

New South Wales



ANNO VICESIMO TERTIO

ELIZABETHÆ II REGINÆ

Act No. 39, 1974.

An Act to make further provision with respect to the granting of legal aid under certain Acts; to establish the office of Commissioner for Legal Aid Services and state the powers, authorities, duties and functions of the holder of the office; for these and other purposes to amend the Legal Assistance Act, 1943, the Public Defenders Act, 1969, and the Legal Practitioners (Legal Aid) Act, 1970; and for purposes connected therewith. [Assented to, 23rd April, 1974.]

BE

Legal Aid (Miscellaneous Provisions).

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

Short title. **1.** This Act may be cited as the "Legal Aid (Miscellaneous Provisions) Act, 1974".

Commence-
ment. **2.** The several provisions of this Act shall commence on such day or days as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

Amendment
of Act No.
17, 1943. **3.** The Legal Assistance Act, 1943, is amended—

Sec. 2.
(Defini-
tions.) (a) by inserting after the definition of "Assisted person" in section 2 the following definitions:—

"Commissioner" means the person for the time being holding the office of Commissioner for Legal Aid Services under this Act;

"Legal assistance under this Act" means legal assistance in connection with any civil proceedings, but does not include legal assistance in connection with any criminal proceedings;

Sec. 3A. (b) by inserting after section 3 the following section:—

Commis-
sioner for
Legal Aid
Services. 3A. (1) The Governor may appoint a person to be the Commissioner for Legal Aid Services.

(2) A person shall not be appointed as Commissioner if he is of or above the age of seventy years.

(3) The Commissioner shall be paid such remuneration as may be determined by the Governor.

(4)

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(4) The provisions of the Public Service Act, 1902, shall not apply to or in respect of the appointment of the Commissioner for Legal Aid Services, and the Commissioner shall not, as Commissioner, be subject to that Act during his term of office.

(5) The Commissioner shall be deemed to have vacated his office—

- (a) if he engages (whether in New South Wales or elsewhere) during his term of office in any paid employment or practice outside the duties of his office;
- (b) if he is removed from office by the Governor for inability, misbehaviour or failure to comply with the terms and conditions of his appointment;
- (c) if he becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his creditors or makes any assignment of his remuneration or of his estate for their benefit;
- (d) if he becomes a temporary patient, a continued treatment patient, a protected person or an incapable person within the meaning of the Mental Health Act, 1958, or a person under detention under Part VII of that Act;
- (e) if he absents himself from duty for a period of more than fourteen consecutive days, except on leave granted by the Minister;
- (f) if he resigns his office by writing under his hand addressed to the Governor; or
- (g) upon his attaining the age of seventy years.

(6)

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(6) A person who is, at the date of his appointment as Commissioner, an officer of the Public Service shall, in the event of his ceasing to hold office as Commissioner by reason of that office being discontinued or abolished, be entitled, if he is under the age of sixty years, to be appointed upon the recommendation of the Public Service Board to some office in the Public Service not lower in classification and salary than that which he held immediately before his appointment under this Act.

(7) Nothing in this Act shall affect the rights accrued or accruing under the Public Service Act, 1902, to any person appointed as Commissioner, who is at the date on which he is appointed or has been at any time previous thereto an officer of the Public Service or an employee within the meaning of the Superannuation Act, 1916.

(8) Any officer of the Public Service or person who at the date on which he is appointed as Commissioner is an employee within the meaning of the Superannuation Act, 1916, shall continue to contribute to any fund or account and be entitled to receive any deferred or extended leave, and any payment, pension or gratuity as if he were an officer or employee within the meaning of the Public Service Act, 1902, or the Superannuation Act, 1916, as the case may be, and for that purpose his service as Commissioner shall be deemed to be service for the purpose of those Acts.

(9) The Governor may, if he thinks it proper or necessary to do so, on such terms and conditions (including terms and conditions as to payment of remuneration, allowances and expenses) as the Governor may determine, appoint a person as deputy Commissioner for Legal Aid Services to act for the Commissioner during the illness or

absence

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absence of the Commissioner, and any person so appointed, while he so acts, shall have and may exercise or perform the powers, authorities, duties and functions of the Commissioner.

(10) No person shall be concerned to inquire whether or not any occasion has arisen requiring or authorising a deputy Commissioner for Legal Aid Services to be appointed or to act in the place of the Commissioner, and all acts or things done or omitted by a deputy Commissioner for Legal Aid Services shall have the same consequences as if they had been done or omitted by the Commissioner.

- (c) (i) by omitting paragraph (a) of section 6 (4) and by inserting instead the following paragraph—

Sec. 6.
(Application
for
assistance.)

- (a) the applicant has reasonable grounds for taking, defending, continuing or being a party to such proceedings or to proceedings of such a class in such court as may be prescribed; and;
- (ii) by omitting from section 6 (4) (b) (v) the words "six thousand dollars" and by inserting instead the matter "\$10,000";
- (iii) by omitting from section 6 (4) (c) the words "three hundred dollars" and by inserting instead the matter "\$400";
- (iv) by inserting after section 6 (4A) the following subsections : —

(4AA) The Public Solicitor may, whether or not he is satisfied as to all or any of the matters referred to in subsection (4), grant to the applicant a certificate that the applicant is entitled to legal assistance under this Act if the Commissioner so recommends under section 22 (1).

(4AB)

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(4AB) The Public Solicitor may, if he thinks fit, give legal advice to any person whether or not he would, if that person applied for legal assistance under this Act, have been obliged by the operation of subsection (4) (b) or (c) to refuse a certificate to that person.

Sec. 8.
(Endorsement and filing of certificate.)

- (d) (i) by inserting in section 8 (6) after the word "Act" where firstly occurring the words "in respect of any civil proceedings";
- (ii) by omitting from section 8 (6) the words "any proceedings" and by inserting instead the words "any civil proceedings";

Secs. 21
and 22.

- (e) by inserting after section 20 the following sections :—

Criminal
legal
assistance.

21. (1) In this section "prescribed officer" means the Public Solicitor, the Under Secretary of the Department of the Attorney-General and of Justice, an Assistant Under Secretary of that Department or any other officer of that Department authorised by the Minister to act as a prescribed officer for the purposes of this section.

(2) The Commissioner may, if he thinks fit, delegate to any prescribed officer or officers any or all of the powers, authorities, duties and functions of the Commissioner under this section (other than the power of delegation).

(3) No person shall be concerned to inquire whether or not any power, authority, duty or function has been delegated under subsection (2). and all acts or things done or omitted by a prescribed officer who purports to act under delegation under subsection (2) shall have the same consequences as if they had been done or omitted by the Commissioner.

(4)

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(4) Any person who—

- (a) is charged with the commission of, or desires to appeal against his conviction or sentence for, any indictable offence or any other offence prescribed or of a prescribed class; or
- (b) has been committed for trial or sentence for an indictable offence,

may apply to the Commissioner for criminal legal assistance.

(5) Where an application is made to the Commissioner under subsection (4) and it appears to him that the applicant's means are insufficient to enable the applicant to provide or to continue to provide adequate criminal legal assistance for himself, the Commissioner may make arrangements for the applicant to be provided with such criminal legal assistance in connection with the proceedings on the charge, the appeal, the trial or the proceedings at which he is to be sentenced, as the case may be, as the Commissioner thinks fit.

(6) The Commissioner shall not make arrangements under subsection (5) in respect of criminal legal assistance in connection with proceedings on an appeal unless it appears to him, on such legal advice as he sees fit to obtain, that the applicant has good grounds for making the appeal.

(7) The fees of any barrister or solicitor, other than a Public Defender, the Public Solicitor or a solicitor employed in the office of the Public Solicitor, with whom any arrangements under subsection (5) are made or by whom any advice referred to in subsection (6) is furnished shall be paid by the Department of the Attorney-General and of Justice out of money provided by Parliament for the purpose.

(8)

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(8) An arrangement under subsection (5) may be made with, or advice referred to in subsection (6) may be obtained from, a Public Defender, the Public Solicitor or any other barrister or solicitor, and where under any such arrangement the Public Solicitor acts in any proceedings he may instruct a Public Defender or any other barrister in the proceedings.

Further powers, etc., of Commissioner.

22. (1) The Commissioner may, in any case in which he thinks it necessary or proper to do so, recommend to the Public Solicitor that he grant to an applicant a certificate certifying that the applicant is entitled to legal assistance under this Act in respect of any civil proceedings in any court.

(2) The Commissioner shall consider and keep under review the working of his office and of all legal aid services available in New South Wales, and—

- (a) may from time to time;
- (b) shall upon direction by the Minister; and
- (c) shall as soon as practicable after the thirtieth day of June in each year,

make a report to the Minister on or in connection with the workings of that office and those services.

(3) The Commissioner shall investigate and report to the Minister on any matters when requested by the Minister to do so.

(4) The Commissioner shall furnish each report made under subsection (2) (c) to the Minister for presentation to Parliament.

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4. The Public Defenders Act, 1969, is amended by omitting section 4 and by inserting instead the following section :—

Amendment
of Act No.
60, 1969.
Sec. 4.

4. (1) A Public Defender may appear for a person who is provided with criminal legal assistance under section 21 of the Legal Assistance Act, 1943.

Legal
assistance.

(2) A Public Defender may, when appearing for a person under subsection (1), be instructed by the Public Solicitor or by another solicitor.

5. The Legal Practitioners (Legal Aid) Act, 1970, is amended—

Amendment
of Act No.
37, 1970.

(a) (i) by omitting the definition of “contributor” in section 2 (1) and by inserting instead the following definitions :—

Sec. 2.
(Inter-
pretation.)

“contributor” means a person in respect of whom a certificate is in force and who is, pursuant to section 7, required to make a contribution;

“non-contributor” means a person in respect of whom a certificate is in force and who is not, pursuant to section 7, required to make a contribution;

(ii) by inserting after the definition of “scheme” in section 2 (1) the following definition :—

“Suitors’ Fund” means the Suitors’ Fund established under the Suitors’ Fund Act, 1951.

(b) (i) by omitting from section 3 (1) the words “for the purpose of providing legal aid for persons who do not qualify for assistance under the Legal Assistance Act, 1943”;

Sec. 3.
(Scheme.)

(ii) by inserting after section 3 (3) the following subsection :—

(3A) The council may make resolutions, not inconsistent with this Act or the regulations, for or with respect to the establishment and conduct of legal advice and referral centres.

(c)

Legal Aid (Miscellaneous Provisions).

Sec. 6.
(Terms and
conditions
attaching
to a
certificate.)

- (c) (i) by inserting in section 6 (6) (a) after the word "contributor" the words "or the non-contributor";
- (ii) by inserting in section 6 (8) after the word "contributor" the words "or the non-contributor";

Sec. 7.

- (d) by omitting section 7 and by inserting instead the following section :—

Contribu-
tions.

7. (1) Subject to subsection (4), where a certificate is issued in respect of any person it shall be a condition of the certificate that the person pay a contribution if, but only if—

- (a) the person is possessed of or entitled to property of a total value of more than \$400 exclusive of—
- (i) the subject-matter of the proceedings;
 - (ii) wearing apparel of the person;
 - (iii) tools of trade of the person;
 - (iv) household furniture used by the person in his home; and
 - (v) an interest in a dwelling house owned and used by the person as his home, in so far as the interest does not exceed \$10,000 at the date of the application;
- (b) the income of the person, together with the income (if any) of the spouse of the person, during the period of twelve months preceding the making of the application, after deducting therefrom an amount equal to \$400 for each person totally dependent on the person or spouse, exceeds an amount calculated

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calculated by adding \$200 to the annual equivalent of the basic wage for adult males in force within the meaning of Part V of the Industrial Arbitration Act, 1940, immediately before the application is made;

- (c) some other property or income limitations or both, that are for the time being prescribed, are exceeded in relation to the person; or
- (d) the certificate is for legal aid in respect of proceedings in the Family Law Division of the Supreme Court.

(2) The amount of the contribution which a person is required to make pursuant to subsection (1) is the amount (being not less than fifty dollars) specified in the certificate issued in respect of the person.

(3) Subsection (1) applies to a certificate issued pursuant to an application for legal aid under this Act made by an administrator, executor, trustee or next friend if, but only if, such property and income limitation in respect of such person or persons as may be prescribed are exceeded.

(4) Except as may be provided in the regulations, the council may, in order to relieve hardship, direct—

- (a) in any case where subsection (1) would apply to a certificate issued in respect of any person, that the subsection shall not so apply; or
- (b) in any case where a condition is included in a certificate pursuant to subsection (1), that the condition shall cease to have effect,

and, notwithstanding any other provision contained in this Act, the direction shall have effect according to its tenor.

(5)

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(5) Where a certificate has been issued before the commencement of section 5 (d) of the Legal Aid (Miscellaneous Provisions) Act, 1974, and it was a condition of the issue of the certificate that a contribution be paid, subsection (4) (b) shall apply to and in respect of the certificate and, for the purposes of the application, that condition shall be deemed to be a condition included in the certificate pursuant to subsection (1).

(6) Where an application for legal aid under this Act is made jointly by a husband and wife then, for the purpose of assessing the amount of the contribution (if any) to be paid pursuant to subsection (1), the husband and wife shall be treated as one person.

Sec. 8.
(Proceedings in respect of which certificate may be issued.)

- (e) by inserting in section 8 (1) after the words "other courts," the words "or in respect of such classes of arbitration proceedings,";

Sec. 10.
(Financial eligibility to be granted legal aid.)

- (f) (i) by omitting from section 10 (1) (a) (v) the words "ten thousand dollars" and by inserting instead the matter "\$15,000";
- (ii) by omitting from section 10 (1) (b) the words "three hundred dollars" and by inserting instead the matter "\$400";
- (iii) by inserting in section 10 (2) (b) after the word "income" the words "of the applicant or";

Secs. 10A
and 10B.

- (g) by inserting after section 10 the following sections :—

Stay of proceedings.

10A. (1) Where an application is made on behalf of a person for legal aid under this Act in respect

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respect of any proceedings the council may if it thinks fit issue, and the person or his solicitor may if he thinks fit file in the Court in which the proceedings are pending, a memorandum to the effect that the application has been made.

(2) Where a memorandum is filed under subsection (1) in respect of any proceedings the proceedings shall, unless the Court in which they are pending otherwise orders, be stayed until the expiration of a period of fourteen days commencing on the date on which the memorandum was issued.

(3) While any proceedings are stayed under subsection (2), unless the Court in which the proceedings are pending otherwise orders, time fixed by or under any Act or by or under any rules of court, regulations or otherwise for the doing of any act or the taking of any step in the proceedings shall not run.

10B. (1) Where a certificate is in force in respect of a contributor or a non-contributor and in respect of any proceedings, no fee shall, for the purposes of the proceedings, be charged to or payable by the contributor or the non-contributor for court fees or such fees payable for the service or execution of process as are required to be carried to the Consolidated Revenue Fund, whether or not any such fee is imposed by or under the authority of any Act. ^{Waiver of certain fees.}

(2) Any fee referred to in subsection (1) which would, if it had been paid, have been recoverable by a contributor or a non-contributor as costs in any proceedings shall be so recoverable notwithstanding that under that subsection it has not been charged to, or is not payable by, the contributor or the non-contributor.

(3)

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(3) Where any costs paid to a contributor or a non-contributor or his solicitor include the amount of any fee which by virtue of subsection (1) has not been paid by or on behalf of the contributor or the non-contributor, the contributor, non-contributor or solicitor, as the case may be, shall pay that amount, in priority to all other items included in the costs, to the officer to whom it would have been payable had subsection (1) not been enacted.

(4) This section shall not apply where a certificate is in force in respect of a contributor or a non-contributor if the certificate was issued before the commencement of section 5 (g) of the Legal Aid (Miscellaneous Provisions) Act, 1974.

Sec. 12.
(Subrogation.)

(h) by inserting in section 12 after the word "contributor" the words "or a non-contributor";

Sec. 14A.

(i) by inserting after section 14 the following section :—

Further provisions as to costs.

14A. (1) Where a certificate is in force in respect of any contributor or non-contributor and in respect of any proceedings, whether or not legal aid or legal assistance has been granted under this or any other Act to any other party to the proceedings—

- (a) the Court in which or the arbitrator before whom the proceedings are taken shall make, in favour of the contributor or the non-contributor, the like order for costs as the Court or the arbitrator would have made in his favour had he not been a contributor or a non-contributor, as the case may be; and
- (b) in proceedings in which costs follow the event the contributor or the non-contributor shall be entitled to costs in like manner as if he had not been a contributor or a non-contributor, as the case may be,

notwithstanding

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notwithstanding that, in the case of a non-contributor, no amount is or will be payable by the non-contributor or that, in the case of a contributor, the costs are in excess of the amount which is or will be payable by the contributor.

(2) Where a certificate is in force in respect of a contributor or a non-contributor and in respect of any proceedings, whether or not legal aid or legal assistance has been granted under this or any other Act to any other party to the proceedings—

- (a) the Court in which or the arbitrator before whom the proceedings are taken shall make, against the contributor or the non-contributor, the like order for costs as the Court or the arbitrator would have made against him had he not been a contributor or a non-contributor, as the case may be; and
- (b) in proceedings in which costs follow the event the like costs shall be payable to another party by the contributor or the non-contributor as would have been so payable if he had not been a contributor or a non-contributor, as the case may be.

(3) Subject to subsections (4), (5) and (6), any costs ordered by a Court under subsection (2) (a) to be paid by a non-contributor, or payable by a non-contributor under subsection (2) (b), to a party shall, upon production to the Under Secretary of the Department of the Attorney-General and of Justice of such evidence as to the amount thereof as he may require, be paid from the Suitors' Fund to the party.

(4)

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(4) There shall not be paid under subsection (3) in respect of the costs of any one proceeding an amount in excess of \$3,000, or of such other amount as may from time to time be prescribed in lieu of that sum.

(5) No amount shall be paid under subsection (3) in respect of the costs of any proceedings under any Act of the Parliament of the Commonwealth.

(6) Where any costs are ordered against, or are payable by, a non-contributor under subsection (2) in respect of—

- (a) an appeal, or an application for a new trial, made on the ground that money awarded to the non-contributor is inadequate; or
- (b) an action in which the non-contributor is successful against one or more, but not all, of several defendants,

the Under Secretary of the Department of the Attorney-General and of Justice may, if in the circumstances of the case he thinks it is proper to do so, direct that the whole of those costs, or such part thereof as he specifies, shall not be payable from the Suitors' Fund, and those costs or that part shall not be so payable and the non-contributor shall be liable for the payment thereof.

(7) Subject to subsection (6), a non-contributor ordered by a Court to pay costs under subsection (2) (a), or by whom costs are payable under subsection (2) (b), shall, whether or not all of those costs are paid or payable from the Suitors' Fund under subsection (3), not be liable for the payment of the whole or any part thereof.

(8)

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(8) Where the effect of an order of a court is to require costs paid pursuant to the order of a court in earlier proceedings to be refunded and those costs were paid from the Suitors' Fund—

- (a) the person liable to refund the costs shall pay the amount thereof to the Under Secretary of the Department of the Attorney-General and of Justice;
- (b) the Under Secretary may recover the amount of the costs from the person so liable as a debt in any court of competent jurisdiction; and
- (c) the Under Secretary shall pay any amount paid to, or recovered by, him under this subsection into the Suitors' Fund.

(9) This section shall not apply where a certificate is in force in respect of a contributor or a non-contributor if the certificate was issued before the commencement of section 5 (i) of the Legal Aid (Miscellaneous Provisions) Act, 1974.

- (j) by inserting after section 15 (3) (a) the following paragraph :—
 - (a1) all administration costs, other than salaries (including professional fees), relating to the establishment or conduct of legal advice and referral centres, whether incurred before or after the commencement of section 5 (j) of the Legal Aid (Miscellaneous Provisions) Act, 1974;

Sec. 15.
(Legal Aid Fund.)

- (k) by inserting after the word "contributor" in section 16 (1) the words "or a non-contributor".

Sec. 16.
(Privileges and immunities.)

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Savings.

6. Where legal assistance has been granted—

- (a) under the Legal Assistance Act, 1943, before the commencement of section 3 of this Act; or
- (b) under the Public Defenders Act, 1969, before the commencement of section 4 of this Act,

in respect of any proceedings that assistance shall continue to be provided, and those proceedings shall be conducted, as if this Act had not been enacted.

BY AUTHORITY

D. WEST, GOVERNMENT PRINTER, NEW SOUTH WALES—1974