



ACT AUDITOR-GENERAL'S OFFICE

MEDIA RELEASE

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Performance Audit Report

Grants of Legal Assistance

Today the ACT Auditor-General, Dr Maxine Cooper, presented the 'Grants of Legal Assistance' Report to the Speaker for tabling in the ACT Legislative Assembly.

The report provides an independent opinion to the Legislative Assembly on the Legal Aid Commission's management of grants of legal assistance.

Attached is Chapter 1 – Report summary and conclusions. This includes recommendations.

The report

Copies of the report are available from the ACT Auditor-General's Office website; www.audit.act.gov.au and the Office (please call 6207 0833 or go to 11 Moore Street, Canberra).

1. REPORT SUMMARY AND CONCLUSIONS

INTRODUCTION

- 1.1 This report presents the results of a performance audit that examined the ACT Legal Aid Commission's (the Commission) management of grants of legal assistance.

Grants of legal assistance

- 1.2 A report into the economic value of legal aid by PricewaterhouseCoopers (PwC) notes:

Legally enforceable rights and duties underpin a democratic society. Access to justice is essential to make these rights and duties real. Access to justice can be understood as access to legal assistance for all people, regardless of their means, background or capabilities. Australian governments, under various international conventions and treaties, have an obligation to ensure access to justice for all their citizens, as a basic human right. A key delivery mechanism of access to justice in the Australian community is the provision of legal aid services.¹

- 1.3 Grants of legal assistance facilitate access to the justice system for people who may otherwise find it difficult. A grant of legal assistance provides a person with access to a lawyer who may:

- provide legal advice;
- assist the person to reach agreement or resolve a dispute with someone;
- prepare legal documents; or
- provide representation in court.

- 1.4 While the Commission manages the grants process, legal assistance may be provided by a Commission lawyer or private practice lawyer. Monetary sums are not provided directly to a grant recipient, as grants of legal assistance are managed by the Commission on their behalf.

AUDIT OBJECTIVE

- 1.5 The objective of this audit is to provide an independent opinion to the Legislative Assembly on the efficiency, effectiveness and value for money of the Legal Aid Commission's management of grants of legal assistance.

¹ PricewaterhouseCoopers (2009) *Economic value of legal aid: analysis in relation to Commonwealth funded matters with a focus on family law*, p. i.

AUDIT CONCLUSION

1.6 The audit conclusion drawn against the audit objectives is set out below.

The Commission provides a range of services to vulnerable and disadvantaged people in the ACT in seeking to ‘maximise the ability of people to access the justice system.’ Grants of legal assistance are a key means by which the Commission achieves its stated aim of ‘ensuring that vulnerable and disadvantaged people receive the legal services they need to assert or defend their rights.’

The main risk for the Commission is its financial liquidity, and the Commission has made substantial financial losses in recent financial years. Accordingly, it is incumbent on the Commission to develop and implement administrative processes for the management of its legal aid services (including grants of legal assistance) that are efficient and cost-effective and lead to it being able to deliver its services within its budget in the longer term.

The Commission’s governance and administrative arrangements for delivering grants of legal assistance are effective overall. While its strategic and operational planning, risk management and complaints handling procedures are also appropriate there are shortcomings which, if addressed, would strengthen the Commission’s governance and administration.

The inherent risks associated with the Commission’s multiple roles and responsibilities for assessing and making decisions regarding applications for grants of legal assistance and allocating grants to either its own in-house Legal Practice or private practice lawyers are effectively managed.

The administrative processes in place to receive and allocate grants of legal assistance are effective. While some shortcomings in the administration and documentation of these processes were identified, as well as instances of non-compliance with administrative processes, these are not considered to indicate that there is an overall problem with these processes. The Commission’s administrative processes are considered to facilitate appropriate decision making regarding the eligibility of clients for grants of legal assistance, although some improvements are warranted.

The Commission has made many improvements in its management of grants of legal assistance in recent years. This includes the implementation of an eGrants system, development of a panel of legal services providers and better processes to manage the private practice lawyers it engages for grants. All these are intended to provide efficiency and consistency in the Commission’s administrative processes, documentation and record-keeping for the management of grants of legal assistance.

The processes for improving the Commission’s management of private practice lawyers have not been adopted by the Commission in managing its own in-house lawyers. For example, the Commission’s Legal Practice does not provide regular progress reports to the Client Services Division for monitoring and does not use the eGrants system to manage grants. The Commission’s overall management of grants of legal assistance could be improved if there was consistency in the management of its in-house Legal Practice and that used for private practice lawyers.

The Commission has implemented a Service Management and Report Tracking project, which has been effective in developing and measuring indicators of *service effectiveness*. However, it has not made similar progress in developing and measuring indicators of *service efficiency*. The lack of

a costing model for the delivery of its in-house Legal Practice services means that the Commission cannot accurately measure and benchmark the costs of its own service delivery for grants of legal assistance. Without this, it is impossible to undertake any benchmarking or compare the Commission's costs with private practice lawyers. Accordingly, Audit could not assess whether the Commission's own management of grants of legal assistance is being undertaken efficiently or in a manner that offers value for money. While this information would have been useful for this audit, it is also important for the Commission to have so that it can monitor its own efficiency.

KEY FINDINGS

- 1.7 The audit conclusion is supported by the following findings:

Chapter 2 (Legal Aid Commission background)

- The total number of all services provided by the Commission has generally fluctuated in the four years to 2011-12, while the total number of grants of legal assistance managed by the Commission has steadily declined. There were 2 534 grants of legal assistance provided in 2008-09, and 2 276 grants in 2011-12.
- Key drivers of demand for the Commission's services, including grants of legal assistance, are the introduction of new laws, interpretations and procedures and the current economic climate and its impact on legal needs.
- The Commission made substantial financial deficits in 2010-11 and 2011-12 of \$653 732 and \$869 637 respectively (most of which related to provisions and depreciations). The Commission has remained operational because it has been able to draw on its comparatively large cash and cash equivalents. In June 2012 the Commission had approximately \$3.7 million in cash and short term deposits. The Commission has identified its financial liquidity as its highest organisational risk.
- A key factor influencing the Commission's activities is the 2009 Council of Australian Governments (COAG) *National Partnership Agreement on Legal Assistance Services*. This agreement has introduced a range of new indicators for legal aid commissions, including those for measuring the quality of legal services.
- The *National Partnership Agreement on Legal Assistance Services* envisages a 25 percent increase in the total number of services delivered by legal aid commissions across Australia, but only a 10 percent variance from 2009-10 baseline services for grants of legal assistance. This reflects an increasing focus on preventative, early intervention services as opposed to the more costly and complex grants of legal assistance.

Chapter 3 (Governance and administrative arrangements)

- The Commission has three functional divisions: the Legal Practice, Client Services Division and Corporate Services Division. The Legal Practice is responsible for delivering the Commission's legal services, including grants of legal assistance. Client Services is responsible for receiving and assessing applications for grants of legal assistance and allocating these grants to its Legal Practice or private practice lawyers.
- There are inherent conflict of interest risks associated with the Commission's multiple roles for managing grants of legal assistance, including its responsibilities for assessing and making decisions on clients' applications for grants of legal assistance and allocating the grant to the in-house Legal Practice or private practice lawyers. However, the Commission's administrative arrangements are appropriate to mitigate the inherent risks. The Commission's administrative arrangements include a strict division of roles

and responsibilities between its Legal Practice and the Client Services Division.

- The Commission has a Conflict Policy, which provides guidance to staff for recognising and managing conflicts of interest. Audit's review of a sample of the Commission's files found that a conflict of interest check had been performed for all of the applications for grants of legal assistance.
- The Commission has developed a number of plans to guide the delivery of its services, including a four-year strategic plan and an annual operational plan. The Commission's strategic and operational planning is generally satisfactory, but there are shortcomings in that key requirements and deliverables of the *National Partnership Agreement on Legal Assistance Services* are not reflected in these plans and the goals and strategies identified in the strategic and operational plans are not linked with the Commission's annual Statement of Intent and the key performance indicators reported in the annual Statement of Performance. Furthermore, roles, responsibilities and accountabilities for specific goals and strategies are not defined in the annual operational plan.
- The Commission has a Risk Management Plan, which documents the Commission's risks, risk ratings, mitigation strategies and responsible business owners. It also documents actions and progress on the management of the risks. Both fraud and risks are monitored by the Commission's Executive, the Finance Committee, the Payment Assurance Working Group, the Commission's HR Manager and the Audit Committee on an ongoing basis.
- The Commission has a *Complaints Handling Policy and Procedure* (the Complaints Policy), which provides a satisfactory basis by which the Commission can manage complaints. The Commission maintains a Complaints Register and 54 complaints were recorded between January 2010 and June 2012. The Chief Executive Officer or Deputy Chief Executive Officer provided a response to every complaint and there was satisfactory documentation to support the actions taken by the Commission to investigate the complaint and provide a response to the complainant. A shortcoming however is that there is no evidence indicating what management actions had been taken to address or improve business practices as a result of a complaint.

Chapter 4 (Receiving and allocating applications for grants of legal assistance)

- The Commission provides a range of information, referral, legal advice and minor assistance services, which provides an opportunity to advise people of their legal rights and the principles that are considered in assessing an application for a grant of legal assistance.
- The Commission has developed *Legal Assistance Guidelines*, which state the eligibility principles for grants of legal assistance. Applications for grants of legal assistance are assessed against these principles, including those which apply to the conduct of the means test (assessing the applicant's capacity to pay for the legal service) and reasonableness test (assessing the relative merits of the applicant's legal claims).
- Audit's review of a sample of applications for grants of legal assistance found a series of exceptions and non-compliance in the information provided by applicants, which makes it difficult for the Commission to make an appropriate decision on the application. However, the exceptions and non-compliance identified in the application process do not suggest there are problems with the Commission's overall management of the application process. Shortcomings in the information provided in applications for grants of legal assistance demonstrates the inherent difficulties of the Commission's role and the need to balance adherence to administrative processes and the delivery of services

to vulnerable people.

- All applications for grants of legal assistance are subject to a means test and reasonableness test. There were shortcomings in the application and documentation of the means test and reasonableness tests in the sample of applications reviewed by Audit. In 11 out of 75 applications, there was no evidence that the means test was applied, while in three other applications it appeared the means test had only been partially applied. Furthermore, while a template had been developed to facilitate the conduct of the means test, this had been used inconsistently and, in some instances, not at all. The Commission does not document the conduct of the reasonableness test for all applications, except for those applications that fail the test. This needs to be addressed.
- A person, who receives legal assistance, unless exempted, is required to pay a contribution of \$90. In the sample of grants examined by Audit, it was found that 25 percent of applicants who had been required to pay the client contribution did not make this payment. The vast majority of contributions that were not recovered related to grants managed by the in-house Legal Practice. While the amount of client contribution to be recovered needs to be balanced against the administrative costs associated with Commission staff seeking its recovery, Audit considers that options for improving the recovery of client contributions need to be explored.
- The Commission processes applications for grants of legal assistance in a timely manner. Eighty percent of all applications were processed within five days and ten percent were processed in five to ten days. The balance of applications was processed in ten or more days, often due to the need to seek more information from the applicant or clarify information that has been received.
- Over half of the grants of legal assistance are allocated to private practice lawyers. In 2011-12, 1 213 grants of legal assistance were assigned to private practice lawyers and 1 063 were assigned to the Commission's in-house Legal Practice. The Commission has developed *Work Allocation Guidelines*, which are part of its *Legal Assistance Guidelines*, to guide the administrative decision making process for the allocation of grants to either its in-house Legal Practice or private practice lawyers. However, where there was no conflict of interest or an applicant had not expressed a preference for a particular lawyer there was a lack of documentation to explain the rationale for the selection of a lawyer. While there was no evidence that the assignation of a lawyer was inappropriate or not in compliance with the *Legal Assistance Guidelines*, there was insufficient evidence to support the decision that had been made and to provide evidence that the *Work Allocation Guidelines* had been applied.

Chapter 5 (Managing and monitoring grants of legal assistance)

- Two key means by which effective legal aid services are facilitated are the *Legal Profession Act 2006* and Professional Conduct Rules published by the Law Society of the ACT. These establish the professional duties and responsibilities of all lawyers in the ACT and apply to both in-house Commission staff and private practice lawyers.
- The Commission has developed and promulgated *Practice Standards* for the provision of services under grants of legal assistance. The *Practice Standards* 'set out strategies to ensure the effective, efficient and economic delivery of quality legal services and apply to both private practice lawyers and in-house Legal Aid ACT lawyers.'
- Client Services has a role in managing and monitoring grants of legal assistance being provided by private practice lawyers. However, it does not have a role in managing and

monitoring grants of legal assistance that are assigned to the in-house Legal Practice, which is the responsibility of each Head of Practice (e.g. Family Law or Criminal Law).

- As part of the Commission's 2008-12 Strategic Plan, the Commission has been implementing a *New Directions Program*. This involves a series of projects which are intended to improve business practices associated with the Commission's management of grants of legal assistance. These include the development of the eGrants system, the SMART (Service Management and Report Tracking) project and the implementation of the General Panel of private practice lawyers for the provision of services under grants of legal assistance.
- The Commission has developed a standard *General Panel Services Agreement*, for the provision of services by private practice lawyers. This provides a strong basis for the Commission to manage private practice lawyers delivering legal services under a grant of legal assistance. The *General Panel Services Agreement* also provides for the conduct of compliance audits on private practice lawyers. To date, however, a compliance audit program has not been developed and there have only been two compliance audits conducted on private practice lawyers.
- A 'stage of matter' approach is used by the Commission to monitor a grant's progress. This is facilitated by the eGrants system, which has a 'dashboard' reporting function that allows a Commission system user to identify, at any given time, the status of a grant of legal assistance, i.e. what stage it is up to, and the total commitment and expenditure incurred on the grant. A shortcoming of the Commission's administration of grants of assistance is that its eGrants system is only used to manage those grants assigned to private practice lawyers.
- Where a grant is assigned to a private practice lawyer, a key means by which Client Services manages and monitors the provision of services is through progress reports. Progress reports should be received when a grant has reached, and completed, a particular 'stage of matter' and a final report should be received once the matter has been finalised. In the review of a sample of the Commission's files, Audit found there was considerable variability in the quality and comprehensiveness of information provided by private practice lawyers in progress reports. In-house Legal Practice lawyers are not required to provide progress reports or final reports to Client Services. Audit considers that this impairs the ability of the Commission to overall manage its grants and allocate resources efficiently.
- The Commission has implemented the Service Measurement and Report Tracking (SMART) project to improve the recording of service information and enhance service delivery. This project involved the development of measures of *service effectiveness* and *service efficiency*. There has been substantial progress in developing measures of *service effectiveness* and comprehensive six-monthly reviews of performance have been conducted by the Commission to assess the effectiveness of service provision.
- The development of measures of *service efficiency* was intended to be achieved through a more accurate understanding of the Commission's costs of legal services, as a basis for comparison and benchmarking. The Commission has not given priority to the development of measures of *service efficiency* and considerable work needs to be done in relation to this component of the project. At present, the Commission cannot accurately identify the comparative costs of providing grants of legal assistance through its in-house Legal Practice or benchmark these costs against private practice lawyers. This is a concern given that the Commission has made significant financial losses in recent years and it predicts that this will continue in future years.

- Dr Curran concluded in her report on the Commission; *We Can See There's a Light at the End of the Tunnel: Demonstrating and Ensuring Quality Service to Clients* (April 2012) that with respect to the quality of the provision of legal services to clients, the Commission 'scored highly and consistently on the outcome indicators'.

RECOMMENDATIONS AND RESPONSE TO THE REPORT

- 1.8 Ten recommendations are made to address the audit findings detailed in this report and assist the Commission in further improving its business practices related to grants of legal assistance.
- 1.9 In accordance with Section 18 of the *Auditor-General Act 1996*, a final draft of this report was provided to the Chief Executive of the Legal Aid Commission for consideration and comments. The Chief Executive's overall response is shown below:

The Commission welcomes the performance audit report which is supportive of business practice improvements made as part of the Commission's New Directions Program. The Commission accepts, with some qualifications, all recommendations in the report.

The performance audit report provides a useful basis for making ongoing improvements to the management of grants of legal assistance.

- 1.10 In addition, the Chief Executive provided responses to each recommendation.

Recommendation 1 (Chapter 3 - Governance and administrative arrangements)

The Commission should improve its strategic and operational planning by:

- a) recognising and incorporating key requirements and deliverables of the *National Partnership Agreement on Legal Assistance Services* in its Strategic Plan and Operational Plan;
- b) linking the goals and strategies identified in its strategic and operational plans with its annual Statement of Intent, including key performance indicators identified in the annual Statement of Intent (which are reported in the annual Statement of Performance); and
- c) clearly identifying roles, responsibilities and accountabilities for specific goals and strategies in its Operational Plan.

Legal Aid Commission's Response:

- 1 a) Agreed

The Commission's strategic plan for 2008-2012 was developed two years before the commencement in July 2010 of the *National Partnership Agreement on Legal Assistance Services* (NPA) and the goals and strategies in the plan are consistent with those in the NPA. Since the commencement of the NPA did not require a change in the Commission's strategic directions it was not considered necessary to amend the strategic plan to include reference to the NPA. The Commission will incorporate reference to the NPA in its strategic plan for 2013-2017.

1 b) Agreed

1 c) Agreed

While the Operational Plan for 2012-13 does not specify the officers responsible for achieving goals and objectives in the plan, the responsible officers are aware of their accountabilities after several years of implementing these plans and reporting twice yearly on progress against the goals and objectives for which they are responsible. The responsible officers will be specified in operational plans from 2013-2014.

Recommendation 2 (Chapter 3 - Governance and administrative arrangements)

The Commission should improve its complaints handling procedures by routinely analysing all complaints to identify potential business practice improvements.

Legal Aid Commission's response:

Agreed

On the occasions when complaints reveal business practice deficiencies appropriate corrective action is taken. Action taken to correct business practice deficiencies will in future be recorded in the Complaints Register.

Recommendation 3 (Chapter 4 - Receiving and allocating applications for grants of legal assistance)

The Commission should develop specific assessment criteria for guiding decision makers in applying the reasonableness test to applications for grants of legal assistance.

Legal Aid Commission's Response:

Agreed in principle.

The Commission will review whether it is appropriate, having regard to the provisions of the *Legal Aid Act 1977*, to develop additional assessment criteria for application of the reasonableness test.

Recommendation 4 (Chapter 4 - Receiving and allocating applications for grants of legal assistance)

The Commission should ensure that decision making processes for the means and reasonableness tests for applications for grants of legal assistance are documented. This should include:

- a) use of standard forms and templates for the conduct of the tests; and
- b) where relevant, documentation as to why either of the tests are not applied to an application for legal assistance.

Legal Aid Commission's Response:

Agreed

The Commission notes that the files checked by Audit related to applications for assistance processed prior to 30 June 2011. Steps taken since June 2011 to improve administrative processes and compliance, including the implementation of the eGrants system, mean that the sample of files selected by Audit does not reflect current practice. The Commission will be taking further steps to improve documentation of decision making relating to means and reasonableness testing.

Recommendation 5 (Chapter 4 - Receiving and allocating applications for grants of legal assistance)

The Commission should investigate options to enhance the recovery of client contributions.

Legal Aid Commission's Response:

Agreed

As noted in paragraph 4.58 of the report the Commission implemented a revised *Contributions Assessment & Recovery Policy & Procedure* in April 2012. The new policy will enhance the recovery of contributions by ensuring that contributions are levied and recovered when it is equitable and cost-effective to do so.

Recommendation 6 (Chapter 4 - Receiving and allocating applications for grants of legal assistance)

The Commission should ensure that there is appropriate documentation of all reconsideration and review processes undertaken for applications for grants of legal assistance.

Legal Aid Commission's Response:

Agreed.

The Commission will take steps, consistent with the independence of review committees and their power under the *Legal Aid Act 1977* to regulate the conduct of proceedings at meetings as they think fit, to improve the minuting of review committee meetings and the documentation of reasons for decision.

Recommendation 7 (Chapter 4 - Receiving and allocating applications for grants of legal assistance)

The Commission should ensure that all decisions regarding the assignment of a grant of legal assistance to either its in-house Legal Practice or private practice lawyers are documented.

Legal Aid Commission's Response:

Agreed

The Commission will improve documentation of the application of the Allocation of Work Guidelines.

Recommendation 8 (Chapter 5 - Managing and monitoring grants of legal assistance)

The Commission should develop and implement a risk-based compliance audit program for the delivery of legal services by private practice lawyers under grants of legal assistance.

Legal Aid Commission's Response:

Agreed

As noted in paragraph 5.26 of the report the Commission has commenced risk based compliance audits of private practice lawyers' files and is currently reviewing the audit methodology to ensure that it addresses areas of greatest risk. The Commission will conduct regular risk-based compliance audits of both private practice lawyer and in-house Legal Practice files.

Recommendation 9 (Chapter 5 - Managing and monitoring grants of legal assistance)

The Commission should ensure that all grants of legal assistance, irrespective of whether they are assigned to the in-house Legal Practice or private practice lawyers are:

- a) managed using the eGrants system; and
- b) subject to regular progress reports to Client Services.

Legal Aid Commission's Response:

9 a) Agreed

It has been the Commission's intention to manage all grants through the eGrants system. Development of a portal to give the in-house Legal Practice access to eGrants is currently underway.

9 b) Agreed

However, it is important to balance the requirement for progress reports with the need to minimise the administrative overhead cost of handling legally assisted cases. In most cases the need for progress reports is satisfied through the provision of information supporting requests for extensions of assistance, or reports on case outcomes. Reporting letters sent by the in-house Legal Practice to clients at the conclusion of cases satisfy the requirement for a report on case outcomes and in future copies of this letter will be kept on the Client Services file as well as the Legal Practice file.

Recommendation 10 (Chapter 5 - Managing and monitoring grants of legal assistance)

The Commission should:

- a) develop a costing model for its Legal Practice services (e.g. hourly charge-out rates) which should facilitate an accurate assessment of the cost of providing legal services by the Commission; and
- b) use this as a basis for developing measures of service efficiency, which can then be used as a basis for benchmarking and cost comparison.

Legal Aid Commission's Response:

10 a) Agreed

As noted in paragraphs 5.6 and 5.12 of the report the development of a system to measure service costs was part of the New Directions Program under the Commission's Strategic Plan for 2008-2012. The limited resources available to the Commission to undertake major systems improvement projects has resulted in priority being given to projects that offered the greatest potential for efficiency gains (eGrants) or to improve service quality and outcomes (PANELS and the Curran research). Having completed these projects the Commission has allocated funding in its 2012-13 and 2013-14 budgets to the development

of the Legal Aid Management Information System (LAMIS) which will incorporate systems for measuring service costs.

10 b) Agreed

The Commission acknowledges the need to establish service efficiency measures for internal management and benchmarking purposes, but sounds a note of caution in regard to cost comparisons. Comparing the cost of services provided by private practice lawyers and lawyers employed by legal aid commissions (salaried lawyers) has been the subject of a number of inquiries and reports over the past 30 years.

An acceptable model for accurately calculating and comparing the cost of legal assistance services delivered by salaried lawyers and private practice lawyers has not been developed, and given the complexity of the exercise the cost of administering such a model could outweigh the potential benefits. This is partly because cost is not the only factor to be taken into account when deciding whether a case should be handled by a salaried lawyer or a private practice lawyer.

While comparative cost might be an important determinant of whether a particular type of legal assistance service should be predominantly provided by private practice or salaried lawyers, comparative service quality and effectiveness are also important factors.

Furthermore, salaried legal assistance services provide important tangible benefits to the community which cannot be measured in purely cost terms. These include:

- addressing through innovation the needs of vulnerable and disadvantaged people;
- providing competitive stimulus, benchmarking and other information which assists the containment of costs and improves service quality;
- providing specialist services to children and others with special needs;
- providing advice in relation to the development of legal assistance policy and legal assistance programs;
- providing independent and informed input to law reform; and
- increasing the availability and accessibility of legal services to vulnerable and disadvantaged people.

A further non-cost consideration that must be factored into work allocation decisions is that in order to properly carry out its statutory functions the Commission's Legal Practice needs to maintain a caseload of sufficient volume and diversity to develop and sustain the professional expertise necessary to support the provision of other legal assistance services such as legal advice, duty lawyer services, minor legal assistance, dispute resolution services and community legal education.