REPORT ON THE SUFFICIENCY OF FUNDING OF THE LEGAL AID COMMISSION OF QUEENSLAND AND THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS, QUEENSLAND

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Dear Sirs

In accordance with section 26 of the *Criminal Justice Act 1989*, the Commission hereby furnishes to each of you its report on "Report on the Sufficiency of Funding of the Legal Aid Commission of Queensland and the Office of the Director of Public Prosecutions, Queensland".

Yours faithfully

R. S. O'Regan

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FOREWORD

This report examines the funding of the Queensland Director of Public Prosecutions (DPP) and the Legal Aid Commission of Queensland (LAC). It has been prepared pursuant to section 23(c) of the *Criminal Justice Act 1989*, which confers on the Criminal Justice Commission (CJC) the statutory responsibility to monitor and report on:

> ... the sufficiency of funding for law enforcement and criminal justice agencies including the office of Director of Prosecutions and the Legal Aid Commission (so far as its functions relate to prescribed criminal proceedings within the meaning of the *Legal Aid Act 1978*.

This report provides a detailed analysis of trends in the funding and workload of the two agencies and, where possible, compares Queensland with other jurisdictions. This report also looks at ways in which funding processes and decision-making can be improved and resources utilised more effectively by the agencies concerned. However, this report does not recommend specific increases to the budget of either agency. Quite apart from the practical difficulty of calculating the size of any increases, the CJC does not consider it appropriate to make recommendations of such specificity. Decisions about the appropriate allocation of resources to various agencies can only be taken by Government, in the context of an examination of overall budgetary priorities and consideration of the many competing demands which are made for increased resources. The role of the CJC is to help ensure that funding decisions relevant to the criminal justice system are properly informed, and to suggest ways in which the decision-making process itself can be improved.

Undertaking this review has been a challenging exercise for the CJC. Neither the *Criminal Justice Act* nor the report of the Fitzgerald Commission of Inquiry (1989) provides any guidance as to how "sufficiency" should be assessed. In addition, some issues could not be investigated thoroughly because relevant data were not available. However, the CJC is confident that, within these constraints, it has been able to provide an accurate and relatively comprehensive analysis of the funding situation of each agency. The CJC also believes that the recommendations contained in the final chapter of this report provide a constructive framework for dealing with funding issues relevant to the LAC and DPP over the longer term.

The CJC is conscious that section 23(c) of the *Criminal Justice Act* applies to agencies other than just the DPP and LAC and, moreover, that monitoring requires more than the production of a single, stand-alone, report. As part of its strategy for discharging its responsibilities under this and related sections of the Act, the CJC is currently preparing an annual "Queensland Criminal Justice System Monitor", which, amongst other things, will report regularly on trends in criminal justice agency budgets, workload and staffing. The Commission will also continue to undertake more detailed inquiries into particular components of the criminal justice system when, and if, significant problems in those areas are identified.

R. S. O'Regan

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Chairperson

ACKNOWLEDGEMENTS

Many people have assisted the CJC in the preparation of this report. In particular, the CJC wishes to acknowledge the contribution of the following individuals and organisations:

- The members of the Advisory Committee established to assist the CJC in the preparation of this Report: Ms Ros Williams of the Queensland Association of Independent Legal Services; Mr John Jerrard QC, who represented the Queensland Bar Association; Mr Ken Levy, Deputy Director of the Department of Justice and Attorney-General; Mr Royce Miller QC, the Director of Public Prosecutions; Mr Michael Shanahan, Head of Counsel of the Legal Aid Commission; and Mr John Robertson (now Mr Justice Robertson of the District Court) and Mr Peter Carne, who acted as representatives of the Queensland Law Society. The members of the Committee are not responsible for any of the findings, interpretations or recommendations contained in this report, but the CJC is grateful for the advice and assistance provided.

- Officers of the Office of Director of Public Prosecutions and the Legal Aid Commission, in particular, Mr John Hodgins, Director of the Legal Aid Office and Mr Brendan Butler, Deputy Director of Public Prosecutions, who responded helpfully to our many requests for information and took the time to check and comment on sections of the draft report.

- Those individuals and organisations listed in Appendix 1 who provided written submissions to the CJC.

- Mr Andrew Boe and other legal practitioners who met with staff of the CJC to discuss issues relevant to the Inquiry.

- David Goody, one of the CJC's financial analysts, who provided invaluable assistance in the interpretation of financial data.

The bulk of this report was written by Mr Ted Wright, Visiting Fellow at the University of New England Law School, with the assistance of Mary Burgess of the CJC's Research and Co-ordination Division. Other Division staff who played a significant role in the preparation of the report were: Amanda Carter, who served as a research assistant for the duration of the project; Susan Johnson, who conducted many of the interviews with practitioners and helped in the writing of the final chapter; and Tracey Stenzel, who was responsible for the difficult and time consuming task of preparing the report for publication. The contributions of all staff associated with the project are greatly appreciated by the CJC.

David Brereton
Director
Research and Co-ordination

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ABBREVIATIONS

ALAO	Australian Legal Aid Office
CJC	Criminal Justice Commission
Director	Director of Public Prosecutions
DPP	Office of the Director of Public Prosecutions (Queensland)
Fitzgerald Inquiry	Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct
LAC	Legal Aid Commission of Queensland
LAO	Legal Aid Office (Queensland)
PD	Public Defender's Office
PSMC	Public Sector Management Commission

EXECUTIVE SUMMARY

CHAPTER 1: INTRODUCTION

This introductory chapter defines the scope of the report. Section 23(c) of the *Criminal Justice Act 1989* requires the Criminal Justice Commission (CJC) to monitor and report on:

> the sufficiency of funding for law enforcement and criminal justice agencies including the office of the Director of Prosecutions' and the Legal Aid Commission (so far as its functions relate to prescribed criminal proceedings within the meaning of the *Legal Aid Act 1978*).

In *Boe v Criminal Justice Commission*[1] Mr Justice de Jersey held that the nature of this obligation 'necessitates its being discharged on a more or less continual or regular or recurrent basis' (p. 11). This report is one of a number of initiatives which the CJC is undertaking to discharge this responsibility.

Three issues are relevant to determining the scope of this review:

WHICH AGENCIES SHOULD BE EXAMINED?

Section 23(c) of the *Criminal Justice Act* refers to 'law enforcement and criminal justice agencies' in general. This phrase encompasses not just the Legal Aid Commission (LAC) and the Office of the Director of Public Prosecutions (DPP), but also the Queensland Police Service, the Queensland Corrective Services Commission and the juvenile justice function within the Department of Family Services and Aboriginal and Islander Affairs.

It would be a massive and unmanageable task to comprehensively examine the funding of all of these bodies in a single review. This report therefore focuses only on the LAC and DPP, consistent with the terms of the orders made by de Jersey J in *Boe v Criminal Justice Commission.*[2]

IN THE CASE OF THE LEGAL AID COMMISSION, TO WHAT EXTENT SHOULD THE FOCUS BE RESTRICTED TO THE FUNDING OF PRESCRIBED CRIMINAL PROCEEDINGS?

Section 23(c) of the *Criminal Justice Act*, read literally, requires the Commission to consider only whether the LAC has received sufficient funds to meet its obligations in regard to prescribed criminal matters. Prescribed criminal proceedings include proceedings in the District and Supreme Courts, and committal proceedings in the Magistrates Court for offences carrying a maximum penalty of 14 years or more. Under the *Legal Aid Act* (s. 29), the LAC is required to fund such matters, subject to the application of a means test.

Such a limited assessment would show that the LAC has granted aid in all cases in which it has been required by law to provide assistance, albeit at levels which some sections of the legal profession and judiciary regard as less than adequate. However, if the report were to focus only on the prescribed crime area, it would not provide an accurate account of the LAC's overall funding situation. As discussed in Chapter 3, in recent years the LAC has sustained its resource commitments to prescribed criminal matters only at the cost of a marked reduction in the level of assistance provided in civil and family law matters and, to a lesser extent and more recently, in the area of non-prescribed crime. These broader developments have not been ignored in this report.

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1 Supreme Court of Queensland 10 June 1993 [93.186], unreported.

2 Ibid.

HOW SHOULD THE SUFFICIENCY OF FUNDING BE MEASURED?

The ostensibly simple concept of "sufficiency" raises a host of complex evaluative questions, relating to different interests, processes and outcomes, and involving a number of potentially relevant standards or benchmarks. The manner in which sufficiency is "operationalised" (or defined in measurable terms) significantly affects the conclusions which are reached about the adequacy or otherwise of funding.

In order to avoid the conceptual and practical pitfalls of the various approaches which can be taken to determining sufficiency, this report relies primarily on "real world" benchmarks. These take the form of historical, inter-jurisdictional and inter-agency comparisons.

Historical comparisons involve contrasting current levels of revenue, expenditure and service relative to those of preceding financial years, to determine whether:

- funding for each agency has kept pace with inflation, population growth and service demands
- the level of service has deteriorated, improved or been maintained.

The historical approach provides an approximate indication of whether the agencies have been provided with sufficient funds to keep up with changing demand. Its main limitation is that it does not entail any independent evaluation of whether the benchmark levels of funding and service provision were themselves appropriate.

Inter-jurisdictional comparisons involve comparing current levels of revenue, expenditure and service of the Queensland agencies with those of equivalent organisations in the other two major eastern jurisdictions. Such comparisons give some indication of whether the Queensland agencies have been under-funded relative to their counterparts in other States. The major practical problem with this approach is that differences in agency functions and statistical reporting processes limit the scope for comparisons, especially where prosecuting authorities are concerned.

Inter-agency comparisons involve comparing the LAC and DPP with each other and the criminal justice system as a whole, in terms of funding and workload. This approach provides some indication of whether the "balance" between the different components of the system has been altered over the last few years, although the concept of "balance" is conceptually problematic and difficult to apply empirically.

Through using these various benchmark measures the report is able to provide a relatively comprehensive account of the funding situation of each agency, indicate whether the situation has deteriorated or improved in recent years, and provide some useful comparisons. Where appropriate the report also makes recommendations about structures and processes for setting, adjusting and monitoring funding levels and for ensuring that these funds are used cost effectively. However, the CJC does not see its responsibility under section 23(c) of the *Criminal Justice Act* as requiring it to recommend that funding for either agency be adjusted by some specific amount. The reality of the political and budgetary process is that the amount of money available for distribution among the various government programs is limited and there are many areas (for example, education, health, the environment) where there are equally strong claims for increased funding. It is not for the CJC to say that the LAC or the DPP is more deserving of extra funds than these other areas. This is a decision which can – and should – only be taken by governments. The primary role of bodies such as the CJC is to help ensure that future decisions about funding are properly informed.

It should also be noted that the report focuses primarily on what the agencies concerned are currently required to do, rather than on what they might be doing in the future. There would be much to commend a review of criminal justice agency funding which began with questions about whether the system is as effective, equitable and efficient as it might be, and then worked down from such a model to ascertain the cost of the legal assistance and prosecution services required to support it. However, this sort of exercise would necessarily go well beyond the boundaries of simple "monitoring" of funding sufficiency.

THE ISSUE OF PAYMENTS TO PRACTITIONERS

The issue of the adequacy of payments to practitioners was raised in the CJC's consultations with members of the private legal profession and in a number of the written submissions. In particular, it was argued that legal aid work is inadequately remunerated and that this situation creates the potential for practitioners to provide sub-standard service in order to maintain some profit margins. Concerns were also expressed about the adequacy of DPP briefing-out fees.

Under section 23(c) of the *Criminal Justice Act* the CJC's responsibility is to investigate the sufficiency of *agency* funding not the adequacy of payments to individual practitioners. However, it is relevant to look at such payments in the context of determining whether the agencies concerned are able to attract suitably qualified practitioners to undertake the work required and to deliver an acceptable standard of service.

The report:

- presents historical data on trends in legal aid payments to legal practitioners, particularly in relation to prescribed criminal matters
- discusses the concerns which practitioners have expressed about the level of payments and the processes for determining and paying fees in individual cases
- compares the fees paid by the LAC and DPP to private practitioners
- reviews and makes recommendations in relation to the mechanisms used by the LAC and DPP to determine practitioner payments.

This material will hopefully contribute to more informed discussion about the issue of whether, and in what ways, existing fee structures and payment practices need to be revised.

CHAPTER 2: THE LEGAL AID COMMISSION OF QUEENSLAND AND THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

This chapter provides a brief overview of the origins, structure, functions and funding arrangements of the LAC and the DPP. Key features of the two organisations include:

- Funding arrangements for the LAC are governed by the 1990 Commonwealth/State Funding Agreement. This Agreement is based on the operational expenditure of the LAC and Public Defender's Office (PD) in 1987/88, adjusted annually for cost increases. Under the Agreement the Commonwealth and State governments contribute 55 per cent and 45 per cent respectively of LAC revenue. LAC revenue derives from six different sources: Commonwealth Government grants; State Government grants from consolidated revenue; interest on solicitors' trust accounts; recoverable costs; client contributions; and interest on investments. In contrast, virtually all of the DPP's income is from annual State consolidated revenue grants administered by the Department of Justice and Attorney-General. This funding is not adjusted according to any specific formula.
- The LAC is an independent commission which includes amongst its membership representatives of various groups with an interest in the provision of legal services. In the case of the DPP, decision-making authority resides with the Director. The Director is generally responsible to the Minister, but is required to act independently in the performance of his or her functions and duties.

- The DPP's workload is largely restricted to criminal proceedings in the higher courts. The LAC provides legal assistance in relation to a much wider range of matters: civil and family law, as well as criminal law matters; including criminal proceedings in the lower as well as the higher courts.

CHAPTER 3: THE LEGAL AID COMMISSION: FUNDING AND WORKLOAD

This chapter presents the results of a detailed analysis of LAC funding and workload trends, and comparisons with other jurisdictions. The key findings are as follows:

REVENUE TRENDS

- LAC and PD revenue has fluctuated significantly over the last decade.

- Revenue has dropped in recent years from a peak reached in 1990/91. However revenue indexed for inflation and population growth has remained above that of 1987/88 (the benchmark level under the 1990 Commonwealth/State Funding Agreement).

FUNDING SOURCES

- LAC and PD revenue has been very sensitive to fluctuations in revenue from interest on solicitors' trust accounts. Income from this source has dropped dramatically in recent years and this drop has not been fully offset by increased contributions from State Consolidated Revenue.

- The State's total contribution to LAC and PD revenue (i.e. grants from State Consolidated Revenue and interest on solicitors' trust accounts) declined sharply between 1989/90 and 1992/93. Although the State's contribution increased significantly in 1993/94, it was still below the 1990/91 peak year by $2.3m (12 per cent) in real terms.

- In the period 1988/89–1990/91, the State's total contribution significantly exceeded the minimum under the 1990 Commonwealth/State Funding Agreement, due to the high level of trust account income. Since 1990/91, the contribution has, for the most part, continued to exceed the minimum required, albeit by considerably smaller amounts.

- The Commonwealth's grants have exceeded the minimum required under the 1990 Commonwealth/State Funding Agreement in all years since 1989/90. However, it appears that virtually all of this 'surplus' has taken the form of tied grants for specific purposes, such as, for Veterans' Affairs matters.

- Internally generated revenue increased significantly until 1993/94, when it fell by 27 per cent in real terms. This decline was due primarily to the progressive withdrawal by the LAC from providing assistance in civil law matters and family law property matters where successful litigation could enable the LAC to recover its costs.

INTER-STATE COMPARISONS

- The Commonwealth grant to the Queensland LAC, indexed for inflation and population growth, has tended to fall over the last four financial years, and on a per capita basis is now appreciably below the grant made by the Commonwealth to legal aid bodies in New South Wales and Victoria. The difference in 1993/94 was equivalent to revenue of about $2.7m, if Queensland had been funded on the same per capita basis as New South Wales, or $4.7m if Victoria is used as a benchmark.

- On a per capita basis, the total State contribution to the Queensland LAC in 1993/94 was slightly above the New South Wales State contribution and only slightly below the Victorian State grant. However, for the four years 1990/91 to 1993/94 the average State contribution was appreciably lower in Queensland than in the other two States, with a particularly marked shortfall in 1991/92 and 1992/93. The net difference over these four years between Queensland and New South Wales was equivalent to $3.2m, and the difference between Queensland and Victoria was equivalent to $9.9m.

- In the last three years, total per capita legal aid revenue in Queensland has been significantly below the level of Victoria. However, on a per capita basis Queensland has funded a similar number of grants of aid to Victoria.

DETERMINANTS OF EXPENDITURE INCREASE

- There was a marked rise in real LAC expenditure between 1988/89 and 1991/92. This was primarily the result of a 25 per cent increase in the number of grants of aid between 1988/89 and 1990/91 and a rise of 17.5 per cent in costs per grant between 1988/89 and 1989/90.

DETERMINANTS OF LEGAL AID COMMISSION EXPENDITURE AND LIQUID ASSETS

- The LAC significantly increased grants of aid during the peak income years of 1989/90 and 1990/91 when interest rates were high and interest on funds in solicitors' trust accounts comprised a large proportion of LAC income. With hindsight, it is apparent that inadequate provision was made for a possible decline in income. In addition, the cost of fee increases and the increased number of grants of aid were seriously underestimated. As a result, the LAC's cash reserves were significantly depleted in 1991/92 and 1992/93. The level of reserves has been partly restored, but only by drastic reductions in the level of service provided by the LAC in 1992/93 and 1993/94.

LEVELS OF SERVICE

- The level of service provided by the LAC, as measured by the number of grants of aid approved, has fallen markedly in recent years.

- This dramatic drop in grants of aid has been only partly attributable to falls in revenue. The increase in grants in the peak revenue years of 1989/90 and 1990/91 considerably exceeded the increase which could have been supported from revenue received in those years. The number of grants in 1991/92 was also too high relative to revenue.

- The reduced number of grants of aid in 1992/93 and 1993/94 reflects a substantial correction for the high level of approvals in the previous three years.

- Approvals could have been maintained at their 1987/88 level throughout the period, with the application of a policy of income smoothing and modest additional net expenditure of cash reserves.

LEVEL OF SERVICE BY LAW TYPES

- The dramatic drop in recent years in the total number of grants of aid has been almost entirely at the expense of applicants for assistance in family law and civil law matters. Family and civil law grants have fallen dramatically, both relative to population growth and in absolute numbers. The number of family law grants per 1,000 population is now only 40 per cent of the level in 1987/88. The number of civil law grants per 1,000 population is now less than one-quarter of its level during the period from 1987/88 through 1990/91. If grants of aid had kept pace with increases in population, an additional 9,500 family and 13,300 civil law grants would have been made since 1987/88.

- The increase in prescribed criminal law grants of aid has at least kept pace with, and possibly exceeded, increases in prosecutions of prescribed criminal matters since 1987/88.

- The total number of grants of aid for non-prescribed criminal matters since 1987/88 increased broadly in line with population growth until 1993/94. Grants in the period between 1990/91 and 1992/93 actually ran ahead of increases in population, whereas in 1993/94 they were about 15 per cent below what was necessary to keep pace with population growth.

- The marked change in the legal assistance service profile since 1990/91 has come about, at least partly, because as a matter of law, the LAC has been required to provide aid for all prescribed criminal law matters subject only to a means test. The number of prescribed criminal matters continued to increase significantly after 1990/91 at the same time as revenue fell.

- Had prescribed criminal law matters continued to be funded on the same basis as prior to the merger of the LAC and PD, the LAC would have received several million dollars in additional funds. However, it must be acknowledged that one of the objectives of the merger was to ensure the more efficient use of available funds.

COST OF MAINTAINING SERVICE LEVELS

- In order to maintain increases in grants of aid in line with increases in prescribed criminal matters and population since 1987/88, LAC revenue would have had to continue to increase after its actual peak in 1990/91, to about $55m in 1993/94. This is around $12.2m more than the LAC's actual revenue for that year. However, these estimates do not involve any assessment of the potential for meeting the demand for legal assistance in other ways, or of the LAC's capacity to reduce costs per grant.

CHAPTER 4: THE LEGAL AID COMMISSION AND PRIVATE PRACTITIONERS

This chapter examines issues relating to the LAC's payment structures and briefing practices, and the quality of service provided by private legal practitioners. The key findings are:

LEGAL AID COMMISSION FEE SCALES

- Since September 1988 trial fees paid to private practitioners by the LAC for prescribed criminal matters have increased by around 60 per cent, or 40 per cent in real terms.

- The rate of increase for prescribed criminal law fees has generally been higher than for fees for civil and family law and non-prescribed criminal matters, but this is because prescribed crime fees were historically low in comparison with fees for those other matters.

- To the extent that comparisons are possible, there is no indication that fees paid by the LAC are significantly below those paid by legal aid bodies in other Australian jurisdictions.

- LAC fees in the criminal law area are still substantially below those fees set by the LAC for civil and family law matters. On the other hand, there has been a very substantial tightening of eligibility criteria for civil and family law matters. No such restrictions have been imposed in relation to prescribed crime matters and it is only recently that cutbacks have been made in the area of non-prescribed criminal law.

- Practitioners assert that fees for privately funded criminal law work tend to be substantially higher than for matters funded by the LAC. However, the fees paid by private clients do not provide a good benchmark for assessing the adequacy of LAC fees because:

    - ⋆ In the criminal law area in particular, the LAC dominates the market for legal services. Few practitioners are in a position to do substantial amounts of privately funded criminal law work for the simple reason that there is not much of that type of work available. Hence it is erroneous to assume that the rates paid by private clients in some way provide a better indication of the "true worth" or "market value" of legal work than the rates paid by the LAC.

    - ⋆ If it was left to "the market" to determine rates for criminal law work without the intervention of the LAC (in its capacity as the dominant purchaser of services) it is quite probable that the rates would be below what they are now. Most defendants in criminal matters have only very limited resources at their disposal and, if required to fund their own defence, would almost certainly pay less than the LAC.

    - ⋆ Arguably, in the final analysis, the only basis for determining whether fees are adequate is whether practitioners are willing and able to provide an acceptable level of service at the rates offered by the LAC. Clearly, there are still many practitioners willing to take on legally aided work, although many others have dropped out of the market. Whether the service being delivered is of sufficient quality is addressed below.

PAYMENT PRACTICES

- In recent years, there has been a substantial tightening of LAC payment guidelines and practices.

- LAC figures indicate that these changes have contributed to a 16.4 per cent reduction between 1991/92 and 1993/94 in the amount of remuneration received per prescribed criminal matter by private legal practitioners.

EXPENDITURE ON PRIVATE PRACTITIONERS

- LAC expenditure on private legal practitioners rose significantly in real terms, from $19.3m in 1988/89 to a peak of $32.1m in 1991/92. Expenditure then declined markedly to $18.5m in 1993/94.

- Private legal practitioner costs as a proportion of total LAC expenditure have declined from 62.2 per cent in 1991/92 to 48.6 per cent in 1993/94.

- The decline in expenditure on private legal practitioners after 1991/92 has been due primarily to a reduction in the overall number of grants of aid approved, and, secondarily, to a greater proportion of matters being handled in-house by the LAC.

- Private legal practitioners bore virtually the full force of the expenditure cuts imposed by the LAC in 1992/93 and 1993/94. On the other hand, practitioners were the main beneficiaries of the expansion of legal aid services in the late 1980s.

- The shift to a greater reliance on in-house work appears to have been driven by organisational imperatives, specifically the difficulty of reducing staffing levels and the desire of the LAC to increase in-house productivity. The shift does not appear to have produced any identifiable efficiency gains for the LAC.

IMPACT OF FUNDING CHANGES ON PRIVATE LEGAL PRACTITIONERS

- Over the last decade or so there has developed a group of practitioners, especially in the area of criminal law, who have become largely dependent on income from the LAC.

- These practitioners have been particularly affected by the tightening of LAC payment guidelines, reduced flexibility in the administration of these guidelines, and the recent moves by the LAC to handle more matters in-house.

- The CJC was not given any concrete evidence that private practitioners funded by the LAC are providing an inadequate level of service in relation to criminal law matters. However, a situation has developed where there are increasing pressures on practitioners to "cut corners" in some cases, especially in the absence of any systematic monitoring by the LAC of the quality of service being provided.

CHAPTER 5: THE DIRECTOR OF PUBLIC PROSECUTIONS: FUNDING AND WORKLOAD

This chapter focuses on the funding, workload and performance of the DPP. The key findings are:

REVENUE, EXPENDITURE AND WORKLOAD

- Between 1986/87 (the first full year of operation of the DPP) and 1988/89, DPP real revenue fell by 11 per cent. Between 1988/89–1993/94, DPP revenue increased by 84 per cent. For the period 1986/87 to 1993/94, real DPP revenue increased by 64 per cent.

- Between 1989 and 1993 the overall number of staff employed by the DPP increased by 54 per cent and the number of legally qualified staff nearly doubled.

- Between 1986/87 and 1993/94, the number of depositions received by the DPP increased by around 83 per cent, the number of matters proceeding as trials increased by 64 per cent and the number proceeding as sentences increased by 93 per cent. The DPP also took on additional functions which contributed to a further increase in overall workload.

- Real revenue per deposition in 1993/94 was 10 per cent less than it was in 1986/87, but around 23 per cent above the level of 1988/89. Real DPP revenue per deposition decreased in 1992/93 and 1993/94.

INTER-JURISDICTIONAL COMPARISONS

- It is extremely difficult to compare prosecution authorities across jurisdictions, because agencies differ markedly in their structure and the range of functions they perform. The Queensland DPP appears to receive less funding, on a pro rata basis, than prosecuting authorities in other jurisdictions. However, in the absence of more detailed information about the range and complexity of matters handled by the different agencies, and the counting rules which they employ, such comparisons should be regarded with extreme caution.

INTER-AGENCY COMPARISONS

- Since 1986/87, DPP funding has increased at a greater rate than LAC funding, but this may have been from a lower base.

- Since the merger of the LAC and PD in March 1991, DPP total expenditure has increased at a greater rate than LAC expenditure on prescribed criminal matters.

- Given the limited data available, it is not possible to say whether one agency spends more than the other per higher court criminal matter.

BRIEFING OUT PRACTICES

- In contrast to the LAC, only a small proportion of cases are briefed out by the DPP to private legal practitioners.

- DPP briefing out fees are substantially below those paid by the LAC.

QUALITY OF SERVICE

- The DPP's operations appear to require improvement in a number of respects, but these shortcomings may be due more to internal structural and managerial problems, and inefficiencies in the wider criminal justice system, than to inadequate funding of the DPP.

- In terms of the overall higher court acquittal rate, the Queensland DPP currently appears to be performing at least as well as prosecuting authorities in Victoria and New South Wales.

CHAPTER 6: ISSUES TO BE ADDRESSED

This chapter addresses structural and procedural issues relating to the funding of the LAC and DPP. The recommendations put forward in the chapter are as follows:

LEGAL AID COMMISSION FUNDING ARRANGEMENTS

1. The 1990 Commonwealth/State Funding Agreement should be revised, as it has not provided an adequate process for maintaining the original LAC service profile established by the Agreement.

   A key objective of any review should be to determine an appropriate service delivery profile for the LAC. This will require consideration of such questions as the appropriate balance of criminal, family and civil law matters; the types of matters within these categories which should be given funding priority, taking into account such things as gender bias considerations; the funding relationship between the LAC and Aboriginal and Torres Strait Islander Legal Services; and an assessment of whether existing merit and means tests need revising. Once issues about the service profile have been resolved, the focus should be on determining what funding arrangements are required to enable the LAC to provide a stable level of service in terms of this profile.

2. Whatever funding arrangement is adopted, provision should be made for the LAC's revenue to be reviewed periodically to take account of: changes in the level of service demand as measured by such factors as population growth and higher and lower court criminal prosecutions; unavoidable cost increases; and external legal and/or administrative changes which affect the LAC's workload.

3. The State Government, in conjunction with the LAC, should develop appropriate indicators, acceptable to the Commonwealth, for measuring changes in LAC costs and workload, and changes in the level of demand for legal services.

LEGAL AID COMMISSION PAYMENTS TO PRACTITIONERS

4. The CJC supports initiatives being developed by the LAC to introduce more competitive discipline in the determination of what the organisation pays for legal services, on the condition that there is proper monitoring of the quality of services being provided under different arrangements, and of the impact of these arrangements on private legal practitioners.

5. Decisions on matters relating to payments to practitioners should be seen as a management responsibility, with representatives of the legal profession having input in an advisory capacity only.

6. If scale fees are to continue to be used to any extent, serious consideration should be given to establishing a clear benchmark relationship between these scales and the cost of providing similar services in-house.

7. The LAC should develop mechanisms for systematically monitoring the quality of service provided across the whole spectrum of legal aid service delivery, both internally and in relation to all assigned, tendered and franchised legal aid work.

USE OF PRIVATE PRACTITIONERS AND IN-HOUSE STAFF BY THE LEGAL AID COMMISSION

8. The LAC should put in place procedures which will enable it to accurately compare the cost effectiveness of, and quality of service provided by private practitioners and in-house staff. Decisions about the appropriate method of delivering legal aid services should be based primarily on the information collected through this process.

STRUCTURE OF THE LEGAL AID COMMISSION

9. Experience shows that decision making by a body which is deliberately made up of representatives for a number of sectional interest groups can be slow, ineffectual and, on occasions, unduly influenced by sectional considerations. Given the critical importance of the issues the LAC will continue to address into the future, serious consideration should be given to reducing the size of, and restructuring, the current LAC. The current structure of the LAC should be reviewed, taking into account the following "minimal" requirements:

- It is quite appropriate that the LAC should include on its governing board, legal professionals with expertise in the operation of the legal system and the delivery of legal services. However, in order to avoid any possibility of conflict of interest, the professional associations should not have direct representation on the LAC.
- As at present, the LAC should include at least one member with specific responsibility for representing the interests of legally assisted persons.
- The LAC should include at least one person from outside the LAC with proven managerial expertise.
- It is important that an appropriate gender balance on the LAC be maintained, especially given that gender equity is a very significant issue in relation to the allocation of funds for legal assistance.

THE LEGAL AID COMMISSION'S PRESCRIBED CRIME WORKLOAD

10. The CJC supports initiatives aimed at reducing the prescribed crime workload of the LAC provided that there is no detriment to accused persons and there is compliance with the principles articulated by the High Court in *Dietrich's Case*[3].

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS FUNDING ARRANGEMENTS

11. The DPP, as a matter of priority, should develop workload measures capable of providing reasonably accurate information about the number of person hours/days associated with various activities undertaken by the Office. This will enable the DPP with Treasury to develop a funding formula which reflects changes in its workloads.

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[3] (1992) 177 CLR 292.

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS MANAGEMENT ISSUES

12. The Government, in consultation with the DPP, should review, cost out and, where appropriate, implement the recommendations of the Queensland Administration of Criminal Justice Review Committee relating to the restructuring and reorganisation of the DPP. (This committee was appointed by the Queensland Department of Justice and Attorney-General in 1993 to review certain parts of the Queensland criminal justice system, with particular emphasis on the existing processes within the DPP.)

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS QUALITY CONTROL PROCEDURES

13. The DPP should develop processes for routinely and systematically monitoring the quality of work performed by in-house staff and private counsel who do work on behalf of the DPP.

USE OF PRIVATE PRACTITIONERS BY THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

14. Although the bulk of prosecution work will continue to be handled in-house by the DPP for the foreseeable future, there is scope for the DPP to make greater use of private counsel.

    To determine whether greater use of briefing out is desirable, the DPP should establish a system of time recording for in-house prosecutors and processes for monitoring the quality of the work performed by both in-house and private counsel. The DPP should also endeavour to ensure that, for the purposes of this evaluation, the matters which are briefed out to private counsel are roughly comparable to those dealt with by in-house prosecutors.

IMPROVING THE CRIMINAL JUSTICE SYSTEM GENERALLY

15. In order to facilitate earlier decision-making in the criminal justice system, some *transitional* funding should be made available to enable agencies such as the DPP and LAC to change their processes and focus more resources at the "front end" of the system.

16. A permanent group, similar to the Criminal Case Management Group should be established to develop, implement and monitor across-agency strategies to improve the criminal justice system. The Criminal Case Management Group was formed in 1994 as an initiative of the Litigation Reform Commission, with the aim of developing some specific strategies that could be implemented on a system-wide basis to improve efficiency in the criminal justice system, .

17. Priority should be given to proposed legislative changes designed to improve the efficiency of the system, particularly in relation to committal proceedings.

18. All criminal justice agencies should give the maximum possible support to initiatives designed to improve the quality, quantity and timeliness of information relating to the operation of the criminal justice system.

CHAPTER 1
INTRODUCTION

This report has been prepared pursuant to the Criminal Justice Commission's (CJC) statutory responsibility under section 23(c) of the *Criminal Justice Act 1989* to monitor and report on:

> the sufficiency of funding for law enforcement and criminal justice agencies including the office of the Director of Prosecutions and the Legal Aid Commission (so far as its functions relate to prescribed criminal proceedings within the meaning of the *Legal Aid Act 1978*).

The section gives effect to recommendation BI2(f) of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (Fitzgerald Inquiry 1989).

In *Boe v Criminal Justice Commission*[4] Mr Justice de Jersey held that the nature of this obligation 'necessitates its being discharged on a more or less continual or regular or recurrent basis' (p. 11).

This introductory chapter outlines the approach which the CJC has taken to discharge this statutory responsibility and describes the data sources and consultative strategies used in the preparation of the report.

SCOPE OF THE REVIEW

Three issues are relevant to determining the scope of this review:

- which agencies should be examined?
- in the case of the Legal Aid Commission (LAC), to what extent should the focus be restricted to the funding of prescribed criminal proceedings?
- how should the sufficiency of funding be measured?

WHICH AGENCIES?

Section 23(c) of the *Criminal Justice Act* refers to 'law enforcement and criminal justice agencies' in general. This phrase encompasses not just the LAC and the Office of the Director of Public Prosecutions[5] (DPP), but also the Queensland Police Service, the Queensland Corrective Services Commission and the juvenile justice function within the Department of Family Services and Aboriginal and Islander Affairs.

It would be a massive and unmanageable task to comprehensively examine the funding of all of these bodies in a single review. This report therefore focuses only on the LAC and DPP, consistent with the terms of the orders made by de Jersey J in *Boe v Criminal Justice Commission*. However, this should not be construed as indicating that the CJC has not monitored, or is not intending to monitor, the adequacy of the resources provided to other agencies in the criminal justice system. The CJC has undertaken quite extensive research on Queensland Police Service staffing levels (CJC 1994a). In addition, work is well advanced on the preparation of an annual 'Queensland Criminal Justice System Monitor' which, amongst other things, will report regularly on trends in agency budgets, workloads and staffing levels. Under the *Criminal Justice Act*

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4 Supreme Court of Queensland 10 June 1993 [93.186], unreported.

5 Previously the Director of Prosecutions. See *Statute Law (Miscellaneous Provisions) Act (No. 2) 1994*, s. 3 (in force December 1994).

the CJC is also able to undertake more detailed inquiries into the funding situation of particular components of the criminal justice system when significant problems in those areas are brought to the CJC's attention, as in this case in relation to the LAC and the DPP.

PRESCRIBED CRIMINAL PROCEEDINGS

Section 23(c) of the *Criminal Justice Act* refers to funding for the LAC 'so far as its functions relate to prescribed criminal proceedings'.[6] These include criminal proceedings in the District and Supreme Courts, and committal proceedings in the Magistrates Court for offences carrying a maximum penalty of 14 years or more (see p. 10 for a full definition). Under the *Legal Aid Act 1978* (s. 29), the LAC is required to fund such matters, subject to the application of a means test.

Section 23(c), read literally, requires the Commission to consider only whether the LAC has received sufficient funds to meet its obligations in regard to prescribed criminal matters. Such an assessment would show that the LAC has granted aid in all cases in which it has been required by law to provide assistance, albeit at levels which some sections of the legal profession and judiciary regard as less than adequate. However, if the report was to focus only on the prescribed crime area, it would not provide an accurate account of the LAC's overall funding situation. As discussed in Chapter 3, in recent years the LAC has sustained its resource commitments for prescribed crime only at the cost of a marked reduction in the level of assistance provided in civil and family law matters and, to a lesser extent and more recently, in the area of non-prescribed crime. These broader developments have not been ignored in this report.

DETERMINING SUFFICIENCY

The *Criminal Justice Act* directs the CJC to investigate the sufficiency of funding for criminal justice agencies but does not attempt to prescribe how this should be done. The Fitzgerald Inquiry (1989) also did not provide any guidance in this regard.

The ostensibly simple concept of "sufficiency" raises a host of complex evaluative questions, relating to different interests, processes and outcomes, and involving a number of potentially relevant standards or benchmarks. The manner in which sufficiency is "operationalised" (or defined in measurable terms) will significantly affect the conclusions which are reached about the adequacy or otherwise of funding. In relation to the LAC, for example, any of the following could be considered appropriate research questions:

- Are the services provided in assisted matters sufficiently comprehensive and of high quality? For instance, should the LAC assist more accused persons at the committal stage or pay for more prison visits?
- Is legal assistance available to everyone who should receive it?
- Are LAC fees high enough to provide a reasonable income for legal practitioners?

It is apparent that each of these questions raises difficult policy issues and poses considerable methodological and other problems. This can be illustrated by comparing two of several possible approaches which could be taken to the issue of whether the LAC has sufficient funding to provide assistance to everyone who "should" receive it.

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6 The Act originally referred to 'the offices of the Director of Prosecutions and Public Defender', using almost exactly the same form of words as contained in the relevant Fitzgerald Inquiry recommendation (1989, p. 372). The Public Defender's Office, prior to being merged with the LAC in 1991, was responsible for aiding all prescribed crime matters.

One answer to this question might be that legal aid should be provided to those persons charged with serious criminal offences who lack the means to pay for their own representation. This answer roughly approximates the standard set by the *Legal Aid Act* in relation to prescribed crime, and the High Court in *Dietrich v The Queen*.[7] Using this benchmark, funding for legal assistance would appear to be sufficient, given that the LAC is continuing to meet its prescribed crime obligations, but very few people would suggest that this standard is anything other than an absolute minimum. There are many defendants who could also be considered "deserving" of legal aid, but are denied it because of stringent means tests and restrictions on the types of matters the LAC is able to fund.[8]

Another approach might be to construct some sort of "ideal" standard for determining what level of legal assistance should be available to the community. However, there are very considerable practical and methodological difficulties involved in determining what an "ideal" level of service would cost. In the case of the LAC, for example, such an assessment would involve trying to measure the level of currently unmet demand for legal assistance, a very difficult task. The obstacles posed by the policy issues involved are even more fundamental. The demand for some government services is virtually infinite and nearly all agencies could do with more money. For instance, if the LAC had more funds it could relax, or even abolish, its means test and increase the range of matters aided and the level of service provided in relation to each case. With more funding, the DPP could hire additional highly qualified staff, devote more resources to preparing cases and take on more functions. However, governments do not have limitless funds at their disposal. For that reason, in most areas of government service, it is generally acknowledged that the first priority is to provide an *acceptable* – rather than optimal – level of service. Arguably, the same general approach should be used to determine whether the funding of criminal justice agencies is "sufficient".

In order to avoid the conceptual and practical pitfalls of these different approaches to determining sufficiency this report relies primarily on "real world" benchmarks. These take the form of historical, inter-jurisdictional and inter-agency comparisons.

Historical comparisons involve contrasting current levels of revenue, expenditure and service relative to those of preceding financial years, to determine whether:

- funding for each agency has kept pace with inflation, population growth and service demands
- the level of service has deteriorated, improved or been maintained.

The historical approach provides an approximate indication of whether the agencies have been provided with sufficient funds to keep up with changing demand. Its main limitation is that it does not entail any independent evaluation of whether the benchmark levels of funding and service provision were themselves appropriate. In the case of the LAC, for instance, the 1990 Agreement Between the Commonwealth of Australia and the State of Queensland in Relation to the Provision of Legal Assistance (Agreement) establishes levels of service in 1987/88 as a conventional benchmark. However, the provision of legal assistance as a function of government has a comparatively short history in this country. Hence, it has been argued that service levels, even as recently as 1987/88, were significantly determined by the amount of money available from interest on money held in trust by solicitors rather than by any other assessment of community needs for legal assistance.[9] The CJC acknowledges that this argument has some force and, to this end, later in the report proposes that the basis of this agreement be re-examined by the State and Commonwealth

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7 (1992) 177 CLR 292.

8 As already noted, the High Court's *Dietrich* (ibid.) decision establishes as a general proposition that it will be unfair to proceed with the trial of an 'indigent' accused who 'by reason of lack of means' is without legal representation. However, as Deane J remarked (p. 336), 'in the context of the current level of legal fees, it is arguable that no accused persons should be required to devote a substantial part of their possessions to obtaining legal representation in resisting a prosecution for an alleged offence of which the law presumes them to be innocent'.

9 LAC of Queensland 1992, *Annual Report 1991/92*, President's letter of transmission to the Attorney-General.

Governments. However, it is not the role of the CJC to presuppose what the outcome of that re-examination might be.

Inter-jurisdictional comparisons involve comparing current levels of revenue, expenditure and service of the Queensland agencies with those of equivalent organisations in the other two major eastern jurisdictions. Such comparisons give some indication of whether the Queensland agencies have been under-funded relative to their counterparts in other States. This is of particular relevance in the case of the LAC, given the extensive involvement of the Commonwealth Government in the funding of legal aid schemes and the strong presumption that there should be equity between States in the provision of services. The major practical problem with this approach is that differences in agency functions and statistical reporting processes limit the scope for comparisons, especially where prosecuting authorities are concerned.

Inter-agency comparisons involve comparing the LAC and DPP with each other and the criminal justice system as a whole, in terms of funding and workload. This approach provides some indication of whether the "balance" between the different components of the system has been altered over the last few years although, as discussed later in the report, the concept of "balance" is conceptually problematic and difficult to apply empirically.

Through using these various benchmark measures the report is able to provide a relatively comprehensive account of the funding situation of each agency, indicate whether the situation has deteriorated or improved in recent years, and provide some useful comparisons. Where appropriate the report also makes recommendations about structures and processes for setting, adjusting and monitoring funding levels and for ensuring that these funds are used cost effectively. However, the CJC does not see its responsibility under section 23(c) of the *Criminal Justice Act* as requiring it to recommend that funding for either agency be adjusted by some specific amount. Quite apart from the practical difficulty of arriving at a dollar figure, the CJC does not consider that it would be proper to make any such recommendations. As discussed above, the reality of the political and budgetary process is that the amount of money available for distribution among the various government programs is limited and there are many areas (for example, education, health, the environment) where there are equally strongly argued claims for increased funding. It would be presumptuous of the CJC to say that the LAC or the DPP is more deserving of extra funds than these other areas. This is a decision which can – and should – only be taken by governments. The primary role of bodies such as the CJC should be to help ensure that future decisions about funding are properly informed. As recently stated by the Access to Justice Advisory Committee (1994, para. 9.44, p. 243):

> . . . we recognise that legal aid is only one of many important services that governments must fund. Accordingly, there will always be limited resources available to assist people in need. We cannot undertake the balancing of interests that is involved in allocating additional funds to any one area.[10]

It should also be noted that the report focuses primarily on what the agencies concerned are currently required to do, rather than on what they might be doing in the future. The CJC has elsewhere recommended that the LAC should provide free legal advice in police stations to people who have been arrested (CJC 1994b). On the CJC's estimates, this scheme would cost somewhere in the vicinity of $1.55m–$2.59m per year to operate. There is also a strong case to be made that the DPP should take over the prosecution of all committal hearings in the Magistrates Court. This would quite likely necessitate some additional funding for that agency and the LAC, even if only on a transitional basis. However, the report does not attempt to factor in the cost of these additional activities: the focus is on past and present responsibilities and funding levels. There would be much to commend a review of criminal justice agency funding which began with questions about whether the system is as effective, equitable and efficient as it might be, and then worked down from such a model to ascertain the cost of the legal assistance and prosecution services required to support it.

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10 The approach adopted by the CJC in this report may be compared with the approach of the Access to Justice Advisory Committee (1994, paras 9.41–9.46, pp. 238–243).

However, this sort of exercise would necessarily go well beyond the boundaries of simple "monitoring" of funding sufficiency.

THE ISSUE OF PAYMENTS TO PRACTITIONERS

The issue of the adequacy of payments to practitioners was raised in the CJC's consultations with members of the private legal profession and in a number of the written submissions. In particular, it was argued in these forums that legal aid work is inadequately remunerated and that this situation creates the potential for practitioners to provide sub-standard service in order to maintain a reasonable profit margin. Concerns were also expressed about the adequacy of DPP briefing-out fees, although this issue was less salient than in the case of the LAC because the great bulk of prosecution work is done "in-house".

Under section 23(c) of the *Criminal Justice Act* the CJC's responsibility is to investigate the sufficiency of *agency* funding not the adequacy of payments to individual practitioners. It is relevant to look at such payments in the context of determining whether the agencies concerned are able to attract suitably qualified practitioners to undertake the work required and to deliver an acceptable standard of service. However, there is no agreed upon methodology for determining what is a fair, or adequate, rate of payment for a legal practitioner.[11] In order to address this issue, the CJC would have to make value judgements about the worth of various types of legal work, the relative efficiency of different types of legal practice structures, appropriate profit margins and so on. These are matters well beyond the competence and jurisdiction of the CJC. In any event, the CJC was not able to obtain detailed and reliable information about service delivery costs and the financial structure of legal practices.[12] While it was asserted by some that substandard service was being provided because fees were too low, no concrete evidence to this effect was provided by practitioners or the agencies concerned.

Although the report does not seek to resolve the issue of whether payments to practitioners are adequate, it does:

- present historical data on trends in legal aid payments to legal practitioners, particularly in relation to prescribed criminal matters
- discuss the concerns which practitioners have expressed about the level of payments and the processes for determining and paying fees in individual cases
- compare the fees paid by the LAC and DPP to private practitioners
- review, and make recommendations in relation to, the mechanisms used by the LAC and DPP to determine practitioner payments.

This material will hopefully contribute to more informed discussion about the issue of whether, and in what ways, existing fee structures and payment practices need to be revised.

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11 The LAC already pays for services provided by private practitioners by reference to fee scales. Essentially, the suggested approach calls for a review of these scales. The problems associated with using fee scales based on average historical costs plus a "normal" rate of profit to price legal services are now well recognised. See Chapter 6, below. See also Trade Practices Commission 1993, *Study of the Professions – Legal: Draft Report*, p. 203, and Access to Justice Advisory Committee (1994, paras 5.20–5.37, pp. 154–159).

12 For the purposes of this report a number of private legal practitioners were asked to keep records of the costs associated with handling various legally aided matters, but this exercise failed to generate usable information.

MANAGEMENT AND SYSTEM ISSUES

The primary purpose of this review was to assess the sufficiency of funding, not to examine the internal management practices of the LAC or the DPP. Management matters have already been quite extensively canvassed in a range of reviews undertaken by other bodies, most notably:

Relating to the LAC:

- the Treasury and Public Sector Management Commission 1991, *Review of Legal Aid Commission (Public Defence) Funding*
- Coopers and Lybrand 1992, *Legal Aid Office (Queensland) Assignments Division Revenue Final Report*
- Public Sector Management Commission 1992, *Review of the Legal Aid Office (Queensland)*, confidential document, provided in part to the CJC by the Attorney-General to assist in its inquiry
- The Consultancy Bureau 1993, *Legal Aid Office (Queensland) Service Evaluation: Volume 1 – Report.*

Relating to the DPP:

- Treasury 1992, *Treasury Resource Review of the Department of Justice and Attorney-General and Parts of the Department of Police: Review Report*
- Price Waterhouse Urwick 1989, *Department of Justice Study to Determine the Most Cost Effective and Efficient System for the Management of Criminal Prosecutions: Final Report*
- Public Sector Management Commission 1991, *Final Draft Report on the Review of the Department of the Attorney-General*
- Queensland Administration of Criminal Justice Review Committee 1993, *Report of the Queensland Administration of Criminal Justice Review Committee.*

Although management is not a major focus of this review, it was not possible to divorce the task of assessing the sufficiency of funding completely from any consideration of the way those funds are managed, and the efficiency of the processes which they support. Inevitably, in the course of preparing this report a number of issues about management and policy were brought to the CJC's attention, often on the advice of the two agencies themselves. Some of these matters are discussed in Chapter 6 and, where relevant, recommendations are made.

In considering whether funding for particular criminal justice agencies is sufficient, it also was not possible to ignore the broader context in which these agencies operate. The ability of the LAC and DPP to utilise funds effectively is constrained by – and also has implications for – what happens elsewhere in the criminal justice system: for instance, court listing practices affect, and are affected by, the case preparation and staff

management practices of the DPP and LAC. This report does not address "process" issues such as these in great detail, primarily because most of them have been canvassed, or are currently being dealt with by various other reviews and committees.[13] However, the report recognises that reforms at this level may well be the most realistic and effective strategy to address funding issues over the medium to longer term.

DATA SOURCES AND CONSULTATION PROCESS

The information on which this report is based is derived primarily from the following sources:

- published information contained in the LAC and DPP annual reports and substantial additional unpublished material provided by these agencies
- extensive consultation with senior officers of these agencies
- submissions from a variety of organisations and individuals, received both as a result of direct approaches made by the CJC and in response to a call for submissions published in the media on 14 and 15 August 1993[14] (see Appendix 1 for a copy of the advertisement and a list of the non-confidential submissions received)
- material put before the Supreme Court in relation to the matter of *Boe v Criminal Justice Commission*[15]
- interviews with 15 barristers and 19 solicitors experienced in legal aid work, in Brisbane, the south-eastern region and far north Queensland, undertaken in late 1993 and early 1994
- previously completed external reviews of the LAC and the DPP (see above)
- published and unpublished information obtained from legal aid commissions and directors of public prosecutions in other Australian jurisdictions.

The CJC also established an advisory committee in November 1993 to assist in the preparation of the report. Organisations represented on this Committee were the:

- Department of Justice and Attorney-General
- DPP
- LAC
- Queensland Law Society
- Bar Association of Queensland
- Queensland Association of Independent Legal Services.

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13 See Chapter 6 (p. 102) for a description of the various committees and the system issues they considered.

14 Advertisements calling for public submissions appeared in *The Weekend Australian* of 14-15 August 1993 and *The Courier-Mail* of 14 August 1993.

15 Supreme Court of Queensland 10 June 1993 [93.186], unreported.

The committee met on four occasions and all members were given the opportunity to comment on the report's findings in draft form.[16]

In December 1994 staff of the Research and Co-ordination Division attended a meeting of the LAC to discuss the key conclusions of the report. A further meeting was held with a sub-committee of the LAC in March 1995. The DPP was also given the opportunity to comment on those sections of the report which related to the Office.

The CJC received full cooperation from the LAC, DPP and other criminal justice agencies in conducting this review. However, as noted at various points in the report, a number of practical impediments were encountered due to the limited statistical information available concerning the internal operations of the DPP and the LAC, and the criminal justice system generally. These deficiencies are being addressed to various degrees by the agencies responsible and other sections of the government, but progress in some areas has been very slow. This is a matter of considerable concern to the CJC because inadequate information impairs the quality of policy decisions made by the agencies in relation to their operations and planning, and by government in relation to the criminal justice system.

REPORT STRUCTURE

The remainder of this report is organised as follows:

- Chapter 2 describes the evolution, structure and functions of the LAC and DPP and outlines how these agencies fit into the wider criminal justice system.
- Chapter 3 deals with issues relating to the funding focusing, particularly on the various benchmark measures outlined above.
- Chapter 4 deals with issues relating to payments to private legal practitioners by the LAC.
- Chapter 5 examines DPP funding and workload and issues relating to the Office's briefing-out practices, and compares trends in LAC and DPP funding.
- Chapter 6 addresses issues relating to the management of the LAC and DPP and to structures and processes for determining funding levels. Where appropriate, the chapter also puts forward specific proposals.

[16] See acknowledgements for a list of the membership of this Committee. The CJC is grateful for the advice provided by members of this committee. However, the views and interpretations expressed in this report are those of the CJC alone.

CHAPTER 2
THE LEGAL AID COMMISSION OF QUEENSLAND AND THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

INTRODUCTION

This chapter provides an overview of the structure and operations of the LAC and the DPP. The first part of the chapter outlines the history of the LAC and the recent merger of the LAC and the Public Defender's Office (PD) and describes:

- the constitution of the LAC and its statutory functions
- funding arrangements
- the structure of the Legal Aid Office (Queensland) (LAO), the office through which the LAC performs its statutory functions
- the range of services provided by the LAO.

The second part of the chapter is concerned with the DPP. It outlines the history of the DPP in Queensland and then describes its:

- primary functions
- funding arrangements
- organisational structure.

THE LEGAL AID COMMISSION OF QUEENSLAND

HISTORICAL BACKGROUND

The LAC is the body responsible for the provision of legal aid services in Queensland. It is the product of the merger of a number of agencies which at various times have been responsible for the administration of legal aid services in Queensland.

The Legal Assistance Committee of Queensland was established by the *Legal Assistance Act 1965*. It was responsible for establishing and administering a 'scheme for providing legal assistance for persons of limited means' (s. 8) and for providing legal advice. The Committee commenced operation on 16 May 1966 and was funded from interest on solicitors' trust accounts under the provisions of the *Queensland Law Society Act 1952* which set up the Legal Practitioners' Fidelity Guarantee Fund (see p. 14). The Legal Assistance Committee provided legal aid in the areas of civil and family law and in criminal cases dealt with in the Magistrates Court jurisdiction. Although some services were provided by in-house staff, the scheme primarily funded private legal practitioners to provide legal services under the scheme.

The first Australian Legal Aid Office (ALAO) opened in Ipswich in 1975. The ALAO was a division of the Commonwealth Attorney-General's Department. It employed solicitors who gave legal advice and conducted in-house casework. It also funded private practitioner casework assigned by the office via its regional office network. The ALAO was solely funded by the Commonwealth Government.

On 3 December 1979 the *Legal Aid Act* merged the Legal Assistance Committee of Queensland and the ALAO, establishing the LAC of Queensland.

The current form of the LAC of Queensland is the result of the merger of the LAC of Queensland and PD on 28 March 1991 by the *Legal Aid Act Amendment and Public Defence Act Repeal Act 1991*.

PUBLIC DEFENDER'S OFFICE

The PD was the earliest provider of legal assistance to the Queensland community. The position of Public Defender was created in 1916 as part of the Office of the Public Curator. From 1967 the Office operated separately from the Public Curator's Office, although it was not until 1 July 1974, with the enactment of the *Public Defence Act 1974*, that it was established as a separate statutory office.

Section 6 of the *Public Defence Act* defined the functions of the PD. The legislation prescribed certain types of criminal proceedings for which the PD was required to provide legal aid.[17] These matters became known as 'prescribed' criminal proceedings. Prescribed criminal proceedings as currently defined in the *Legal Aid Act* section 6(1) are:

- criminal proceedings in the District and Supreme Courts
- committal proceedings in the Magistrates Court in respect of charges for which the maximum penalty exceeds 14 years imprisonment
- indictable offences prosecuted in the Children's Court at every stage of the proceedings
- breaches of probation and community service orders made in the District and Supreme Courts
- references to the Mental Health Tribunal in respect of prescribed criminal proceedings
- appeals to the Court of Appeal and the High Court with respect to criminal charges
- any other proceeding, not being a civil proceeding, that the LAC determines.[18]

Under the *Public Defence Act* the Attorney-General also had the authority to direct that legal assistance be provided in other criminal proceedings in appropriate cases. This Act removed responsibility for deciding who should be granted legal assistance from judges and magistrates. All applications for legal assistance were required to be made through the Under Secretary, Department of Justice.

Applications for legal assistance under the *Public Defence Act* were subject to a means test which required an assessment of the person's income, financial commitments and assets.

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17 These provisions have since been incorporated into s. 29 of the *Legal Aid Act*.

18 Section 6(1) of the *Legal Aid Act* uses the same definition of 'prescribed crime' as the *Public Defence Act*.

The PD had a large salaried staff which handled casework in-house. It also paid private legal practitioners to provide legal services on its behalf. Initially, the State Government funded the costs of the PD for both its internal operations and its payments to private legal practitioners. However, this funding was later supplemented by monies from the interest earned on solicitors' trust accounts.[19] These monies were required to be used to pay private practitioners' costs for work performed by them on behalf of the PD.

LEGAL AID COMMISSION AND PUBLIC DEFENDER'S OFFICE MERGER

In January 1990 the State Government made a decision in principle to amalgamate the PD with the LAC. The offices officially merged on the 28 March 1991. In his Second Reading Speech to Parliament, the Honourable Dean Wells, Attorney-General of Queensland, said that the merger had two main objectives:

> (1) the delivery of legal aid services by a broad-based, multi-talented group of legal professionals; and
>
> (2) production of efficiencies which will ensure greater availability of legal assistance and more efficient use of available legal aid funds.
>
> In other words, it will drive the legal aid dollar further. (*Queensland Parliamentary Debates* 1991, p. 6,235)

The latter of these objectives was echoed in a Treasury/Public Sector Management Commission report entitled *Review of Legal Aid Commission (Public Defence) Funding* (Treasury/PSMC 1991, p. 1) where it was stated that the decision to amalgamate the offices was made on the basis that it would save costs and, for the medium term, would obviate the need to increase the consolidated revenue contributions towards legal aid.

The financial effect of the merger and the impact of increases in workload in prescribed criminal proceedings are discussed in some detail in Chapter 3.

THE CONSTITUTION OF THE LEGAL AID COMMISSION AND ITS STATUTORY FUNCTIONS

The LAC performs its statutory functions through the LAO. In practice, the LAC is responsible for legal aid policy and the future direction of the organisation and the LAO is responsible for the day-to-day operations of the organisation and the provision of legal aid services. The LAO is accountable to the LAC through its Executive and, in particular, its Director, who is a Commissioner.

Section 8(1) of the *Legal Aid Act* outlines the criteria for appointment of Legal Aid Commissioners. The LAC has a representative membership, being constituted by:

- two commissioners nominated by the Council of the Queensland Law Society
- a commissioner nominated by the Bar Association of Queensland

[19] These monies are derived from interest on the contribution fund (see later in this chapter). The PD received 35 per cent of the interest earned by this fund.

- a commissioner nominated by the Attorney-General
- a commissioner nominated by the Attorney-General to represent the interests of legally assisted persons
- a commissioner nominated by the Attorney-General who is a registered company auditor or a chartered accountant
- a commissioner nominated by the Queensland Association of Independent Legal Services
- two commissioners nominated by the Attorney-General of the Commonwealth
- the Director of LAO appointed under section 18 of the Act
- a commissioner nominated as prescribed by regulation to represent all officers of the LAC.

The Governor in Council appoints all of the Commissioners except the Director and, on the nomination of the Attorney-General, appoints the President of the LAC [s. 8(2)].

The general function of the LAC outlined in section 9 of the *Legal Aid Act* is to provide legal assistance by:

- arranging for private legal practitioners to provide legal services at the expense of the LAC, or
- employing staff to provide legal services.

The LAC is required to perform its function by providing legal assistance:

- to people who are unable to afford the costs of obtaining legal services from private legal practitioners [s. 29(1)]
- in the most effective, efficient and economical manner [s. 11(1)(a)]
- consistent with, and without prejudice to, the independence of the private legal profession [s. 11(1)(b)].

The Act sets out other duties of the LAC, including to:

- establish local offices and make other arrangements to ensure LAC services are available to persons eligible for legal assistance
- subject to agreements or arrangements made between the Commonwealth and State Governments, determine priorities in the provision of legal assistance as between different classes of persons or classes of matters
- arrange for the provision of duty lawyer services
- provide interpreter, marriage counselling and welfare services to legally assisted persons
- make recommendations to the Minister with respect to law reform
- provide educational programs designed to promote an understanding by members of the public of their rights, powers, privileges and duties under the law.

Subject to any agreement between the Commonwealth and the State Governments the LAC may provide financial assistance to community legal centres and voluntary legal aid bodies.

FUNDING OF THE LEGAL AID COMMISSION

Funding of the LAC comes from six sources:

- Commonwealth Government grants
- State Government grants
- interest on solicitors' trust accounts
- recoverable costs (the LAC has statutory authority to recover professional costs and outlays incurred in actions which were successfully settled or resolved in favour of its clients)
- client contributions (the LAC may seek a financial contribution from its clients towards the cost of legal representation)
- interest on investments.

Commonwealth and State Funding

1979 Funding Agreement

Prior to the *Legal Aid Act* the Commonwealth and State Governments' arrangements for the funding of legal aid in Queensland were based on a "numbers system" whereby the Commonwealth agreed to fund the costs of a specific number of cases referred to private legal practitioners irrespective of the time taken to complete the matters or their cost. The Commonwealth also agreed to pay 76 per cent of the administrative costs incurred by the LAC. The LAC was required by the agreement to expend the Commonwealth monies on the delivery of legal services in the Federal jurisdiction; for example, on behalf of Department of Social Security recipients, migrants and defence forces personnel. This funding arrangement operated in addition to the State Government's responsibility to fund prescribed criminal matters.

1990 Funding Agreement

The current arrangements between the Commonwealth and State Governments for legal aid funding came into effect on 1 July 1989. The basis of these arrangements is the Agreement dated 30 January 1990 which was deemed to operate retrospectively from 1 July 1989.

The Agreement recognised the State Government's intention to merge the LAC and the PD and used the net operational expenditure of those organisations for the 1987/88 financial year as the funding base year. By implication, the Agreement recognised that the merged organisation would assume the State's responsibility to fund prescribed criminal matters.