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## Legal aid in Victoria

# Cash crisis

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*Jeff Giddings*

### *The Attorney-General, Jan Wade, responds with new powers for judges to order legal aid but no fist full of dollars*

During February and March of this year, Victoria's legal aid system received substantial attention from the media. Legal aid was described as being 'in crisis' and the State Government was called on by various groups to provide additional funds to cover the shortfall. The spark for this media interest was the decision of Judge Duggan in the Melbourne County Court to grant a stay of proceedings against five of the seven defendants in the Werribee land fraud conspiracy trial until legal representation became available to them. Judge Duggan found that the five were unable to pay for legal representation themselves.<sup>1</sup> The case had been estimated as likely to cost the Legal Aid Commission of Victoria (LACV) a total of \$900 000.

Rather than responding with a fist full of dollars, the Attorney-General, Jan Wade, called on the LACV to review its guidelines for providing legal assistance and, at the end of April, introduced legislation giving judges the power to order that the LACV provide assistance in certain cases.

The LACV had, in early 1992, altered its legal assistance guidelines such that it would not finance any trial estimated to cost more than \$200 000 unless additional funds were provided by Government, either State or Commonwealth, to cover legal representation for the defendant. In December 1992, the LACV restricted assistance further by imposing a \$50 000 funding ceiling on both criminal and civil cases unless additional funds were provided. When this guideline resulted in major criminal trials being halted, Jan Wade, expressed the view that the Commission 'review its priorities for granting legal aid'.<sup>2</sup> Clearly, any move on the part of the LACV to fund such cases would be at the expense of many smaller grants of assistance in less expensive cases. At present, 40% of the LACV's funding is consumed by the 4% of grants of assistance where costs exceed \$5000.

### **Impact of the Dietrich case**

The LACV's expensive trial guidelines would not have created such turmoil had it not been for the High Court's decision in *Dietrich v R* (1992) 109 ALR 385. In the process of holding that the right to a fair trial will almost always mean that a person charged with a serious criminal offence must have legal representation at trial, there was little discussion of the role and function of legal aid in the provision of representation to indigent persons. In their joint judgment, Mason CJ and McHugh J noted that it was 'possible, perhaps probable, that the decision of a Legal Aid Commission [to refuse assistance to a defendant who was then unsuccessful in having that refusal overturned by a review committee] would be reconsidered if a trial judge ordered that the trial be adjourned or stayed pending representation being found for the accused' (at 397).

Their Honours then observed that the Commonwealth and the States had been given notice of the issues which were to be argued by the appellant, in particular the assertion that indigent accused people had a right to have counsel appointed at public expense in serious indictable trials. Despite this, only the Attorneys-General for the Commonwealth and South Australia intervened. Further, it was observed that no argument was put to the court that recognition of a right to the provision of counsel at public expense would impose an unsustainable financial burden on

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government. It should be noted that these issues were not specifically dealt with by any of the other members of the court in their judgments.

### Commission restructure

The LACV also comprehensively reviewed its structure during 1992. In January 1993, the Board of Commissioners resolved to move ahead with implementation of restructuring, which, among other changes, would overhaul the senior management structure, replacing the post of Deputy Director with two positions:

- *Director, Legal Services*, with overall responsibility for the Melbourne and regional office legal practices,
- Director, Corporate Services*, with overall responsibility for finance, administration and assignments functions.

The package of proposed changes would have a significant impact, most particularly with the demise of the Education and Information Division. The LACV has been acknowledged as a leader in the provision of community legal education services and there are major concerns that this focus will diminish. The Community Legal Education Unit and continuing legal education staff from the Division would be responsible to the Manager of the Melbourne legal practice. Research, media and law reform responsibility would be given to the proposed

Executive Services Unit, and Publications and the Community Legal Centre Funding Program are provisionally proposed to be responsible to the Director, Corporate Services.

The restructure decision was described by LACV Director, Andrew Crockett, in a LACV staff bulletin as 'probably the most important decision the Commission has made since it commenced in 1981'. When the LACV sought approval from the Attorney-General to implement these changes to the senior management structure it was advised that no alterations would be approved until after the federal election. It is now clear that there will be an external review of the LACV<sup>3</sup> although it is not yet known who will conduct the review or what its terms of reference will be.

While it is important for the LACV to seek to ensure its structure is designed so as to effectively service Victoria's legal aid system, it must be recognised that external factors will continue to have an enormous effect on the LACV. The LACV needs to spend far more time considering long-term issues such as how to prevent the continuing escalation of average costs per legally aided case as well as developing political strategies to deal with its declining ability to service legal aid needs. When faced with funding cuts the LACV should vigorously defend the legal aid system rather than moving to further restrict the legal assistance guidelines in an effort

to appear responsible managers. Initiatives such as the cost limits for stages of matters introduced in 1992 will need to be strengthened and supported by other measures.

### Declining financial position

The LACV's financial position has been deteriorating for several years. This has clearly hindered its ability to co-ordinate a comprehensive legal aid system in Victoria. As at July 1990, the LACV had an accumulated debt (fees owing for work already done for legally assisted clients) of \$3.1 million. By July 1991, this debt had increased to \$5.4 million. Clearly a significant contributing factor to this worsening position, average per case costs increased far quicker than government funding to the Commission. According to LACV annual reports between 1987-88 and 1990-91, the average cost of many legally assisted cases increased by 69% while government funding increased by only 31% over the same period.

By the end of 1991, the LACV was clearly signalling that it needed to achieve major reductions in spending. In late November 1991, it was estimated that, if applications continued to be approved at the current rate, the accumulated debt at July 1992 would be \$8.5 million. This resulted in the introduction at the start of 1992 of what the LACV itself described in its 1991-92 Annual Report as 'the most restrictive Legal Assistance Guidelines in [its] history'. The situation was worsened further by the LACV receiving \$3 million less from the then State Labor Government than was needed to cover the cost of expensive criminal cases and the ongoing operation of the Criminal Trial Delay Reduction Program.

The steps taken in response to this situation included:<sup>4</sup>

- tightening the legal assistance guidelines so as to reduce the number of grants of aid to 30 000, a drop of more than 6000 (16%) on the 1990-91 figure. The rate of rejection of applications for assistance increased dramatically to an overall rate of 29.3%. Criminal matters, which made up 62.7% of total applications and 73.5% of total approvals, had a rejection rate of 17.2% whereas the rejection rates for family and civil law applications were 42.7% and 65.7% respectively;

imposing a \$30 compulsory contribution on assisted persons. While this flat fee can be waived in cases of exceptional hardship, waivers are generally only given to people in custody;

- moves to increase the amount of self-generated revenue. This increased from \$14.5 million in 1990-91 to \$18.3 million in 1991-92. This increase was achieved, in the main, by increasing the costs recovered by assisted persons, with greater contributions being required both from people currently being assisted and those whose cases had already been finalised;

amendment of the *Legal Aid Commission Act 1978*, removing the s.32 requirement that the Commission pay private practitioners 80% of the relevant scale fee for work done for legally assisted persons (there was subsequently a 10% reduction in the fees payable in criminal matters) and also giving the Commission the ability to charge interest on contributions required from assisted persons which remain outstanding;

staff redundancies (26 staff accepted voluntary departure packages which the Commission had to fund itself) as well as leaving vacant positions unfilled for substantial periods

of time. Staff levels have fallen from their 1991 high of 450 to 372 at 30 April 1993.

The funding situation continues to deteriorate and the State Liberal Government is maintaining the line that no additional funds will be provided to ease the legal aid difficulties. Funding of \$2.3 million which had been promised to the Commission in the then Labor Government's August 1992 budget was withdrawn by the Liberals after the election. Further problems arose from recent substantial claims on the Solicitors Guarantee Fund which had, until recently, provided the major share of State Government funding of legal aid. In December 1992 the Law Institute of Victoria, which administers the Fund, set aside \$10 million to cover claims against one particular law firm. This claim exacerbates the recession's effect on the Fund's income generating capacity, most notably through falling interest rates and smaller amounts being held in solicitor's trust accounts. It is estimated that the 1993-94 contribution by the Guarantee Fund to legal aid will fall by \$6.75 million due to the claim, down to only \$500 000.

The April mini-budget has significantly worsened the LACV's financial outlook. The Department of Justice, of which the LACV is part, is being required to achieve expenditure cuts of 11% over the next two financial years. The Ministry of Police and Emergency Services has been excluded from these expenditure reductions. As with other Departments, the Government has not specified where the cuts are to be made, preferring to leave this to the Departments. It is likely that the LACV will face a shortfall in State funding for 1993-94 of between \$2 million and \$3 million.

The situation for community legal centres (CLCs) is generally unclear and decidedly bleak in the case of those Centres reliant on funds from the former Ministry of Consumer Affairs (now the Office of Fair Trading within the Department of Justice). The Tenants Union of Victoria has been advised of a 52% cut and Consumer Credit Legal Service a 36% cut to their funding from this source. Those centres reliant on LACV funds are waiting to hear what funds will be available after 30 June from the State Government.

While this information is unlikely to be available until after the August State budget, the LACV has taken the step of providing three months' interim funding to cover CLCs until the end of September. Serious concerns have been expressed regarding the LACV's move to leave the decision as to CLC funding levels in the hands of the State Government. In a letter to the Acting Secretary of the Department of Justice dated 29 March 1993, the Director of Legal Aid stated:

The Commission's role is not to determine the level of CLC funding. The State Government must decide on future funding levels and should do so in consultation with the Commonwealth. If the decision is to reduce CLC funding, then the Commission will advise on the distribution of the cuts and the likely impacts.

CLCs were not consulted by the LACV before this view was communicated to the Minister. It appears that the Commission was seeking to avoid having to apportion some of its own spending cuts to CLCs because, in the recent past, CLCs have successfully argued against cuts to their small part of the legal aid funding pie. It appears that the Department of Justice will handball the CLC funding decision back to the Commission rather than face the adverse publicity which would arise from making the decision itself.

## Judges ordering legal aid

Despite anything in the *Legal Aid Commission Act 1978*, the Legal Aid Commission of Victoria must provide legal representation in accordance with an order under sub-section (2).

[cl.27(3) *Crimes (Criminal Trials) Act*]

The *Crimes (Criminal Trials) Act* is concerned primarily with a series of procedural reforms designed to reduce the length of criminal trials. The legislation was passed by the Legislative Council on 26 May 1993 but the relevant sections have not yet been proclaimed although this is expected to occur in the near future. While some of these proposals<sup>5</sup> may create difficulties for unrepresented defendants, s.27 of the Act threatens the independence of the LACV and will have a disastrous impact on Victorian legal aid, particularly when combined with the foreshadowed funding cuts. Supreme and County Court judges will be given the power to order the LACV to provide assistance to an accused where the court is satisfied that it would otherwise be unable to ensure that the accused will receive a fair trial and the accused is unable to afford the full cost of legal representation.

The section raises fundamental questions about the LACV's ability to determine priorities for the provision of legal assistance as well as guidelines for the implementation of those priorities. The Commonwealth Government, which provides 55% of Victoria's legal aid funding has, in recent times, expressed concern at the increasing share of the legal aid dollar consumed by criminal trials. This Act will no doubt cause the Commonwealth to further reflect on the escalating refusal rate for applications and increasingly stringent guidelines for assistance in family law matters in particular.

No guidelines are provided for judges in relation to the exercise of this discretion. It should also be noted that the section enables judges to order the Commission to provide assistance 'on any conditions specified by the court'. Does this include the general terms of legal assistance which apply to all legally assisted matters? Can a court override these?

One unintended consequence of the legislation could be to encourage defendants charged with indictable offences triable summarily to elect to go to trial in the hope that the court will order representation for them. In the past, defendants facing such charges have often considered they would be better served by having the charges against them heard in the County Court but have been effectively prevented from exercising this right by the LACV guideline that limited assistance in such cases to a summary hearing unless there were exceptional circumstances.

## Conclusion

Despite denials from the likes of LACV Chairman, Peter Gandolfo,<sup>6</sup> the legal aid system is in crisis. Increases in average costs per case, lack of funds for implementation of the Criminal Trial Delay Reduction Program, declining Solicitors Guarantee Fund revenue, the impact of the *Dietrich* ruling and an increasing number of 'mega-cases' have all contributed to the current difficulties. The return to a legal aid system dealing in the main with criminal law cases will dilute the focus which legal aid should have on assisting people to positively assert their rights.

The independence of the Commission has been attacked by the *Crimes (Criminal Trials) Act*. This attack is all the more extraordinary given the strong recognition which is regularly given to the need for an independent legal system; an independent judiciary and independent legal profession. It will be a

tragic state of affairs if, when faced with a greater need for legal aid, the Government responds by reducing the total funds available to legal aid and palming the problem off to a bureaucracy stripped of its independence and unable to provide a comprehensive legal aid system across Victoria.

## References

1. *Age*, 23.2.93, p.5.
2. *Age*, 24.2.93, p.3.
3. Evans, R., 'Legal Aid at Breaking Point', *Law Institute Journal*, May 1993, p.344.
4. Legal Aid Commission of Victoria, Thirteenth Annual Report, 1991-92, p.6.
5. See s.4 (requirement that the accused file a statement of defence disclosing elements of the offence charge which are admitted and those which are not admitted at least 7 days before the trial), s.5 (broad pre-trial decision-making powers given to judges), s.19 (power for the court to order either party or their legal adviser(s) to personally pay costs if they unreasonably fail to comply with the legislation), and s.26 (amendment of the *Sentencing Act 1991* permitting the accused's lack of remorse (indicated by refusal to admit the truth of documents filed by the prosecution and subsequently failing to seriously contest the proof of those matters at the trial) to be taken into account by the court when imposing sentence).
6. Evans, R., above, p. 344.

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8. *Age*, 22.5.92, p.13.
9. Davies, S., *Big Brother Australia's Growing Web of Surveillance*, Simon and Schuster, Sydney 1992, pp.44-5.
10. Toohey, B., 'ASIO looks for greener fields', (1991) *Australian Society*, August, p.7.
11. Toohey, above, p.8 and House of Representatives, Hansard 35th Parliament, First Session Second Period, 3 June 1988, 3265, Guideline 3.3: 'ASIO may make preliminary inquiries of matters or persons for purposes reasonably believed to be relevant to security, including protection from politically motivated violence. Acts or threats of violence are not an essential prerequisite'.
12. *Hope*, 1985, pp.46, 76.
13. Pemberton, above, p.58.
14. Bowman, above, p.24.
15. *Hope*, 1985, pp.45-6.
16. *Hope*, 1985, p.70.
17. Pusey, M., *Economic Rationalism in Canberra: A Nation Building State Changes Its Mind*, Cambridge University Press, Melbourne, 1991.
18. Senior US State Department Official Richard Solomon quoted in the *Age*, 22.5.92, p.13.
19. Royal Commission on Intelligence and Security, *First to Fourth Reports*, AGPS, Canberra, 1978, (the *First Hope Report*, Robert Marsden Hope, Royal Commissioner) and *Hope*, 1985.
20. *Hope* 1985, p.53.
21. *Hope*, 1985, p.53.
22. *Hope*, 1985, p.53.

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1. Joint Standing Committee on Migration Regulations, 'Australia's Refugee and Humanitarian System', AGPS, August 1992, p.42.
2. Irving, P., 'The Detention of Asylum Seekers and Article 3 of the European Convention on Human Rights', (1988) *Immigration and Nationality Law and Practice*, October, p.70.
3. Refugee Council of Australia, 'Position Paper with respect to Asylum Seekers and the Refugee Determination Procedure', May 1992, p.1.
4. Helton, A.C., 'The Legality of Detaining Refugees in the United States', (1986) *xiv Review of Law and Social Change*, New York University, pp. 371-2.
5. The United Nations High Commissioner for Refugees, 37th Session of the Executive Committee, Excom Conclusion No. 44, 1986.
6. Letter A.C. Helton, Lawyers Committee for Human Rights to Gene McNary, Commissioner, Immigration and Naturalisation Service, 9 September 1991.
7. Memorandum, Immigration and Naturalisation Service, re Parole Project for Asylum Seekers at Ports of Entry and in INS Detention, 20 April 1992.
8. Memorandum, above, p.2.
9. Refugee Council of Australia, above.