

[Act 1996 No 94]



New South Wales

Legal Aid Commission Amendment Bill 1996

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Legal Aid Commission Act 1979* so as:

- (a) to expand the circumstances in which persons engaged in the administration of the Act may disclose information obtained in connection with the administration of legal aid, and
 - (b) to increase the accountability of the Legal Aid Commission, and
 - (c) to give legislative recognition to the Commission's alternative dispute resolution initiatives, and
 - (d) to enhance revenue protection, and
 - (e) to enhance cost recovery by the Commission, and
 - (f) to provide for the internal review of decisions to refuse or terminate a grant of legal aid by enabling the Commission to redetermine those decisions, and
 - (g) to increase the maximum penalty for offences under the Act, and
 - (h) to make minor amendments of a machinery nature.
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Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides that the proposed Act will commence on a day or days to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the Schedules of amendments to the *Legal Aid Commission Act 1979*.

Schedule 1 Amendments relating to confidentiality and accountability

Schedule 1 [1] inserts proposed section 25 (1A) to make it clear that the solicitor-client relationship that arises under the section does not arise between a person and a solicitor employed by the Commission if the solicitor does not act for the person but merely arranges for a private legal practitioner to act for the person.

Schedule 1 [3] amends section 25 (4) to extend the circumstances in which certain information relating to the administration of legal aid may be disclosed. Those circumstances include the divulging of information to a person for the purpose of facilitating the conduct of alternative dispute resolution under proposed Part 3A of the Act (to be inserted by **Schedule 2**) or obtained from a person with the consent of the person. **Schedule 1 [2]** makes a consequential amendment.

The amendment also gives the Commission the discretion to divulge certain information to a court or tribunal concerning an application for legal aid (for example, whether or not an application for legal aid has been made by a particular person or whether an application was granted or refused).

Schedule 1 [4] inserts proposed section 25 (5) and (6). Proposed section 25 (5) provides that the Commission, a committee established under the Act, the Managing Director or a member of staff of the Commission cannot be required to divulge to any person or court the identity of a person from whom information has been received concerning a breach or alleged breach of a condition of a grant of legal aid or a requirement of the Act or the regulations or the commission or alleged commission of an offence in connection with the administration of legal aid.

Proposed section 25 (6) makes it clear that the solicitor-client relationship that arises under the section extends to persons to whom legal advice (but no other form of legal aid) is provided.

Schedule 1 [5] replaces section 26. The proposed section prohibits the divulging of any information or document obtained in connection with the administration of legal aid by a person engaged in the administration of the Act. A maximum penalty of 50 penalty units (currently \$5,000) or imprisonment for 6 months is imposed. It will not, however, be an offence under the proposed section to divulge any information or document if it is done in connection with the administration of legal aid or in the circumstances referred to section 25 (4) (as amended by **Schedule 1 [3]**) which provides for the divulging of information.

Schedule 2 Amendment relating to alternative dispute resolution

Schedule 2 inserts new Part 3A (sections 60A–60G) relating to alternative dispute resolution.

- Proposed section 60A sets out the purpose of the proposed Part which is to enable the Commission to arrange for matters to be dealt with by alternative dispute resolution. The parties are not prevented from participating in alternative dispute resolution otherwise than in accordance with the proposed Part.
- Proposed section 60B defines terms for the purposes of the proposed Part. *Alternative dispute resolution* is defined as including conferencing. *Conferencing* is defined as a structured negotiation process that takes place in the course of a program approved by the Commission and in which the convenor assists the parties to a dispute to settle the dispute.
- Proposed section 60C sets out the Commission's power to arrange for matters to be dealt with by alternative dispute resolution and includes the Commission's power to recover expenses incidental to alternative dispute resolution (including the interest on any expenses that remain unpaid) from the applicant for legal aid or the person to whom legal aid is granted.
- Proposed section 60D gives conferencing sessions, and documents and materials produced for them or as a result of them, the same privilege with respect to defamation proceedings that judicial proceedings and documents produced in judicial proceedings have.

- Proposed section 60E provides that evidence of things said or admissions made at a conferencing session will generally not be admissible in proceedings before a court, tribunal or body. Documents prepared for the purposes of, in the course of, or as a result of, a conferencing session will generally not be admissible in evidence in proceedings before a court, tribunal or body. However, such evidence and documents will be admissible with the consent of the persons concerned or in proceedings relating to acts or omissions causing injury to a person or damage to property.
- Proposed section 60F specifies the circumstances in which the convenor of a conferencing session may disclose information obtained in connection with a conferencing session. Those circumstances include disclosure for the purposes of the administration of legal aid and cases in which the convenor has reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to a person or damage to property.
- Proposed section 60G protects the convenor of a conferencing session from personal liability for acts done in good faith for the purposes of conducting a conferencing session under the proposed Part.

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

Schedule 3 [1] and **[2]** amend section 34 to enable the Commission to review a decision to refuse an application for legal aid by allowing the Commission to redetermine the application. **Schedule 3 [4]** amends section 38 to provide for a similar review of a decision to terminate the provision of legal aid. Currently there is no provision in the Act for such reviews. These amendments do not affect a person's current rights under the Act to appeal to a Legal Aid Review Committee.

Schedule 3 [3] amends section 38 to make it clear that the section applies to a variation of a grant of legal aid even if no formal application for legal aid has been lodged.

Schedule 3 [6] and **[8]** amend section 56 to provide for a right of appeal to a Legal Aid Review Committee in respect of a redetermination if the Commission refuses an application for legal aid or terminates the provision of legal aid.

Schedule 3 [9] amends section 56 so that an appeal against a decision to refuse an application for legal aid or terminate the provision of legal aid lapses if the Commission redetermines the matter and grants the application, or restores the provision of legal aid, before the appeal is heard by the Legal Aid Review Committee.

Schedule 3 [5], [7] and [10] make consequential amendments.

Schedule 4 Amendments relating to revenue protection and cost recovery

Schedule 4 [3] amends section 33 to omit section 33 (f). **Schedule 4 [4]** restates that provision as new section 33 (2) and makes it clear that the Commission can require an applicant for legal aid to pay to the Commission the costs of investigating an application for legal aid after the application has been determined. The amendment also enables the Commission to recover any such costs that remain unpaid (including interest). **Schedule 4 [1] and [2]** make consequential amendments.

Schedule 4 [9]–[11] amend section 38 to make it clear that the Commission may vary a grant of legal aid so as to require a legally assisted person to pay a contribution towards the costs and expenses of the legal services provided or to be provided in respect of the person if such a requirement was not imposed at the time of granting the person's application for legal aid. The amendments also enable the Commission to recover any amount that remains unpaid (including interest). **Schedule 4 [5]–[8]** make consequential amendments.

Schedule 4 [12] amends section 40 to enable a legally assisted person to have a review of a private legal practitioner's costs if the person is required by the Commission to meet part or all of those costs. The amendment also makes it clear that the Commission and the legally assisted person have the same rights to obtain a review of a private legal practitioner's costs in respect of work done by the practitioner as if the Commission or the person were the private client of the practitioner. **Schedule 4 [13]** makes a consequential amendment.

Schedule 4 [14] replaces section 43. The section currently enables the Commission to take legal action to recover its expenses if a grant of legal aid has been obtained by fraud or the legally assisted person has acted improperly in respect of the proceedings for which legal aid was granted. The amendment makes it clear that the Commission may exercise this right even if the proceedings in respect of which legal aid was granted have concluded.

Schedule 4 [15] amends section 43A. The section currently enables the Commission to defer payment to a private legal practitioner of the practitioner's costs if an official investigation is being conducted in relation to possible fraud, improper conduct or a breach of the Act or the regulations by the practitioner. The amendment makes it clear that "official investigation" includes an investigation conducted by or under the authority of the Commission but only if the Commission has given written notice to the legal practitioner of the investigation.

Schedule 4 [16] amends section 43A to make it clear that the Commission may defer or refuse payment to a private legal practitioner only in respect of the proceedings to which the section applies and not in respect of other work assigned by the Commission to the legal practitioner.

Schedule 4 [17] inserts proposed section 43B to enable the Commission to recover from a private legal practitioner money paid by it to the practitioner if there is a finding (either in criminal or disciplinary proceedings) that the practitioner acted fraudulently, improperly or breached a provision of the Act or regulations.

Schedule 4 [18] amends section 44 to enable the Commission to require a legally assisted person, or a private legal practitioner who acted for the person, to pay to the Commission all or part of any money received in respect of the person as a result of the proceedings concerned in the manner and within the time period specified by the Commission. **Schedule 4 [19]** amends the section to enable the Commission to take action to recover any amount that remains unpaid (including interest).

Schedule 4 [20] amends section 45 to require the Commission to account to a legally assisted person if the Commission has taken an assignment of a right to recover certain money payable to a legally assisted person.

Schedule 4 [21] amends section 46 to enable the Commission to make more than one determination, or vary a determination made, in respect of the costs and expenses that are to be paid by a legally assisted person in respect of the costs and expenses of legal services provided to the person. The amendment also makes it clear that such a determination can be made at or after the conclusion of the matter for which legal services were provided or, if legal aid has been terminated before the conclusion of the matter, at or after the termination.

Schedule 4 [22] and [24] amend section 47 to extend the circumstances in which the Commission is not required to pay costs awarded against a legally assisted person. Those circumstances will include an order for costs in the case of a legally assisted person who is unsuccessful in interlocutory stages but successful overall in an action and an order for costs in respect of an action under the *Child Support (Assessment) Act 1989* of the Commonwealth. **Schedule 4 [23]** makes a consequential amendment.

Schedule 4 [25] replaces section 48. The proposed section:

- (a) removes the requirement that a legally assisted person to whom legal services are provided by the Managing Director or a member of staff of the Commission must pay to the Commission the costs of the services provided to the person if the person ceases to be a legally assisted person before the completion of the proceedings in respect of which legal aid was granted (section 46 enables recovery of costs from a legally assisted person irrespective of whether the work is assigned to a private legal practitioner), and
- (b) re-enacts current section 48 (1) (b) which gives the Commission a solicitor's lien on documents held by it pending payment of money due from a legally assisted person for legal services provided to the person by the Managing Director or a member of staff of the Commission, and
- (c) provides that the law relating to the waiver of a solicitor's lien applies to the Commission's lien.

Schedule 4 [26]–[28] make consequential amendments to section 71A.

Schedule 5 Amendments relating to miscellaneous matters

Schedule 5.1 inserts proposed section 11A to make it clear that the giving of legal advice to a person, but no other form of legal aid, constitutes the giving of legal aid. However, Part 3 (Provision of legal aid) of the Act will not apply to the giving of such advice.

Schedule 5.2 amends section 28 to extend the circumstances in which the Managing Director or a member of staff of the Commission can be noted as the solicitor on the record in proceedings to include the case of an applicant for legal aid whose application has not yet been determined but in respect of whom the Commission is taking steps to conserve his or her interests.

Schedule 5.3 amends sections 32 (False application) and 41 (Demand for or receipt of certain payments prohibited) to increase the maximum penalty for offences under those sections from 10 penalty units (currently \$1,000) to 50 penalty units (currently \$5,000).

Schedule 5.4 amends section 34 to make it clear that if an application for legal aid is made after the start of proceedings, the Commission may give notice to the other parties to the proceedings of the receipt of the application if the applicant is a defendant in the proceedings (currently the section only applies if the applicant is a plaintiff).

Schedule 5.5 inserts proposed section 34C to make it clear that if the payment of fees as a lump sum grant is agreed to between the Commission and the private legal practitioner to whom the matter has been assigned, the determination of the lump sum grant does not constitute the imposition of a condition on, or the variation of, the grant of legal aid.

Schedule 5.6 amends section 69 to enable the Commission to issue guidelines as to how functions delegated under the Act are to be exercised.

Schedule 6 Amendments relating to savings and transitional matters

The Schedule contains provisions of a savings or transitional nature consequent on the enactment of the proposed Act.