

Questionnaires to Political Parties

The Law Council of Australia has sent questionnaires to the four federal political parties seeking to ascertain exactly those parties' policies regarding Commonwealth legal aid funding responsibilities.

The questionnaires, sent to the Coalition, Labour, Democrats and One Nation parties, are intended to obtain definitive positions on each party's policy regarding legal aid funding prior to election day - and to provide evidence of their pre-election legal aid promises post-election.

"The Law Council considers that legal aid funding should be funded by governments as any other essential service" says the President-elect of the Law Council, Mr Fabian Dixon.

"But we have seen this country's legal aid system stumble from crisis to calamity, with the Commonwealth Government's cuts to legal aid over the past two years and the severe restrictions on types of matters that can be funded.

"The questionnaires attempt to get each party to publicly record its legal aid policies, and - particularly for the major parties - to show exactly the direction in which each party would take legal aid if it were elected to Government."

The four parties have been requested to return the completed questionnaires to the Law Council by 22 September 1998. The questionnaires will then be analysed, and a statement regarding the Law Council's analysis made sometime after that.

"We will, of course, also be advising the Australian public if any of the four parties do not respond to the questionnaire" Mr Dixon says.

The questionnaires cover a wide range of issues regarding the Commonwealth Government's responsibility to legal aid, including:

- whether legal aid is a fundamental right for people who cannot afford to pay for legal representation, and whether there should be limitations on this right.
- whether each party would continue the present approach of limiting Commonwealth funds to Commonwealth law matters, and whether each party intends to retain a variation of legal aid dollars per

capita across the various States and Territories of Australia,

- whether each party would maintain the current Commonwealth Guidelines as to how legal aid commission must spend Commonwealth legal aid funding, and whether each party would maintain the current 'caps' on legal aid funding
- what measures each party would take in addressing the issue of funding criminal 'megacases'
- given that the proposed GST does not provide an exemption for legal services - and that this would cause legal service delivery costs to rise - whether each party would increase funding of the legal aid system to compensate for an increasing pool of people unable to access private legal services.
- in light of this latter point, whether legal aid commissions and other providers of legal aid services would be provided with a GST examination status.
- whether each party would ensure that realistic funding allocations are made to ensure that legal assistance is provided at the 'early-resolution' stage of proceedings.

Media Alert - Doorstop

The Law Council of Australia will hold a doorstop outside the Senate entrance, Parliament House in Canberra on Friday 2 October 1998 to provide a commentary on the major political parties' responses to the Law Council's questionnaire on legal aid and those political parties' legal aid policies.

At the doorstop the Council will also be launching a report - *Legal Aid Demand and Funding* which was commissioned by the Council and undertaken independently by public sector finance consultant Mr Ian McCauley. The report shows that at least \$30 million is required immediately just to restore Commonwealth legal aid funding to 1994 levels. Restoration of that funding it states, would then be enough for the legal aid system to stand still - not to keep pace with the growing demand for legal aid.

Expert witnesses are now also required to disclose all instructions given to them which define the scope of their report, and to disclose the facts, matters and assumptions upon which their report proceeds.

Coalition and Labor Disregard Current Legal Aid Funding Crisis

The Law Council of Australia continues to focus on the level of funding of legal aid because:

- it is an area of crucial importance to Australia's justice system; and
- it is essential to deliver sufficient legal service and representation services required by the financially and socially disadvantaged in the community.

The Law Council considers that neither the Coalition, nor the Labor Party, has grappled with a fundamental funding crisis in the legal aid system, adding that an analysis commissioned by the Council demonstrates \$30 million is required immediately just to restore Commonwealth legal aid funding to 1993-94 levels.

The Council provided the three major federal political parties - the Coalition, Labor, and the Democrats - and One Nation, with questionnaires to ascertain their legal aid, and legal aid funding policies. The coalition, Labor and the Democrats responded to the questionnaire, but the Council received no response from One Nation.

"The Coalition did not specifically answer the Law Council's questionnaire, but has framed its response as a general commentary on its law and justice policy" says the Law Council's Treasurer, Ms Anne Trimmer. "It is particularly disappointing that the Coalition did not clearly spell out its policy direction for mainstream legal aid funding.

"It is evident from the Coalition's response that the Coalition's thinking on legal aid has not come to grips with the negative flow-on effects of a diminished legal aid system.

"The Labor Party's legal aid policy - while trying to travel in the right direction of more legal aid funding and a return to a national approach to legal aid - promises too little too late.

"The Labor Party has announced that it will restore a national legal aid system and abolish the artificial distinction between the so-called 'Commonwealth' and 'State' legal aid responsibilities.

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"But the law Council, whilst acknowledging these announcements, is uncertain as to how these objectives will be implemented. This is because the Labor party's policy does not provide for any increase in Commonwealth legal aid funding until the year 2001, and a further \$30 million additional funding in the 2001/2 Budget.

"The Law Council says, however, that by the year 2001, it will be too late to properly rebuild a legal aid system that adequately meets the needs of disadvantaged Australians."

"The Democrats responded to the Law Council's questionnaire principally with yes or no answers, but through this indicated that it would support the return to a national approach to legal aid, extend the eligibility range for Commonwealth legal aid assistance, would not maintain current Commonwealth guidelines as to how Commonwealth legal aid can be spent by the legal aid commissions, and would not maintain caps on legal aid funding.

"The Democrats, however, did not signal amounts by which they would increase Commonwealth legal aid funding.

"Whilst the Law Council acknowledges that both major parties have signalled some minor funding initiatives - which are positive steps and have merit - it is important to recognise that neither party has addressed the bigger picture of mainstream legal aid funding.

"For example, a direct flow-on effect for the cuts to legal aid is the ever-increasing number of litigants in person who are now clogging our courts. Two recent studies (the Parker report and the University of Wollongong study) demonstrates the direct impact of legal aid cuts on access to justice and the efficient operation of the courts system.

"A report into the state of Australia's legal aid system - commissioned by the Law Council and undertaken independently by public sector finance consultant. Mr Ian McCauley - has activity in criminal courts (particularly involving young people), and more requirements for representation in other jurisdictions.

"The worrying fact is that neither Labor, nor the Coalition, has come to terms with making legal aid viable in the long term - they

have both adopted an approach of tinkering at the edges of a legal aid system in rapid decline."

Expert Witness Guidelines

Expert Witness Guidelines developed co-operatively by Federal Court and Law Council.

In a first for the Federal Court of Australia and the legal profession, the Court and the Law Council of Australia have developed co-operatively a Federal Court practice direction governing the use of expert witnesses in the Court.

The joint development of the expert witness practice direction is an excellent example of the courts and the legal profession working together in a practical and constructive way, to bring about effective reform to court process.

The development of the practice direction arose out of a mutual concern on the part of both the Court and the Law Council, that expert witnesses may be uncertain as to their role in giving expert evidence. The purpose of the practice direction is to define that role to expert witnesses, and to provide guidelines for legal practitioners and their clients in relation to the use of expert witnesses.

The practice direction, *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia*, sets out that an expert witness has a general duty to the Court. This has three defining aspects:

- an expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise;
- an expert witness is not an advocate for a party; and
- and expert witness paramount duty is to the Court and not to the person retaining the expert.

Legal practitioners will now be required to provide any expert witnesses they intend retaining for a case, with a copy of the practice direction.

Amongst other things, the practice direction requires expert witnesses to qualify finding in their reports (where they believe their report may be incomplete or inaccurate without some qualification), and to give reasons for their opinions.

Expert witnesses must now also disclose if their opinions are not fully researched

because they consider that insufficient data are available, and if a particular question or issue falls outside their field of expertise.

In another major change, the practice direction provides that if expert witnesses retained by parties in a case meet at the direction of the Court, it would be improper conduct for an expert to be given or to accept instructions not to reach agreement in that meeting. The direction instructs that if the expert witnesses cannot reach agreement on matters of expert opinion, they must provide reasons for this to the Court.

The development of the practice direction is one of a number of projects on which the Court and the legal profession are working together, with the objective of streamlining court procedure and processes, without compromising the procedural fairness of Australia's civil litigation system.

Family Court Delay Must be fixed

The Law Council of Australia has sent the Federal Attorney-General, the Hon. Daryl Williams AM QC MP, a submission indicating its extreme concern at the level of delay in Family Court hearings, and has called for the appointment of more judges to the Court.

The submissions, written by the Council's Family Law Section, states that the delay in Family Court hearings is "now totally unacceptable" and that the greatest single contributor to this delay "is the insufficient number of judges available to hear contested matters."

The submission demonstrates that the Court's judicial resources have not increased in line with its workload and jurisdiction, which have grown as it has had to deal with proliferating issues such as ex-nuptial children, de facto relationship property matters, under Child Support legislation, children's representatives, welfare matters and surrogacy issues.

The submission also highlights that the complexity of matters coming before the Court, and the increasing numbers of unrepresented litigants - primarily a result of legal aid funding cutbacks - have greatly impacted on Court delay, as have long delays in the Federal Government's appointment for new judges to replace retiring judges.

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