OPINION

Legal aid: A privilege in New South Wales

On 17 December 1992 the Legal Aid Commission of New South Wales resolved to stop granting legal aid in civil matters. This dramatic decision, unprecedented in its extent in Australia, was taken in response to a pending budget deficit for the Commission of close to $10 million in 1993-94. Presumably, little could be done at this stage to meet a budget deficit of $3 million or so in the 1992-93 year.

If the decision was taken to frighten government and move it to rescue the Commission from its financial plight, it was poorly timed. Certainly the decision succeeded in frightening the community and moving it to question the Legal Aid Commission's proper allocation of resources. Seven days before Christmas was hardly smart timing for a 'let's go public and create a storm' tactic. Curiously, the Commission never officially promulgated the decision; it came out in dribs and drabs over the next few days and never hit the public in banner headlines. In the months since then there has been no reported comment from Legal Aid Commission staff or management, and only the most reserved and pessimistic comments from time to time from the Chairman of the Legal Aid Commission, Brian Rayment, QC.

New South Wales Attorney-General, John Hannaford, had a response which effectively negated any attempt that the Legal Aid Commission was making to embarrass the Government: he pointed out that the Commission is an independently constituted body whose policies and operations are beyond his control. If the Commission saw fit to cut legal aid in civil matters, he said, then it was their prerogative to do so. The easy retort is that the Commission cuts services only in response to an insufficient budget allocation from Treasury, and surely the Attorney has some say in Cabinet over the budget allocations? That may be the case, but one might have thought that there were more politically astute ways of addressing the problem than the blunt wholesale cutting of services.

Even if services had to be cut and cut hard, one wonders how the Commission arrived at the decision simply to cut aid in all civil matters. Since Mr Rayment took the chair in September 1991, the Commission meetings have been held in camera, with only the staff of the Legal Aid Commission permitted to attend. In fact, since January this year even the Commission staff have been excluded and the Commission meets entirely in secret. It is thus difficult to divine the process of reasoning that led to the Commission's cost-cutting decision.

Cutting off the nose to spite the face

One would have thought that some detailed regard might have been had to the many civil matters conducted by the Legal Aid Commission in which costs are recovered. Surely on financial criteria these matters compare favourably to the many more family law and criminal matters conducted by the Commission at considerable and unrecoverable expense. One wonders if the Commission took time to look at the comparative merits of maintaining legal aid in some civil matters perhaps at the expense of cutting legal aid in some family law or criminal matters. There is a powerful argument that a body with a statutory duty to pursue law reform should consider maintaining a role in litigation that would have a broad-based or precedent impact. Many civil matters are considerably more amenable to this than the purely individual remedies that come in criminal and family law matters.

'I propose we restrict our activities this year to only those which would attract non-custodial sentences or criminal legal aid'

In one simple and perhaps simplistic decision the Commission has taken its support away from all public interest matters, environmental matters, consumer credit matters, questions of natural justice, and appeals with merit. In doing so they have thumbed their nose at the community's need for responsible representative litigation, and have committed their resources to fighting one-on-one with the increased resources allocated to criminal law enforcement.

The Legal Aid Commission: a poor relation

Recent governments in New South Wales have considerably enhanced the resources of law enforcement authorities. This is important background to the financial situation in which the Legal Aid Commission has found itself. While questions might be raised about the way in which the Commission has dealt with its budget shortfall, little criticism can be made of the Commission finding itself in this position. In recent years the State Government has increased not only the number of police, crown prosecutors and public prosecutions staff, it has also built new gaols, introduced new jurisdictions such as the Victims Compensation Tribunal and the Commercial Tribunal, has built substantial new court complexes at the Downing Centre and at Burwood, introduced a court delay reduction program, and has endorsed increases in lawyers' scale fees. At no stage, however, has the Legal Aid Commission been given the resources to meet the consequential increased demands on its own services. More prosecutions, more court cases, higher fees and more duty solicitors,

have all gone unfunded.

While the Commonwealth Government has committed itself to funding the cost impact of its own initiatives, by providing increased funds to the Legal Aid Commission when introducing initiatives in refugee matters or veterans affairs matters, for example, the State Government has turned a blind eye to this responsibility. While the Commonwealth Government has introduced a formal system of 'legal aid impact statements' accompanying every recommendation for Common-wealth legislative initiatives, the New South Wales Government has failed even to consult with the Legal Aid Commission before introducing steps that have a substantial budgetary impact on it.

At the same time that the Legal Aid Commission faces this funding crisis and struggles in its own special way to deal with it, management of the Commission is under attack from a report by a retired auditor-general and the current Solicitor for Public Prosecutions, Mr Robson and Mr O'Connor respectively. While one might have thought that Mr O'Connor would be in a position of conflict of interest, perhaps there is something to be said for a person well used to substantial resources being asked to report on the conduct of an organisation starved of those same resources, albeit with a fundamentally different philosophical commitment.

The criticisms of Messrs O'Connor and Robson, which were made available for public comment early this year, relate to the manner in which the ten member Commission has managed Legal Aid Commission affairs of late. It is a nice example of the evolution of the Legal Aid Commission in the last couple of years and of the Government's continued unwillingness to recognise the need for the Commission to be properly resourced.

Where does the buck stop?

No-one can suggest that when the Legal Aid Commission was first established with a number of part-time Commissioners it was ever intended that those Commissioners would undertake responsibility for the administration and financial management of the Commission. They represent a range of interests, some of them being users of the Commission's services, others funders of it and still others co-operative participants in the provision of services. They meet for three or four hours once a month, and they meet early in December to avoid Christmas.

They are entitled to expect the expert and able support of senior executive service (SES) staff at management level. The Commissioners ought to be spending their time discussing broader policy initiatives and implications, considering certain legal aid applications from time to time and providing a sounding board or forum of ideas for the Commission's management.

Certainly since the departure of the last appointed director of the Commission, Mark Richardson, in July 1992, and perhaps for some time before that, the Commissioners seem to have been asked to take a greater role in the financial management of the Commission. This was apparent before they began meeting in camera and stopped distributing agendas and minutes. The report of Messrs Robson and O'Connor seems to confirm that this has been the case.

Consequently, it is not surprising that Messrs O'Connor and Robson find fault with the financial management of the Commission, especially if it is in the hands of a diverse group of people, not selected necessarily for financial management skills, who meet for three hours a month. The recent appointment of Colin Neave as the new Managing Director may signal a move to centralised managerial control. Mr Neave's history includes senior positions with Toyota and with the Multi-Function Polis project.

Something has to change. Either the SES staff at the Commission are brought to account for the way in which they manage the Commission (and some question arises as to whether they are there for management ability or simply on the basis of seniority as lawyers), or the fundamental changes to the Commission's structure recommended by Messrs O'Connor and Robson will have to go ahead. These changes involve, in short, the corporatisation of the Commission, replacing the Commissioners with a smaller board of management charged almost exclusively with the financial administration of the Commission. Under such a Board of Management, one wonders what is to become of essential factors in a Legal Aid Commission's functions such as community need, social responsibility, reform and education.

One wonders, too, when, if ever, the New South Wales Government is going to recognise the Legal Aid Commission as something more than a 1970s sop to civil libertarians and human rights activists, and fund it as an integral part of its responsibility to provide minimum standards of living to the community.

Peter Wilmshurst

Peter Wilmshurst is a non-practising bureaucrat.