regard to all relevant matters it is reasonable to provide assistance.

Sub-clause (2) : In certain specified criminal cases, the means of the applicant and the interests of justice are the only relevant matters.

Sub-clause (3) sets out criteria to be considered in deciding whether a person is unable to afford the services of a private practitioner. It is to be noted that the value of a person's interest in the house in which he resides, or the assets of a person involved only in a representative, judiciary or official capacity (for example, the Public Trustee when representing a protected person of small means), are to be disregarded for this purpose.

Sub-clause (4) sets out criteria relevant to the question whether it is reasonable to provide legal assistance. Special provision is made in relation to criminal appeals.

Sub-clause (5) precludes the provision of assistance to a person not ordinarily resident in Victoria, except under a reciprocal arrangement with another legal aid commission or where the assistance relates to court proceedings in Victoria or to a matter arising under Victorian law.

Sub-clause (6) prohibits the grant of assistance in connexion with a review under Part VI.

Sub-clause (7) defines "dwelling-house".

Clause 25 makes it clear that legal assistance may be provided even if the interests of the assisted person are adverse to the State or Commonwealth Governments or their instrumentalities or companies in which they have an interest.

Clause 26 provides that duty lawyer services and legal advice are to be free, but if legal advice is likely to be of a substantial or continuing nature the person concerned may be required to make an application to which the relevant provisions of the Act, including payment of a contribution, will apply.

Clause 27 provides that an application for legal assistance may be granted on condition of payment of a contribution and out-of-pocket expenses. The clause also deals with the manner and time of payments required, and the recovery thereof by the Commission.

Clause 28 requires that, when a decision to provide legal assistance is made, there shall also be a decision under the guidelines determined under clause 10 as to how the assistance is to be provided, the nature and extent of it and what conditions (if any) as to payment are to be imposed.

Clause 29 provides for the variation of decisions to provide legal assistance. This may take the form of terminating assistance, altering its nature or extent, or making it subject to conditions or an altered condition.

Clause 30 deals with the allocation of legal assistance work to private practitioners.

The basic proposition is that, where legal assistance is to be provided by a private practitioner, the assisted person is entitled to select the practitioner from a panel of names prepared by the Commission. If he does not wish to do so, the Commission will make the selection on his behalf—in doing so, the paramount consideration is the interests of the assisted person, but subject to that consideration work is to be allocated equitably amongst private practitioners named on panels prepared under this provision. (*Sub-clauses (1)–(3)*).

The clause also requires the Commission to prepare and maintain panels of names of private practitioners who have notified their willingness to act for assisted persons. A practitioner's name may be excluded or removed from a panel, subject to the Commission notifying him of the reasons and giving him a reasonable opportunity to show cause why the exclusion or removal should not be made. There is a right of appeal to the Supreme Court against exclusion or removal. (*Sub-clauses (4)–(7)*).

Clause 31 has the primary purpose of preserving in respect of an assisted person the relationship between counsel and solicitor and client, as well as any privilege arising therefrom. This is to apply whether a private practitioner or an officer of the Commission is acting for the assisted person. (*Sub-clauses (1) and (2)*).

However, a private practitioner may be required to disclose to the Commission, its officers or a legal aid committee, information relevant to the provision of services by way of legal assistance or the progress or disposal of a legal assistance matter. He may also provide information or an opinion to assist the Commission etc. in the performance of functions under the Act, despite the practitioner/client relationship. (*Sub-clauses (3) and (4)*).

Clause 32 deals with payments to private practitioners for performing legal services for assisted persons.

A private practitioner is not to demand, take or accept any payment other than that to which he is entitled under the Act. The fees to be paid to private practitioners are to be 80 per cent. of normal fees and, so far as practicable, are to be fixed amounts for particular services. Provision is made for a bill of costs to be taxed (i.e. by the Taxing Master).

Clause 33 provides for notice of decisions in relation to the provision of legal assistance or payment of costs by the Commission or a legal aid committee to be given to the person concerned. If he so requests, he is to be given a short statement of reasons for the decision.

PART VI.—RE-CONSIDERATION AND REVIEW OF DECISIONS : COMPLAINTS.

Clause 34 entitles a person affected by a decision as to provision of legal assistance to have the decision re-considered by the Commission, officer or legal aid committee that made the decision.

Clause 35 provides for a legal aid committee to review a decision of the Commission or one of its officers that has been reconsidered under clause 35, on the application of the person concerned. The legal aid committee may confirm, vary or reverse the decision, but its decision is final.

Clause 36 contains provisions, similar to those in clause 35, in relation to review of a matter reconsidered by a legal aid committee. The present clause provides for a review committee to confirm vary or reverse the decision of the legal aid committee.

Clause 37 requires a member of a legal aid committee or review committee to disclose any direct or indirect pecuniary interest he has in a matter being, or about to be, considered by the committee. The disclosure is to be recorded in the committee's minutes and the member is not to be present during any deliberation on the matter after the disclosure.

Clause 38 provides for the establishment of review committees, their membership, period of office and related matters.

Clause 39 requires the Commission, its officers and legal aid committees to provide review committees with relevant information.

Clause 40 deals with complaints as to the handling of a matter by or on behalf of the Commission or a private practitioner. Complaints are to be considered by a legal aid committee, which will report to the Commission. The Commission and its officers are to assist the committee to ensure full consideration of and report upon the complaint.

PART VII.—FINANCIAL.

Clause 41 establishes the Legal Aid Fund, which is to be administered by the Commission.

Sub-clauses (2) and (3) specify the moneys to be paid into the Fund and the amounts and expenses to be paid out of it. The Fund is to bear the whole cost of the legal aid scheme, including the administrative costs and expenses thereof.

Sub-clause (4) allows the Commission with the approval of the Treasurer to invest portion of the Fund not immediately required.

Clause 42 requires the Commission to keep proper accounts and to prepare a statement as at the end of each financial year. These are to be audited by the Auditor-General, and a copy of the accounts and audit report sent to the Attorney-General.

PART VIII.—MISCELLANEOUS.

Clause 43 is designed to protect the confidentiality of documents or information received in relation to an application for legal assistance.

It prohibits a member of the Commission or of a legal aid committee or review committee or an officer of the Commission, unless the consent of the Commission, from producing such document in Court, or communicating such information to any person other than the solicitor acting for the assisted person or from giving such information in evidence in Court.

It provides further that a Court shall not have power to compel the production of any such document or the giving of such information in evidence unless the Commission or the applicant for legal assistance has consented.

Clause 44 makes it an offence to knowingly make a false statement or supply false information in, or in connexion with, an application for legal assistance. A maximum penalty of \$500 or six months' imprisonment is prescribed.

Clause 45 empowers the Court convicting an assisted person under *clause 44* to order him to pay to the Commission the expenses incurred on his behalf less any moneys paid by him or recovered by the Commission towards his expenses. Provision is made for recovery in a court of competent jurisdiction of any sum ordered to be paid.

Clause 46 deals with orders for the payment of costs in favour of an assisted person.

Sub-clauses (1) and (2) have the effect that a court may make an order for costs in favour of an assisted person even though he may not have to pay costs himself, and that costs payable to an assisted person shall be payable to, and recoverable by, the Commission.

Sub-clause (3) provides that a person liable to pay costs to the Commission, and whose solicitor has been notified of the Commission's rights, shall not be discharged from his liability by reason only of making a payment to any person other than the Commission or the solicitor who acted for the assisted person.

Sub-clause (4) provides that on the taxation of costs no item shall be disallowed merely because the assisted person is not obliged to pay wholly or partly for the service or because some disbursement has not been paid prior to taxation.

Clause 47 is designed to ensure that all costs payable under *clause 46*, and all moneys paid by assisted persons, are paid to the Fund. This is the purpose of *sub-clause (1)*. However, *sub-clause (2)* provides that where in any matter the total of costs paid to the Commission and the moneys paid by the assisted person exceed the amount which, in the opinion of the Commission, would be chargeable to him as between solicitor and client if he were not an assisted person, the excess is to be paid to the assisted person.

Clause 48 deals with the situation where an assisted person institutes Court proceedings and the Court orders the assisted person to pay costs of another party. The clause does not, however, apply to a cross-proceeding i.e. where another person institutes the proceedings and the assisted person makes a counter claim in relation to matters arising in the proceedings.

In cases to which the clause applies, the assisted person or the other party may request the Commission to pay the whole or part of the costs involved. The Commission may pay such amount, if any, as it considers just and equitable, but may not do so in relation to a proceeding at first instance (i.e. proceedings not by way of appeal) unless it appears that the person making the request will suffer substantial hardship if the Commission does not pay the costs.

Clause 49 empowers the State to enter into agreements or arrangements with the Commonwealth in relation to legal aid, which will bind the Legal Aid Commission in relation to matters within its purview. These may deal with moneys to be made available by the Commonwealth, or by the State and the Commonwealth, priorities in the provision of legal aid, sharing of costs relating to the Legal Aid Commission, and the transfer of Australian Legal Aid Office staff, accommodation, furniture, records and equipment.

Clause 50 provides for the making of regulations in relation to matters dealt with in the Bill.

PART IX.—TRANSITIONAL.

The provisions of this Part are designed to enable the Commission to take over the functions of the Legal Aid Committee constituted under the *Legal Aid Act 1969* (called "the previous Committee"), the functions of the Australian Legal Aid Office in Victoria and those of the Public Solicitor.

DIVISION 1—GENERAL.

Clause 51 empowers the Governor in Council to fix a day ("the commencing day") upon which the provision of legal assistance under the Act is to commence.

Clause 52 and 53 have the effect of transferring to the Commission on the commencing day all the rights, property, duties, liabilities and obligations of the Legal Aid Committee immediately before that day. *Clause 53* deals specifically with contracts of the Committee.

Clause 54 provides for applications made under the *Legal Aid Act 1969*—that is, to the Attorney-General in criminal matters and to the Legal Aid Committee in civil and criminal matters—or to the Australian Legal Aid Office to be dealt with by the Legal Aid Commission. This applies to applications not yet determined on the commencing day, and also to approved applications in which legal assistance had not been fully provided on that day.

Clause 55 deals with cases in which on or before the commencing day a private practitioner had agreed to perform, or was performing, legal aid services under the *Legal Aid Act 1969* or in the course of operations of the Australian Legal Aid Office. These services are to be continued as legal assistance under the Bill, but the practitioner is to be entitled to payment of not less than he would have received if the services have been wholly performed under the Legal Aid Act or for the Australian Legal Aid Office.

Clause 56 makes provision for the continuation by the staff of the Commission of services being performed before the commencing day by the Public Solicitor or the staff of the Australian Legal Aid Office.

DIVISION 2—TRANSFER OF STAFF TO COMMISSION.

Clauses 57 and 58 provide for the transfer to the Commission of legal practitioners and other staff of the Legal Aid Committee who wish to become employées of the Commission.

Clause 57 provides for such staff becoming employées of the Commission and preserves their existing and accruing rights.

Clause 58 protects persons who become employées of the Commission under clause 57 by providing that their salary or wages shall not be less than the salary or wages of the positions held immediately before transfer to the Commission.

Clause 59, in effect, provides for the transfer to the Commission of persons employed in the Australian Legal Aid Office in Victoria.

Its operation is dependent upon an agreement or arrangement being made under clause 49, but subject thereto requires offers of employment to be made to Commonwealth employées, employment on specified terms of persons accepting such offers and the making by the Commission of certain payments in respect of superannuation.

Clauses 60–63 make provision in relation to officers of the Victorian public service employed in the Public Solicitor's Office.

Clause 60 requires the Commission to make offers of employment to such officers within the period and containing the particulars specified in sub-clause (3). The clause provides for the employment by the Commission of officers who accept such offers whereupon they will cease to be officers of the public service.

Clause 61 ensures the rights of a former State officer who is employed by the Commission to re-enter the public service by way of transfer or promotion within three years after the commencing day referred to in section 51. This right is based on the right conferred by the *Commonwealth Legal Aid Commission Act 1977* on Commonwealth officers who become employées of a State legal aid commission.

Clause 62 confers on a former State officer, upon termination of his employment by the Commission, entitlement on the recommendation of the Public Service Board to appointment to the public service. The clause ensures, amongst other things, that service as an employée of the Commission will be treated as service for the purposes of the long service leave provisions of the *Public Service Act 1974*.

Clause 63 is designed to enable former State officers employed by the Commission to retain their superannuation benefits.

Clause 64 provides for the repeal of the *Legal Aid Act 1969* on the commencing day, being the day on which the Commission will commence the provision of legal assistance and take over the functions of the Legal Aid Committee, the Public Solicitor and the Australian Legal Aid Office in Victoria.

The clause also amends section 21 of the *Appeal Costs Fund Act 1964*, which gives to the Appeal Costs Board a discretion to pay moneys to the solicitor of a person entitled to payment from the Appeal Costs Fund.

The amendment is designed to ensure that whenever an assisted person is entitled to payment from the Fund the money is paid to the Legal Aid Commission.