



New South Wales

# Legal Aid Commission Amendment Act 1996 No 94

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New South Wales

# Legal Aid Commission Amendment Act 1996 No 94

Act No 94, 1996

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An Act to amend the *Legal Aid Commission Act 1979* with respect to confidentiality and accountability, alternative dispute resolution, review of decisions to refuse or terminate legal aid, revenue protection and cost recovery; and for other purposes. [Assented to 26 November 1996]

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**The Legislature of New South Wales enacts:**

**1 Name of Act**

This Act is the *Legal Aid Commission Amendment Act 1996*.

**2 Commencement**

This Act commences on a day or days to be appointed by proclamation.

**3 Amendment of Legal Aid Commission Act 1979 No 78**

The *Legal Aid Commission Act 1979* is amended as set out in Schedules 1–6.

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## **Schedule 1 Amendments relating to confidentiality and accountability**

(Section 3)

### **[1] Section 25 Solicitor-client relationship**

Insert after section 25 (1):

- (1A) The relationship that arises as referred to in subsection (1) between a solicitor and a person who is an applicant for legal aid or who is a person to whom legal aid is granted arises only in the context of functions performed by the solicitor in the course of acting for the person as solicitor. That relationship does not arise therefore in the course of the exercise of functions under this Act in arranging for a private legal practitioner to act as solicitor for the person.

### **[2] Section 25 (4) (f)**

Omit “or” where secondly occurring.

### **[3] Section 25 (4) (h)–(l)**

Insert after section 25 (4) (g):

- (h) the divulging of information to a person concerning an application for legal aid made by or on behalf of the person (including such matters as the basis for the refusal of any such application),
- (i) the divulging of information to a person to whom legal aid has been granted concerning the administration of the grant of legal aid,
- (j) the divulging of information for the purpose of facilitating the conduct of alternative dispute resolution under Part 3A,
- (k) the divulging of information obtained from a person, with the consent of that person, or

- (l) the divulging, with the consent of the Commission, to any court or tribunal of information or a document concerning any of the following matters:
  - (i) whether or not an application for legal aid has been made by a particular person,
  - (ii) whether such an application was granted or refused,
  - (iii) the grounds on which such an application was granted or refused (including information as to the means of the applicant),
  - (iv) whether a person has appealed against the refusal of such an application.

**[4] Section 25 (5) and (6)**

Insert after section 25 (4):

- (5) The Commission, a committee established under this Act, the Managing Director or a member of staff of the Commission is not required to divulge to any person, court or tribunal the identity of a person from whom the Commission, the committee, the Managing Director or the member of staff receives information concerning:
  - (a) a breach or alleged breach of a condition on which legal aid has been granted or provided, or
  - (b) a breach or alleged breach of a requirement of this Act or the regulations (for example, a failure to notify the Commission of a change in the means or circumstances of a legally assisted person as required under section 38A (1)), or
  - (c) the commission or alleged commission of an offence in connection with the administration of legal aid.
- (6) For the purposes of this section:
  - (a) an applicant for legal aid includes a person who requests legal advice but no other form of legal aid, and

- (b) a person to whom legal aid is granted includes a person to whom that advice is given, and
- (c) an application for legal aid includes a request for that advice.

**[5] Section 26**

Omit the section. Insert instead:

**26 Divulging of certain information prohibited**

- (1) A person engaged in the administration of this Act must not divulge any information or document (including an application for legal aid) obtained in connection with the administration of legal aid.

Maximum penalty: 50 penalty units or imprisonment for 6 months.

- (2) This section does not prevent the divulging of information or a document if the information or document is divulged:
  - (a) in connection with the administration of legal aid, or
  - (b) as referred to in section 25 (4).
- (3) This section does not limit the operation of section 25. Consequently, a commissioner, a member of a committee established under this Act, the Managing Director or a member of staff of the Commission cannot be required to divulge any information or document merely because the divulging of the information or document is not prohibited by this section.
- (4) For the purposes of this section, an application for legal aid includes a request for legal advice but no other form of legal aid.

## **Schedule 2 Amendment relating to alternative dispute resolution**

(Section 3)

### **Part 3A (sections 60A–60G)**

Insert after Part 3:

### **Part 3A Alternative dispute resolution**

#### **60A Purpose of Part**

- (1) The purpose of this Part is to enable the Commission to arrange for matters to be dealt with by alternative dispute resolution.
- (2) This Part does not prevent the parties to proceedings or proposed proceedings from agreeing to and arranging for alternative dispute resolution of any matter otherwise than in accordance with this Part.

#### **60B Definitions**

In this Part:

*alternative dispute resolution* includes conferencing.

*conferencing* means a structured negotiation process that takes place in course of a program approved by the Commission and in which the convenor assists the parties to a dispute to settle the dispute.

*conferencing session* means a meeting at which conferencing takes place and, in sections 60D and 60E, includes any steps taken in the course of making arrangements for the session or in the course of the follow-up of a session.

*convenor* of a conferencing session means the person to whom a matter has been referred for conferencing under this Part.

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**60C Powers of Commission in respect of alternative dispute resolution**

- (1) The Commission may arrange for a matter, or any aspect of a matter, to be dealt with by alternative dispute resolution if the Commission considers it appropriate to do so. The Commission may do so before or after the determination of an application for legal aid in respect of the matter.
- (2) Without limiting the powers of the Commission under section 33, the Commission may require an applicant for legal aid or a person to whom legal aid is granted to participate in such alternative dispute resolution procedures as may be specified by the Commission.
- (3) The Commission may defray expenses incidental to alternative dispute resolution from money available to the Commission or require (whether before or after the application for legal aid is determined) the applicant or person to whom legal aid is granted to meet those expenses.
- (4) An amount required to be paid under subsection (3) must be paid in such manner, and within such time, as the Commission directs.
- (5) The Commission may recover an amount payable to it under subsection (3), and any interest payable in respect of the amount, as a debt in a court of competent jurisdiction.

**60D Defamation**

- (1) The same privilege with respect to defamation as exists with respect to judicial proceedings and a document produced in judicial proceedings exists with respect to:
  - (a) a conferencing session, or
  - (b) a document or other material sent to or produced to the convenor of a conferencing session, or sent to the Commission, for the purpose of enabling a session to be arranged, or



- (c) a document or other material prepared by the convenor of a conferencing session in the course of, or as a result of, the session.
- (2) The privilege conferred by subsection (1) extends only to a publication made:
  - (a) at a conferencing session, or
  - (b) as provided by subsection (1) (b) or (c), or
  - (c) as provided in section 60F.

#### **60E Admissibility of evidence**

- (1) Evidence of anything said or of any admission made in a conferencing session is not admissible in any proceedings before any court, tribunal or body.
- (2) A document prepared for the purposes of, or in the course of, or as a result of, a conferencing session, or any copy of such a document, is not admissible in evidence in any proceedings before any court, tribunal or body.
- (3) Subsections (1) and (2) do not apply with respect to any evidence or document:
  - (a) if the persons in attendance at, or identified during, the conferencing session and, in the case of a document, all persons identified in the document, consent to the admission of the evidence or document, or
  - (b) in proceedings instituted with respect to any act or omission in connection with which a disclosure has been made under section 60F (c).

#### **60F Secrecy**

The convenor of a conferencing session may disclose information obtained in connection with a conferencing session in any one or more of the following circumstances only:

- (a) with the consent of the person from whom the information was obtained,

- (b) to the Commission, a committee established under this Act, the Managing Director or a member of staff of the Commission in connection with the administration of legal aid,
- (c) if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to a person or damage to property,
- (d) if the disclosure is reasonably required for the purpose of referring any party or parties to a conferencing session to any person, agency, organisation or other body and the disclosure is made with the consent of the parties to the conferencing session for the purpose of aiding in the resolution of a dispute between those parties or assisting the parties in any other manner,
- (e) in accordance with a requirement imposed by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth.

### **60G Immunity for convenors of conferencing sessions**

No matter or thing done or omitted to be done by the convenor of a conferencing session subjects the convenor to any action, liability, claim or demand if the matter or thing was done or omitted in good faith for the purposes of a conferencing session under this Part.

### **Schedule 3 Amendments relating to review of decisions to refuse or terminate legal aid**

(Section 3)

**[1] Section 34 Determination of application**

Insert “The Commission may at any time redetermine an application that has been refused.” at the end of section 34 (1).

**[2] Section 34 (2), (4) and (5)**

Insert “or redetermination” after “determination” wherever occurring.

**[3] Section 38 Variation of grant of legal aid**

Omit “The determination of an application granting” from section 38 (1).

Insert instead “The grant of”.

**[4] Section 38 (1AA)**

Insert after section 38 (1):

(1AA) The Commission may at any time redetermine the variation of a grant that terminates the provision of legal aid.

**[5] Section 38 (1A)–(5)**

Omit “determination” wherever occurring. Insert instead “grant”.

**[6] Section 56 Appeals**

Insert “or redetermination” after “determination” wherever occurring in section 56 (1) (a) and (1A).

**[7] Section 56 (1) (b)**

Omit “determination under section 38 (1); or”.

Insert instead “grant of legal aid under section 38 (1),”.

**[8] Section 56 (1) (b1)**

Insert after section 56 (1) (b):

- (b1) the redetermination of a variation of a grant of legal aid, by such a person or committee, under section 38 (1AA), or

**[9] Section 56 (1B) and (1C)**

Insert after section 56 (1A):

- (1B) An appeal against the refusal of an application for legal aid lapses if, after the appeal is lodged, the Commission grants the application on a redetermination of the matter under section 34.
- (1C) An appeal against the variation of a grant of legal aid that terminates the provision of legal aid lapses if, after the appeal is lodged, the Commission provides legal aid on a redetermination of the matter under section 38.

**[10] Section 56 (2) (a)**

Omit “, variation”.

Insert instead “or redetermination of the application, variation or redetermination of the variation,”.

## **Schedule 4 Amendments relating to revenue protection and cost recovery**

(Section 3)

### **[ 1 ] Section 33 Powers of Commission in respect of application**

Insert “and” at the end of section 33 (d).

### **[2] Section 33 (e)**

Omit “and”.

### **[3] Section 33 (f)**

Omit the paragraph.

### **[4] Section 33 (2)–(4)**

Insert at the end of section 33:

- (2) The Commission may defray expenses incidental to any of the matters referred to in subsection (1) from money available to the Commission or require the applicant to meet those expenses. A requirement that the applicant meet those expenses may be imposed at any time after receipt of the application but not later than the making of a determination in respect of the person under section 46.
- (3) An amount required to be paid under subsection (2) must be paid in such manner, and within such time, as the Commission directs.
- (4) The Commission may recover an amount payable to it under subsection (2), and any interest payable in respect of the amount, as a debt in a court of competent jurisdiction.

### **[5] Section 36 Monetary contribution by applicant**

Insert “may do either or both of the following” after “Commission” where firstly occurring in section 36 (1).

**[6] Section 36 (1) (a)**

Omit “may require”.

Insert instead “impose a condition that requires”.

**[7] Section 36 (1) (a)**

Omit “and” where secondly occurring.

**[8] Section 36 (1) (b)**

Omit “may”.

**[9] Section 38 Variation of grant of legal aid**

Insert “(including a condition of the kind referred to in section 36 (1) (a))” after “additional condition” in section 38 (1) (c).

**[10] Section 38 (1) (d)**

Insert “(including a condition of the kind referred to in section 36 (1) (a))” after “condition”.

**[11] Section 38 (6)**

Insert after section 38 (5):

- (6) If a grant is varied under subsection (1) (c) or (d) so as to impose or vary a condition of the kind referred to in section 36 (1) (a), the amount required to be paid must be paid in such manner, and within such time, as the Commission directs. The Commission may recover the amount, and any interest payable in respect of the amount, as a debt in a court of competent jurisdiction.

**[12] Section 40 Assessment of costs**

Omit section 40 (1). Insert instead:

- (1) To assist in the determination of costs of which the Commission has agreed to pay a proportion to a private legal practitioner to whom work has been assigned by the Commission, the Commission has the same rights to require the private legal practitioner to have a bill of costs assessed or taxed in relation to that work as it would have if the Commission (and not the legally assisted person on whose behalf the work was done) were the client of the private legal practitioner.
- (1A) In addition, a person who is required to pay an amount under section 46 (1) has the same rights to require the private legal practitioner who provided legal services to the person as a legally assisted person to have a bill of costs assessed or taxed in relation to the work done by the practitioner on behalf of that person as the person would have if the person were not a legally assisted person.

**[13] Section 40 (2)**

Insert “or taxation” after “assessment”.

**[14] Section 43**

Omit the section. Insert instead:

**43 Payment of costs in cases of fraud and improper behaviour**

- (1) A court or tribunal may, on the application of the Commission, order a person who is or was a legally assisted person to pay to the Commission any money paid or payable by the Commission as the costs and expenses of the legal services provided to the person as a legally assisted person (including the fees of the legal practitioner who acted for the person, party and party costs and expenses under section 33) if the court or tribunal is satisfied that:

- (a) the legal aid was obtained by fraud or misrepresentation, or
  - (b) the legally assisted person has acted improperly in bringing, defending or conducting any proceedings with which the legal aid is concerned.
- (2) Such an application can be made to the court or tribunal that is hearing or has heard any proceedings with which the legal aid is concerned or to any other court of competent jurisdiction either during or after the conclusion of the proceedings. However, an application can only be made to a court or tribunal that can make an order as to costs.
- (3) When an order is made under this section, the costs are to be assessed as if the person ordered to pay them were not a legally assisted person.

**[ 1 5 ] Section 43A Payment of costs to private legal practitioners**

Insert after section 43A (1):

- (1A) A reference in subsection (1) (b) to an official investigation includes a reference to an investigation conducted by or under the authority of the Commission, but only if the Commission has given written notice to the legal practitioner concerned that the investigation is to be or is being conducted.

**[ 1 6 ] Section 43A (2A)**

Insert after section 43A (2):

- (2A) The power of the Commission to defer or refuse to make a payment to a private legal practitioner under this section applies only to the payment of fees in connection with the proceedings in respect of which legal aid has been granted and to which subsection (1) relates.



**[17] Section 43B**

Insert after section 43A:

**43B Payment of money by certain private legal practitioners**

- (1) This section applies to a private legal practitioner against whom an allegation referred to in section 43A (1) (b) (i) or (ii) is substantiated in any criminal or disciplinary proceedings.
- (2) A court or tribunal may, on the application of the Commission, order a private legal practitioner to repay to the Commission the whole, or part, of any money paid by the Commission to the practitioner in connection with proceedings for which legal aid has been granted and to which the allegation relates.
- (3) Such an application can be made to the court or tribunal that is hearing or has heard any proceedings with which the legal aid is concerned or to any other court of competent jurisdiction either during or after the conclusion of the proceedings. However, an application can only be made to a court or tribunal that can make an order as to costs.

**[18] Section 44 Direction as to payment of certain money to the Commission**

Omit section 44 (2). Insert instead:

- (2) An amount required to be paid under subsection (1) must be paid in such manner, and within such time, as the Commission directs.

**[19] Section 44 (5)**

Insert after section 44 (4):

- (5) The Commission may recover an amount payable to it under subsection (1), and any interest payable in respect of the amount, as a debt in a court of competent jurisdiction.

**[20] Section 45 Recovery of money**

Insert after section 45 (2):

- (3) The Commission must account to the legally assisted person in respect of money recovered by it under this section.

**[21] Section 46 Liability of legally assisted person to pay costs and expenses**

Omit section 46 (1). Insert instead:

- (1) When legal services have been provided to a legally assisted person, the Commission is to determine the amount, if any, payable to the Commission by the person in respect of the costs and expenses of those legal services (including expenses under section 33). More than one such determination can be made in respect of the person and can be made at or after the conclusion of the matter for which legal services were provided or, if legal aid is terminated during the course of the matter, at or after the termination. A determination can be varied by a later determination.

**[22] Section 49 Payment of costs awarded against legally assisted persons**

Insert after section 47 (4) (b):

- (b1) an action in which the legally assisted person is successful after having been unsuccessful in interlocutory proceedings related to the action,

**[23] Section 47 (4) (c)**

Omit "or".

**[24] Section 49 (4) (e)**

Insert after section 47 (4) (d):

or

- (e) an action brought under the *Child Support (Assessment) Act 1989* of the Commonwealth,

**[25] Section 48**

Omit the section. Insert instead:

**48 Commission has lien on certain documents**

- (1) To secure the payment of costs in respect of work done by the Managing Director or a member of staff of the Commission, and expenses incurred by the Commission, on behalf of a legally assisted person, the Commission has a lien on any document held by it in connection with proceedings conducted on behalf of the person by the Managing Director or member of staff.
- (2) The law relating to the waiver of a solicitor's lien applies to the Commission's lien in the same manner as it would apply if the person in respect of whom the Commission's lien is exercised were not a legally assisted person.

**[26] Section 71A Interest**

Renumber section 71A (1) (a) as section 71A (1) (a1).  
Insert before section 71A (1) (a1) as renumbered:

- (a) an amount or part of an amount payable by a person under section 33 (2) that is not paid by such date as may be specified in a direction under section 33 (3), or

**[27] Section 71A (1) (b) and (b1)**

Renumber section 71A (1) (b) as section 71A (1) (b2).  
Insert before section 71A (1) (b2) as renumbered:

- (b) an amount or part of an amount payable by a person under section 38 (1) (c) or (d) that is not paid by such date as may be specified in a direction under section 38 (6), or
- (b1) an amount or part of an amount payable by a person under section 44 (1) that is not paid by such date as may be specified in a direction under section 44 (2), or

**[28] Section 71A (1) (d)**

Insert after section 71A (1) (c):

, or

- (d) an amount or part of an amount payable by a person under section 60C (3) that is not paid by such date as may be specified in a direction under section 60C (4).

## **Schedule 5 Amendments relating to miscellaneous matters**

(Section 3)

### **5.1 Amendment relating to provision of legal advice**

#### **Section 11A**

Insert after section 11:

#### **11A Provision of legal advice only**

To remove any doubt, it is declared that the giving of legal advice to a person constitutes the giving of legal aid if the person is given legal advice and no other form of legal aid. However, Part 3 does not apply to the giving of that advice.

### **5.2 Amendments relating to solicitor on the record if application for legal aid not yet determined**

#### **[1] Section 28 Solicitor on the record**

Insert “an applicant for legal aid or” after “who is” in section 28 (1) (a).

#### **[2] Section 28 (1) (b)**

Omit the paragraph. Insert instead:

- (b) the Managing Director or a member of staff of the Commission is taking steps to conserve the interests of the applicant pending the determination of the application or is providing legal aid to the legally assisted person in relation to the proceeding,

### **5.3 Amendments relating to increases in penalties**

#### **[1] Section 32 False application**

Omit “ 1 0 penalty units”. Insert instead “50 penalty units”.

#### **[2] Section 41 Demand for or receipt of certain payments prohibited**

Omit “ 1 0 penalty units”. Insert instead “50 penalty units”.

### **5.4 Amendment relating to giving of notice to other parties that defendant is legally assisted person**

#### **Section 34 Determination of application**

Omit “applicant has commenced proceedings” from section 34 (7A).  
Insert instead “commencement of the proceedings to which the application relates”.

### **5.5 Amendment relating to lump sum payment of fees for assigned work**

#### **Section 34C**

Insert after section 34B:

#### **34C Certain arrangements do not amount to imposition of condition, or variation, of legal aid**

The determination of a lump sum fixed amount as the amount to be paid to a private legal practitioner as fees for the legal services to be provided by the legal practitioner to a legally assisted person does not of itself constitute the imposition of a condition on, or a variation of, the grant of legal aid.

**5.6 Amendment relating to guidelines for the exercise of delegations**

**Section 69 Delegation**

Insert after section 69 (9):

- (10) The Commission may issue guidelines (either generally or in a particular case) as to the exercise of functions delegated under this section.

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## **Schedule 6 Amendments relating to savings and transitional matters**

(Section 3)

### **[ 1 ] Schedule 8 Savings, transitional and other provisions**

Insert at the end of clause 1A (1):

*Legal Aid Commission Amendment Act 1996.*

### **[2] Schedule 8 Part 9**

Insert after Part 8:

#### **Part 9 Transitional provisions consequent on enactment of Legal Aid Commission Amendment Act 1996**

##### **37 Definition**

In this Part:

*amending Act* means the *Legal Aid Commission Amendment Act 1996*.

##### **38 Variation of certain grants of legal aid**

An amendment made to section 38 by Schedule 4 [9], [10] or [11] of the amending Act extends to a grant of legal aid made in respect of a person before the commencement of the amendment but only if legal aid in respect of the person has not ceased to be provided at that commencement.

##### **39 Assessment of costs**

An amendment made to section 40 by the amending Act extends to work that was assigned to a private legal practitioner before the commencement of the amendment and for which a bill of costs was not provided before that commencement.

##### **40 Payment of costs in cases of fraud and improper behaviour**

Section 43, as substituted by the amending Act, extends to costs and expenses provided to a person as a legally assisted person before the section was substituted.



**41 Official investigations into allegations against private legal practitioners**

Section 43A (1A), as inserted by the amending Act, extends to an official investigation commenced but not completed before the commencement of the subsection.

**42 Deferral or refusal of payment of certain fees to private legal practitioners**

Section 43A (2A), as inserted by the amending Act, extends to fees incurred by the Commission before the commencement of the subsection.

**43 Orders for recovery of money from certain private legal practitioners**

Section 43B, as inserted by the amending Act, extends to money paid by the Commission to a private legal practitioner before the commencement of the section.

**44 Recovery of certain money**

Section 44 (5), as inserted by the amending Act, does not apply to a direction given before the commencement of the subsection.

**45 Costs and expenses**

The amendment made to section 46 by the amending Act extends to legal services provided to a legally assisted person before the commencement of the amendment but only if a determination under section 46 (as in force immediately before that commencement) has not been made in respect of those services.

**46 Orders for payment of costs awarded against legally assisted persons**

Section 47 (4) (b1) or (e), as inserted by the amending Act, does not apply to an order for costs made before the commencement of the paragraph.

#### **47 Existing delegations**

Section 69 (10), as inserted by the amending Act, extends to a delegation made before the commencement of the subsection.

#### **48 Interest**

Section 71A (1) (b1), as inserted by the amending Act, does not apply to a direction given before the commencement of the paragraph.

[Minister's second reading speech made in—  
Legislative Council on 17 September 1996  
Legislative Assembly on 25 September 1996]