



ADMINISTRATIVE REVIEW COUNCIL

REPORT TO THE ATTORNEY-GENERAL

ACCESS TO ADMINISTRATIVE REVIEW PROVISION OF LEGAL AND FINANCIAL ASSISTANCE IN ADMINISTRATIVE LAW MATTERS

Report No. 30



Australian Government Publishing Service
Canberra 1988

© Commonwealth of Australia 1988

ISBN 0 644 07493 0

This work is copyright. Apart from any use as permitted under the Copyright Act 1968, no part may be reproduced by any process without written permission from the Director Publishing and Marketing AGPS. Inquiries should be directed to the Manager, AGPS Press, Australian Government Publishing Service, GPO Box 84, Canberra, ACT 2601.

Time constraints determined by the author department prevented AGPS editorial and design input to this work.

Printed in Australia by R.D. RUBIE, Commonwealth Government Printer, Canberra

ADMINISTRATIVE REVIEW COUNCIL

GPO Box 9955
Canberra A.C.T. 2601

2 May 1988

Dear Attorney-General,

I have pleasure in submitting to you a report by the Administrative Review Council on Access to Administrative Review: Provision of Legal and Financial Assistance in Administrative Law Matters.

Yours sincerely,

(Dr) C.A. Saunders
Chairman

The Hon Lionel Bowen, M.P.
Attorney-General,
Parliament House
Canberra A.C.T. 2600

The members of the Administrative Review Council at the date of the Council's adoption of this report were:

Dr C. A. Saunders (Chair)
Justice T.R. Hartigan
Professor D.C. Pearce
Justice E. Evatt, AO
Mr P. Brazil
Mr R.L. Brown
Dr W.B. Creighton
Mr J.H.P. Disney
Mr P.J. Flood
Mr S.A. Hamilton
Mr W.E. Impey
Mr J.F. Muir
Ms H.F. Vorrath

The members of the committee responsible for overseeing the report were:

Mr J.H.P. Disney (Chair)
Justice E. Evatt, AO
Mr S.A. Hamilton
Justice T. R. Hartigan
Mr W.E. Impey
Professor D.C. Pearce
Ms H.F. Vorrath

The Council expresses its gratitude to the members of its secretariat, both past and present for the assistance given by them in preparing this report. In particular it wishes to thank the Director of Research, Mr Denis O'Brien, project officer, Mr Phillip White, former project officer, Mr Bill Hughes and the Council consultant for the early stages of this project, Mr Tom Brennan.

CONTENTS

	<i>Paragraph</i>	<i>Page</i>
List of recommendations		vi
Chapter 1: Introduction		1
Origin of report	1	1
Outline of report	8	2
Chapter 2: The provision of legal and financial assistance in administrative law matters		3
State and Territory legal aid authorities	11	3
Section 69 of the AAT Act	16	4
Guidelines for provision of legal or financial assistance	22	6
Hardship	23	6
Reasonableness	24	6
Application of guidelines in other areas	26	7
No independent review mechanism for decisions concerning legal and financial assistance	32	8
Stages of review process at which aid may be required	33	9
Welfare rights centres	38	10
Chapter 3: Operation of section 69 of the Administrative Appeals Tribunal Act 1975		11
Section 69 as a special case provider of assistance	41	11
File based decision making	47	12
Information on section 69 given to applicants	51	13
Initiation by State or Territory legal aid authorities of applications for assistance under Commonwealth scheme	56	14
Financial assistance other than legal assistance under section 69	59	16
Link between section 69 assistance and assistance in public interest and test cases	63	17
Consistency in provision of aid	65	18
Chapter 4: Consideration and implementation of recommendations	67	19
Appendix 1: Guidelines for the provision of legal or financial assistance by the Commonwealth other than under the Conciliation and Arbitration Act		20

LIST OF RECOMMENDATIONS

Recommendation 1: Operation of section 69 as a special case provider of assistance (paras 41-46)

- (1) Section 69 of the Administrative Appeals Tribunal Act should be retained in its current form.
- (2) The guidelines relating to the provision of legal or financial assistance by the Commonwealth should generally be revised for clarity and, more particularly, be revised as follows:
 - (a) to emphasise that ordinarily assistance will only be provided in a case where legal aid is not available from a State or Territory legal aid authority;
 - (b) to make it clear that, while reference may be made to the means test for legal aid which applies in the particular State or Territory where the applicant resides as a guide concerning hardship, it is merely one of several factors that may be taken into account;
 - (c) to make it clear that, in determining whether it is reasonable for the purposes of section 69 to grant assistance, the existence of an element of public interest in the proceedings concerned may be only one of several factors that are taken into account; and
 - (d) to indicate that, in cases where a strong public interest element exists and where party and party costs may be involved, assistance may extend to an indemnity against an award of costs.

Recommendation 2: Notification and advice about legal and financial assistance schemes (paras 51-55)

- (1) When, in a notice concerning the right to have a decision reviewed by the AAT, an agency includes information about the availability of legal and financial assistance, the information should-
 - (a) inform the person concerned of the potential for assistance from a State or Territory legal aid authority and the procedures for making an application for such assistance; and
 - (b) inform the person that assistance may be available under section 69 of the Administrative Appeals Tribunal Act, or under the non-statutory scheme relating to public interest and test cases, but, ordinarily, only if the person's application for assistance has been rejected by the relevant State or Territory legal aid authority.
- (2) The Attorney-General's Department should make available to Commonwealth agencies the brochure concerning legal and financial assistance schemes so that agencies may bring the brochure to the attention of their clients.

Recommendation 3: Initiation of applications by State or Territory legal aid authorities (paras 56-58)

- (1) Where an application for assistance has been rejected by a State or Territory legal aid authority and the authority believes that the application may reasonably be considered to come within the guidelines relating to section 69 of the Administrative Appeals Tribunal Act or the non-statutory scheme relating to public interest and test cases, the State or Territory authority should, if the applicant agrees, forward the application to the Office of Legal Aid Administration in the Attorney-General's Department and inform the applicant of the requirements of section 69, and of the

non-statutory scheme, so that the applicant may make additional submissions to the Attorney-General's Department.

- (2) The Office of Legal Aid Administration should treat an application so forwarded as an application under section 69, or under the non-statutory scheme, and should not require the applicant to fill out a separate application form.
- (3) Where an application for assistance has been rejected by a State or Territory legal aid authority and the authority believes that the application is unlikely to attract assistance under section 69, or under the non-statutory scheme, the State or Territory authority should nonetheless inform the applicant that the applicant has a right to apply for assistance under the section 69 scheme or the non-statutory scheme and should advise the applicant of the requirements of those schemes and the procedures for making an application under them.

Recommendation 4: Provision of financial assistance other than legal assistance

(paras 59-62)

- (1) As a means of improving access to review and of potentially decreasing the cost to the community of certain AAT hearings, financial assistance for certain non-legal costs incurred in the conduct of proceedings before the AAT such as-
 - (a) costs related to the production of evidence reasonably required for the purpose of the proceedings (eg medical evidence);
 - (b) travel and accommodation costs for the purpose of attending at the proceedings; and
 - (c) costs of providing care to dependants of the applicant necessitated by attendance at the hearing, should be available under the Commonwealth legal and financial assistance schemes and also through the legal aid schemes administered by State and Territory legal aid authorities.
- (2) The Commonwealth should enter into arrangements with the State and Territory governments to facilitate the provision of such assistance through their legal aid bodies.
- (3) The provision of assistance for the non-legal costs referred to in this recommendation should not be dependent upon an applicant having legal representation.

Recommendation 5: Revision of guidelines relating to assistance in public interest and test cases (paras 63-64)

- (1) The guidelines for the provision of legal or financial assistance by the Commonwealth should be revised to indicate that where, under a statutory scheme, a condition precedent such as hardship is not met, it may still be possible for assistance to be granted if the case raises a novel or unresolved issue, the resolution of which is of public importance, or the case is a test case.
- (2) Assistance by way of an indemnity against an award of costs should be available under the non-statutory scheme relating to public interest cases, and the guidelines should be amended to indicate that such assistance may be available.

Recommendation 6: Consistency in eligibility requirements for assistance (paras 65-66)

The government should take steps to encourage greater consistency between different States and Territories in relation to eligibility requirements for assistance in federal administrative review matters.

Recommendation 7: Consideration of recommendations made in this report (paras 67-69)

The National Legal Aid Advisory Committee should be requested to consider the recommendations made in this report and the question of an appropriate formal merits

review or appeal mechanism for decisions on legal and financial assistance under the Commonwealth schemes.

CHAPTER 1

INTRODUCTION

Origin of report

1. This report is part of the Council's Access to Administrative Review Program. The program originated from the Council's concern that, because of practical impediments to attaining review of administrative decisions, some people were being denied the benefits of that review. The Council in undertaking the program has been mindful of the need to ensure that the existing systems of administrative review operate in as efficient and cost effective manner as is practically attainable and are available to those they are designed to assist. The objective is to facilitate efficient, economical and effective access to review.

2. Stage One of the Access to Administrative Review Program, a report entitled *Notification of Decisions and Rights of Review*, was transmitted to the Attorney-General on 11 September 1986 (Report No. 27). The present report focus's on legal and financial assistance needs of applicants, particularly in the social security jurisdiction. Further stages of the program will examine other practical obstacles to administrative review.

3. Generally, Commonwealth assistance by way of legal aid in federal matters is administered by State or Territory commissions in New South Wales, Queensland, Victoria, Western Australia, South Australia and the A.C.T. and by the Australian Legal Aid Office in the Northern Territory and Tasmania. Section 69 of the *Administrative Appeals Tribunal Act 1975* provides a separate source of assistance. It provides that the Attorney-General may provide legal or financial assistance in respect of proceedings under the Act. It currently operates to fill gaps created by variations in merits and means tests of the State and Territory legal aid bodies in relation to proceedings under the AAT Act and in that sense provides a special category of assistance. The section 69 scheme is administered by the Office of Legal Aid Administration within the central office of the Attorney-General's Department in Canberra.

4. At a public seminar on access problems conducted by the Council in June 1985 the provision of legal and financial assistance was identified as an area where access problems have arisen. In particular it was thought that inefficiencies and other problems were caused by a system where there were 2 distinct sources of assistance and where separate applications were required for assistance from a State legal aid commission or the ALAO on the one hand and from the Attorney-General under section 69 on the other hand. In practice an application under section 69 will not be considered unless an applicant can provide evidence of rejection by the relevant State or Territory authority.

5. Following the 1985 seminar, the Council in 1986 engaged a consultant, Mr Tom Brennan, to undertake a preliminary study of certain issues concerning access to administrative review, including the provision of legal and financial assistance in administrative review proceedings. In preparing his report, Mr Brennan and officers of the Council secretariat consulted officers of State and Territory legal aid commissions, officers of the Attorney-General's Department and representatives of welfare groups in respect of the provision of legal and financial assistance in administrative review matters.

6. In many cases legal and financial assistance is essential if people are to have practical access to administrative review. The need for legal, financial and related help at each stage of review or appeal processes varies from case to case depending upon:
- (a) the personal circumstances of the applicant;
 - (b) the nature of the facts of the case and of the evidence available; and
 - (c) the legal or administrative issues (if any) raised by the case.

7. It is clear that from the point of view of claimants for such assistance some level of assistance would be desirable in nearly every case at every level of decision making. It is also clear that the cost of providing such assistance would be prohibitive.

Outline of report

8. Chapter 2 discusses the general framework for the provision of legal and financial assistance in Commonwealth administrative law matters.

9. Chapter 3 focus's specifically on the operation of section 69 of the AAT Act and examines how the administration of that scheme could be improved. The Council concludes that aspects of the current arrangements are confusing and productive of inefficiency. Access to administrative review will be enhanced if legal and financial assistance is given effectively and where necessary. To achieve an effective distribution of assistance, the Council considers that changes are required to the administration of the section 69 scheme and to other aspects of the provision of assistance.

10. Chapter 4 refers to the new structure for providing advice on legal aid administration that has been put in place in the Commonwealth. The chapter suggests that the Attorney-General refer this report to the National Legal Aid Advisory Committee for consideration.

CHAPTER 2

THE PROVISION OF LEGAL AND FINANCIAL ASSISTANCE IN ADMINISTRATIVE LAW MATTERS

State and Territory legal aid authorities

11. The, broad aim of legal aid delivery is to ensure that needy persons get access to justice in respect of their legal problems. The general principle of legal aid is that no one should be denied justice merely because he or she is unable to afford the services he or she needs. 'Legal aid' as a concept may be defined differently by different people. The Council notes the criticism voiced by the Legal Aid Commission of Victoria when it commented on the 1984 Discussion Paper produced by the Commonwealth Legal Aid Task Force that the paper did not 'describe, define or analyse the subject' it was discussing (Legal Aid Task Force Report, August 1985, p.17). Broadly speaking, however, legal aid encompasses, amongst other things, the provision of advice and assistance, the provision of a salaried lawyer and the referral of matters to private practitioners.

12. The primary providers of legal aid in administrative law matters are State based offices of the Australian Legal Aid Office (Tasmania and Northern Territory) or State legal service or legal aid commissions (New South Wales, Queensland, Victoria, the Australian Capital Territory, South Australia and Western Australia). The Commonwealth provides the bulk of the funds to State and Territory commissions and all of the funds to the ALAO. The commissions are each established by legislation. The provision of legal aid by each body is generally subject to 2 tests: a means test and a merits test. Legal aid is also provided through a network of Aboriginal and Islander legal services to Aboriginals and Torres Strait Islanders.

13. Means tests as applied by legal aid agencies in essence take account of disposable income and disposable assets of the applicants for aid. Although each State and Territory has a different emphasis, the tests are designed to restrict aid to those people clearly unable to afford the cost of the particular legal assistance they seek.

14. Merits tests operate in a substantially uniform manner. They require assessment of the possible consequences for the individual of the proceedings and of the prospects of success of the individual. The more major the possible adverse consequences for the individual, the less significant the prospects of success will need to be to justify aid. Thus, a slight prospect of avoidance of deportation may justify the grant of aid in a deportation case while very good prospects indeed would need to be shown to obtain aid to question a decision to recover a small overpayment.

15. State and Territory commissions and the ALAO operate from regional offices, and assistance and advice is provided at all offices to people when applying for legal aid. The Council notes that a number of State commissions have adopted strategies to develop the expertise of in-house solicitors in federal administrative law generally and in income maintenance law in particular. The New South Wales and Victorian commissions have established specialist administrative law units within the commissions which conduct, or assist in providing, in-house training programs in administrative law. The Council considers that the development of specialist expertise within legal aid authorities is to be encouraged.

It enhances the quality of service to applicants. Furthermore, the appearance before the Administrative Appeals Tribunal of practitioners with administrative law knowledge is likely to assist it in its decision making.

Section 69 of the AAT Act

16. Section 69 of the *Administrative Appeals Tribunal Act 1975* states:

Legal assistance

69. (1) A person who-

- (a) has made, or proposes to make, an application to the Tribunal for a review of a decision;
- (b) is a party to a proceeding before the Tribunal instituted by another person; or
- (c) proposes to institute a proceeding, or is a party to a proceeding instituted, before a court in respect of a matter arising under this Act,

may apply to the Attorney-General for the provision of assistance under this section in respect of the proceeding.

(2) Where an application is made by a person under sub-section (1), the Attorney-General may, if he is satisfied that it would involve hardship to that person to refuse the application and that, in all the circumstances, it is reasonable that the application should be granted, authorise the provision by the Commonwealth to that person, either unconditionally or subject to such conditions as the Attorney-General determines, of such legal or financial assistance in relation to the proceeding as the Attorney-General determines.

17. It may be noted that section 69(1) covers not only proceedings before the AAT but also proceedings before a court in respect of matters arising under the AAT Act. Thus, the section extends to applications for assistance in respect of appeals to the Federal Court from AAT decisions. This may have significance for the type of assistance sought under the section. The general rule is that, before the AAT, all parties bear their own costs. Thus, the question of seeking under section 69 an indemnity against an award of costs does not arise in relation to proceedings in the AAT. However, on an appeal to the Federal Court, although the matter of costs is discretionary, it is usual for the Federal Court to order that the unsuccessful party pay the costs of the successful party (*Harrigan v Department of Health* (1987) 72 ALR 293). Accordingly, an applicant for assistance under section 69 who is contemplating an appeal to the Federal Court may be concerned to ensure that any assistance granted extends to an indemnity against an award of costs in the event of the appeal being unsuccessful. However, an officer of the Office of Legal Aid Administration in the Attorney-General's Department has informed the Council secretariat that assistance by way of an indemnity against an award of costs is very rarely granted under any of the legal and financial assistance schemes administered by the Department. This matter is commented on at paragraph 45 below.

18. The assistance provided under section 69 through the Office of Legal Aid Administration is provided by way of payment to private practitioners. Assistance is provided pursuant to guidelines tabled in the Parliament by the Attorney-General in 1981. The guidelines are set out as Appendix 1 to this report. In practice legal and financial assistance is available under section 69 only to people who are not eligible for aid from a State or Territory commission or the ALAO. In almost every case before an application is processed the applicant must provide evidence of rejection by the relevant State or Territory

authority and must have exhausted whatever mechanisms for review are available within the government agency whose decision is sought to be challenged.

19. The practice of declining to deal with an application for legal assistance under section 69 until the applicant has exhausted whatever remedies for review are available within the government agency whose decision is sought to be impugned and has unsuccessfully sought legal aid from other bodies was examined by the full court of the Federal Court in *Gregory v Secretary, Attorney-General's Department* (unreported, 19 November 1987). The court concluded that there is no error of law discernible from these requirements and that it was open to the Attorney-General to take into account, upon receipt of an application for assistance under section 69, the existence of other avenues of legal aid and to require that the applicant pursue them before considering the application.

20. Table 1 shows the number of applications for assistance and the extent of assistance given by the Attorney-General in respect of applications to the AAT over the last 7 years. The applications represent assistance given under section 69, including (since 1985) assistance given by virtue of an undertaking to provide assistance to servicemen, ex-servicemen and their dependants for proceedings in the AAT in connection with matters arising directly from disabilities incurred in war service. The latter assistance is free of a means test but is subject to a merits test. This assistance has its history in the history of repatriation assistance in Australia. The ALAO in the Northern Territory and Tasmania and the N.S.W. Legal Aid Commission also provide aid to veterans in respect of AAT proceedings on this basis. The thinking behind means test free assistance for persons who have seen war service is that the hardship of war service itself is sufficient. The AAT was given jurisdiction in respect of appeals relating to veterans' entitlements in January 1985. This explains the sudden increase in applications for assistance for AAT matters for the years 1985-86 and 1986-87. Veterans' entitlement cases now constitute approximately 40% of the cases dealt with under section 69. If the other State commissions were to follow the practice of the ALAO and the N.S.W. commission, it could be assumed that the number of applications under section 69 would decrease.

Table 1: Financial Assistance, AAT Act

Year	1980-81	1981-82	1982-83	1983-84	1984-85	1985-86	1986-87
New applications received	131	278	142	145	107	320	580
Approved (a)	34	54	40	25	33	65	271
Refused (a)	9	13	20	22	16	32	129
Not proceeded with (a) (b)	-	-	-	-	104	103	258
Matters on hand at end of year (c)	-	-	-	-	-	120	42
Commitment \$ (d) . .	67 859	54 953	46 108	44 249	109 350	188 959	549 352
Expenditure \$ (e) . .	37 851	35 050	46 290	35 101	78 509	80 727	241 696

Source: Information obtained from Attorney-General's Department Annual Reports

Notes to table 1:

- (a) Includes any applications on hand from previous year.
- (b) Matters listed as not proceeded with are those which have received consideration but were not finalised before being withdrawn by the applicant. Although there are no figures available in the years prior to 1984-85, the discrepancy between the number of applications received and the total number of applications approved and refused largely reflects the number of matters not proceeded with in those years.
- (c) This may include applications received in previous years. There are no figures available for matters on hand in the years prior to 1985-86.

- (d) Means the amount approved by way of grant of financial assistance based on estimate of total legal costs and disbursements to be funded.
- (e) Means the amount paid for legal costs and disbursements following assessment of bills of costs.

21. It can be seen from table 1 that a significant number of applications are withdrawn by applicants. This matter is commented upon at paragraph 52 below. It can also be seen that the total amount of financial assistance presently provided under section 69 is relatively small.

Guidelines for provision of legal or financial assistance

22. The guidelines for the provision of legal or financial assistance under section 69 reiterate the terms of the section in providing that it is a condition precedent to the exercise of the discretion under the section that the Attorney-General is satisfied concerning hardship and the reasonableness of granting the application. Guideline 4 says that, if he is so satisfied, the exercise of the discretion is unfettered and accordingly each case must in the end be determined on its own merits and all relevant circumstances must be taken into account.

Hardship

23. The guidelines define hardship to mean financial hardship. Consideration is given to all relevant matters such as income, expenditure, assets and liabilities of the applicant and the estimated costs of the proceedings. The broad test of hardship is whether the applicant has the means to meet the cost of the proceedings without incurring serious financial difficulty. Guideline 6 states that 'in making this judgment, reference is made to the conditions of eligibility for the grant of legal aid generally'. The Council secretariat has been advised by an officer of the Office of Legal Aid Administration that this guideline has been interpreted to mean that, in a particular case, reference is made as a first step to the means test applied by the relevant local legal aid authority. In this way local variations in means tests are taken into account. This practice is discussed further at paragraph 43. As was mentioned at paragraph 20 above, means test considerations do not apply to the significant numbers of cases where veterans' entitlements arising out of war service are in issue.

Reasonableness

24. In determining whether it is reasonable to provide assistance, regard is had, amongst other things, to:

- (a) the prospects of success;
- (b) the nature and extent of the benefit or detriment that may accrue to the applicant;
- (c) the availability of legal aid generally;
- (d) the benefit to the public or any section of the public.

25. Guideline 9 provides that the Attorney-General may decline to grant assistance if it is available from another source and there is no element of public interest in the proceedings. Guideline 10 states that the Attorney-General has regard to the legislative purpose of the provision under which assistance is sought. It goes on to say that 'Each statutory provision is based upon an element of public interest but its degree may vary from case to case'. Guideline 11 says that 'If there is little or no public interest, aid will normally be granted only in circumstances similar to those which govern the grant of legal aid generally'. These statements appear to the Council to be particularly opaque. Furthermore, while guideline 9 says that the Attorney-General 'may' decline to grant assistance if it is available from another source, as was mentioned at paragraph 18 above, in almost every case an applicant must provide evidence of rejection by the relevant State or Territory legal aid authority. It must be difficult for applicants and their advisers to obtain helpful guidance from the guidelines as to how an application for assistance will be assessed and what the requirements for granting assistance are. The lack of clarity in the guidelines is taken up further in chapter 3.

Application of guidelines in other areas

26. Statutory schemes for the provision by the Commonwealth of legal or financial assistance are to be found in the following Acts:

- *Aboriginal and Torres Strait Islanders Heritage Protection Act 1984* (s.30);
- *Aboriginal Land Rights (Northern Territory) 1976* (ss.54C, 74A);
- *Administrative Appeals Tribunal Act 1975* (s.69);
- *Australian Security Intelligence Organisation Act 1979* (s.72);
- *Conciliation and Arbitration Act 1904* (ss.132J, 141A, 141B);
- *National Crime Authority Act 1984* (s.27);
- *Racial Discrimination Act 1975* (s.25ZB);
- *Sex Discrimination Act 1984* (ss.83, 84);
- *Trade Practices Act 1974* (s.170).

The guidelines apply to the provision of assistance under each of these provisions apart from the Conciliation and Arbitration Act provisions (where separate guidelines apply), the National Crime Authority Act provision (see para. 28 below), the Racial Discrimination Act provision and section 83 of the Sex Discrimination Act.

27. Certain other provisions in Commonwealth Acts and regulations also provide for legal or financial assistance of one sort or another (see, eg, Conciliation and Arbitration Act, sections 132H and 168 (payment of costs), Defence Force Discipline Appeals Regulations, reg.11 (arrangement for legal representation), Federal Proceedings (Costs) Act (payment of costs), Freedom of Information Act, section 66 (payment of costs) and Judiciary Act, section 69 (appointment of counsel)).

28. It is notable that there is a divergence between certain of the provisions providing for legal and financial assistance. For example, section 27 of the *National Crime Authority 1984* provides for the Attorney-General to be satisfied about 'substantial' hardship to the applicant or to be satisfied that the circumstances of the case are 'of such a special nature' that the application should be granted. The different test here means that the guidelines which relate to section 69 of the AAT Act and to the like provision to be found in the Aboriginal and Torres Strait Islanders Heritage Protection Act, the ASIO Act, the Racial Discrimination Act, the Sex Discrimination Act (s.84) and the Trade Practices Act do not apply to the slightly different provision to be found in the National Crime Authority Act. The terms of section 54C of the Aboriginal Land Rights (Northern Territory) Act mean that, while the guidelines apply to that section (and, by extension, to section 74A of the Act), somewhat greater consideration is required to be given to reasonableness than hardship (see guidelines 3 and 13).

29. The Council notes that the administration of the Commonwealth scheme of legal and financial assistance would be likely to be significantly improved if there were to be a greater degree of consistency between the various statutory provisions.

30. The guidelines for the provision of legal and financial assistance by the Commonwealth apply also to the provision of legal and financial assistance under the non-statutory scheme relating to public interest and test cases. 'Public interest cases' are those involving questions arising under a law of the Commonwealth the resolution of which by the courts is, in the opinion of the Attorney-General, of public importance. Public interest cases are cases where the public interest element looms large. By their nature they differ from cases in which the applicant alone has a particular interest in the outcome. Public

interest cases may frequently involve questions of administrative law. 'Test cases' are those brought for the purpose of resolving an important question arising under Commonwealth law that, in the opinion of the Attorney-General, affects the rights of a section of the public which is, or a group of person who are, for the most part, socially or economically disadvantaged. Table 2 shows the number of applications and the extent of assistance given by the Attorney-General in relation to the public interest and test case scheme over the last 7 years. As can be seen from the table, there are very few applications and the total amount of assistance given is relatively small.

Table 2: Financial Assistance, Public interest and test cases

Year	1980-81	1981-82	1982-83	1983-84	1984-85	1985-86	1986-87
New applications received	4	9	19	20	22	36	16
Approved (a)	0	2	1	2	3	8	4
Refused (a)	1	1	7	9	2	5	5
Not proceeded with (a) (b)	-	-	-	-	12	3	18
Matters on hand at end of year (c)	-	-	-	-	-	20	9
Commitment \$ (d)	-	-	3 000	61 250	25 000	219 254	176 109
Expenditure \$ (e)	1 700	3 147	-	11 158	11 598	139 223	150 895

Source: Information obtained from Attorney-General's Department Annual Reports

Notes to table 2:

- (a) Includes any applications on hand from previous year.
- (b) Matters listed as not proceeded with are those which have received consideration but were not finalised before being withdrawn by the applicant. There are no figures available for this in the years prior to 1984-85.
- (c) This may include applications received in a previous year. There are no figures available for matters on hand in the years prior to 1985-86.
- (d) Means the amount approved by way of grant of financial assistance based on estimate of total legal costs and disbursements to be funded.
- (e) Means the amount paid for legal costs and disbursements following assessment of bills of costs.

31. The Council secretariat has been advised by an officer of the Office of Legal Aid Administration that an example of a case where assistance is given under the public interest and test case scheme is where an applicant may not meet the hardship requirements of a statutory assistance scheme such as section 69 but-

- (a) the case raises issues involving novel and unresolved aspects of the law, or
- (b) there are many cases of a like nature and guidance is required as to the application of the law in respect of those cases.

No independent review mechanism for decisions concerning legal and financial assistance

32. All the relevant State and Territory legislation constituting the State and Territory legal aid commissions accords to a person adversely affected by a decision on an application for aid a statutory right to have that decision reconsidered by a review committee established under that legislation. The ALAO, the statutory legal and financial assistance schemes (including the section 69 scheme) and the non-statutory scheme have no such formal merits review or appeal mechanism, although internal reviews of decisions are made upon request by applicants for assistance and reasons are given at all stages. (In any event reasons are obtainable under section 13 of the Administrative Decisions (Judicial Review) Act.)

Stages of review process at which aid may be required

33. Social security applicants are likely to be amongst those who have the greatest need for legal aid. The provision of legal aid may be required by a social security applicant at any of the stages of the review process: departmental review, review by a Social Security Appeals Tribunal or AAT review. This need for assistance may be in relation to either advice or representation. Table 3 shows the type of legal aid available to a social security applicant at each stage of the review process from the various providers of legal aid.

Table 3: Type of legal aid available to social security applicant

	State or Territory Commissions, ALAO	Aboriginal Legal Services	Community Legal Services	AAT Act s.69
Departmental Review - advice	Yes	Yes	Yes	No
Departmental Review - representation	No	Occasionally	Yes	No
SSAT Review - advice	Yes	Yes	Yes	No
SSAT Review - representation	No	Occasionally	Yes	No
AAT Review - advice	Yes	Yes	Yes	Occasionally
AAT Review - representation	Yes	Occasionally	Occasionally	Yes

34. A number of comments received by the Council suggested that a limited grant of assistance to enable an applicant to proceed in a matter to the preliminary conference stage before the AAT may lead to an early resolution of the matter, with consequent significant savings to all parties concerned. The Office of Legal Aid Administration in the Attorney-General's Department has advised the Council's secretariat that assistance is often granted under section 69 to enable the applicant to engage a solicitor to provide an opinion on the prospects of success in the applicant's case. This allows preliminary fact-finding and investigation in relation to the case. Assistance may be continued depending on the results of the preliminary steps. Officers of the New South Wales and Victorian legal aid commissions advised that they usually grant legal aid on the basis that it can be withdrawn at any stage of proceedings. They also advised that it is often only at the preliminary conference stage of an AAT proceeding that the real merits of the case will be ascertainable.

35. The Council recognises that, in certain cases, it may be necessary for assistance to be granted under section 69 so that a solicitor may be able to be engaged to undertake preliminary fact-finding in connection with the applicant's case. Subject to that, the Council considers that in the majority of cases it would be appropriate for assistance to be committed for the whole of the applicant's case. In some cases, however, it may be appropriate for assistance to be given only to the preliminary conference stage of an AAT proceeding. Once that stage was concluded, the whole case could be reassessed. This approach may have advantages over the commitment of aid to the full case subject to withdrawal if the case is not of sufficient merit. The approach would serve to improve the quality of representation at the preliminary conference stage and would put a greater emphasis on the importance of that stage. It may encourage settlements at that stage.

36. A further argument that may be made in favour of this approach is that it may allow for more realistic budgeting in connection with the allocation of funds for legal and financial assistance. As can be seen from tables 1 and 2, there is a substantial difference between the amount committed for the provision of assistance and the amount that is actually spent, although it is recognised that the cases for which funds are committed and those on which

funds are expended may not be the same. The approach under which funds were committed only to the preliminary conference stage would not tie up funds at the outset for the whole of a case.

37. There are, however, significant drawbacks involved in the commitment of assistance only to the preliminary conference stage of AAT proceedings. First, the client, having embarked on the review path, will be faced with the uncertainty about whether his or her case will continue to be funded beyond the preliminary conference stage. Secondly, this uncertainty may lead the client to agree to an unreasonable settlement at that stage. Thirdly, if the matter does not settle at that stage, the solicitor representing the client may feel compelled, in accordance with legal ethics, to continue to represent the client, notwithstanding the client's inability to pay. This may discourage solicitors from accepting cases which have been given such limited assistance. Finally, it may be argued that, although the AAT is presently moving to upgrade the preliminary conference stage in its proceedings, often that stage is not a settlement stage but merely serves as a mechanism for sorting out the real issues in the particular case.

Welfare rights centres

38. Officers of the Council secretariat conducted discussions with welfare rights centres in Brisbane, Sydney and Canberra and with staff at various levels of the Department of Social Security on the operation of the centres. The centres are community legal centres which specialise in social security advice and representation. Each of the centres places significant emphasis on representation at departmental level, on delivery of high level advice early in appeal and review processes (see table 3) and on training, education and close day to day work with welfare agencies in order to improve the assistance provided by those agencies. A number of the centres have deliberately developed significant levels of specialisation in income maintenance law.

39. The Sydney Welfare Rights Centre has advised the Council secretariat that in 1987 it assisted over 2 000 clients. The assistance provided to clients was generally, of the following kinds:

- providing basic advice about rights and entitlements;
- carrying out case-work research and writing submissions which in many cases resolves problems without the need to appeal or take other legal action;
- assisting clients with appeals to the SSAT either by representing the client at the hearing and/or providing a written submission to the Tribunal;
- through its employed solicitors, handling cases in the AAT and, from time to time, the Federal Court.

During 1987 the centre assisted in more than 80 SSAT hearings and 24 AAT appeals conducted by the centre's solicitors were concluded. The policy of the centre in relation to AAT work is to focus on cases which raise legal or policy issues of importance to significant numbers of social security recipients. Where an AAT appeal proceeds to a full hearing, legal aid from the N.S.W. Legal Aid Commission is often obtained. In 1987 the core funding of the centre was mainly from the New South Wales Department of Youth and Community Services and the Sydney City Council. In addition, the centre received a number of grants earmarked for particular projects. One grant from the NSW Legal Aid Commission enabled the centre to employ a second solicitor.

40. The Council considers that welfare rights centres make a substantial contribution to their clients obtaining effective access to the appeals and review system and provide a

significant impetus to the improvement of initial decision making generally. For this reason, the Council considers that the continued funding of the centres by government instrumentalities, amongst others, is worthwhile and should be continued.

CHAPTER 3

OPERATION OF SECTION 69 OF THE ADMINISTRATIVE APPEALS TRIBUNAL ACT 1975

Section 69 as a special case provider of assistance

41. The scheme of assistance under section 69 is fundamentally different to aid administered by State or Territory legal aid authorities. As was mentioned in chapter 1, it functions as a special case provider of assistance. Assistance under section 69 can be provided in cases where an applicant does not qualify under the means or merits test of the relevant State or Territory authority but where there are special factors involved. If the Attorney-General did not provide assistance under section 69 in these cases, they might not proceed. The scheme under section 69 gives the provision of assistance in matters arising under the AAT Act a flexibility that is not available through reliance solely on State or Territory legal aid authorities. The Attorney-General when considering whether it is reasonable to grant an application under section 69 can take into account a range of factors such as whether there is an element of public interest in the matter or whether an applicant who is outside the means test of a State or Territory legal aid authority is nevertheless unable to afford a demonstrably meritorious appeal.

42. As mentioned above (para. 25), guideline 9 states that the Attorney-General may decline to grant assistance if it is available from another source and there is no element of public interest in the proceedings. If, as appears to be the case, the section 69 scheme is, as a general rule, to be administered by considering an application for assistance only after rejection by a State or Territory legal aid authority, the guidelines should be revised to reflect that situation. The guidelines should emphasise that ordinarily assistance will only be provided in a case where legal aid is not available from a State or Territory legal aid authority.

43. In relation to the determination under sub-section 69(2) whether it would involve hardship to a person to refuse that person's application, the practice referred to in paragraph 23 above of referring to the means test of the relevant local legal aid authority as a first step may be appropriate. However, while the local means test may provide a guide to hardship, it should not be the determinative test. In the Council's view, the guidelines should be clarified to make it clear that, while the local means test may be referred to as a guide to determining hardship, it is merely one of a number of factors the Attorney-General should take into account.

44. In relation to the determination under section 69(2) whether it is reasonable in all the circumstances to grant an application, guideline 8 refers to various matters which may be taken into account, including the public interest element in the proceedings. Guideline 9, on the other hand, appears to contradict guideline 8. Guideline 9 appears to promote public interest as a central criterion, indicating that the Attorney-General may decline to grant assistance if there is no element of public interest in the proceedings. In the Council's opinion, this guideline does not accord with the language of the statute. The guidelines should be revised to make it clear that public interest is only one of several factors which may be taken into account.

45. It was mentioned above (para. 17) that the assistance granted under section 69 is treated as not extending to indemnities against an award of costs, although costs awards are relevant in section 69 cases involving an appeal to the Federal Court. Although the Council is fully aware that the funds available under section 69 are finite and that the scheme has to be administered in the way that gets best value from those funds, the Council is of the view that assistance by way of an indemnity against an award of costs should be available at least in those cases involving a strong public interest element. The guidelines should be amended accordingly.

46. It was noted at paragraph 26 above that the guidelines for the provision of legal or financial assistance by the Commonwealth have an application beyond section 69. Thus the revision of the guidelines which the Council proposes would affect the provision of assistance under the statutory schemes identical to section 69 to which the guidelines apply'. The fact that the guidelines have application beyond section 69 emphasises the need for their revision.

Recommendation 1: Operation of section 69 as a special case provider of assistance

- (1) Section 69 of the Administrative Appeals Tribunal Act should be retained in its current form.**
- (2) The guidelines relating to the provision of legal or financial assistance by the Commonwealth should generally be revised for clarity and, more particularly, be revised as follows:**
 - (a) to emphasise that ordinarily assistance will only be provided in a case where legal aid is not available from a State or Territory legal aid authority;**
 - (b) to make it clear that, while reference may be made to the means test for legal aid which applies in the particular State or Territory where the applicant resides as a guide concerning hardship, it is merely one of several factors that may be taken into account;**
 - (c) to make it clear that, in determining whether it is reasonable for the purposes of section 69 to grant assistance, the existence of an element of public interest in the proceedings concerned may be only one of several factors that are taken into account; and**
 - (d) to indicate that, in cases where a strong public interest element exists and where party and party costs may be involved, assistance may extend to an indemnity against an award of costs.**

File based decision making

47. As was mentioned above (para. 3), assistance under section 69 is administered by the Office of Legal Aid Administration in the Attorney-General's Department in Canberra. All applications for such assistance are in writing and the application form seeks a range of information about the applicant under the following headings:

- personal particulars of applicant;
- particulars of applicant's solicitor;
- matter in which assistance is sought;
- particulars of applicant's dependants;
- particulars of weekly income and commitments;
- particulars of assets;
- contribution (to costs which applicant can meet).

48. Although some discussion of matters relevant to the application may take place by telephone, the bulk of consideration is paper based. In a significant number of cases this file

based decision making does not present a major access problem as applications for aid are made by private legal practitioners or have been referred by a State commission. On the other hand, it may be argued that regionalised offices with the capacity for conducting personal interviews would be better able to make decisions on legal aid than Canberra based officers working off file. A legal aid scheme administered from a central government office in Canberra has the potential to become unwieldy. To overcome any lack of details that might, in other circumstances, be remedied by personal contact with the applicant, the Office of Legal Aid Administration has taken the view that an application form separate from any application form which the applicant might have used in seeking aid from a State or Territory legal aid body is necessary. As mentioned below, this has led to criticisms of the operation of the section 69 scheme which may, in the opinion of the Council, be overcome by a decentralised information gathering role being played by the State or Territory legal aid commission (paras 56-58).

49. Balanced against the potential access problems associated with the operation of the section 69 scheme are several arguments in favour of its centralised administration. First, the point may be made that section 69 is a special case provider of assistance in a very small proportion of the legally aided cases before the AAT; the bulk of the legally aided cases are aided through the State and Territory commissions. Secondly, a centralised administration ensures that a consistent approach is taken to the determination of what constitutes reasonableness for the purposes of section 69. Thirdly, a centralised administration is able to assess the special features of a case on a wider basis than a regional administration could. For example, a number of departments refer their unusual or 'hard' cases to the central office of the department in Canberra for assessment of the approach to be taken having regard to the implications for the department over the whole of Australia, and a centralised legal aid scheme is in a better position than a regional administration to liaise with the department if necessary and assess the reasonableness of an application in respect of those cases. Another argument for a centralised administration is that better control can be kept over the overall costs of the scheme within the scheme's budget appropriation.

50. As mentioned above at paragraph 20, if all State legal aid authorities were to follow the approach of the ALAO in Tasmania and the Northern Territory and the N.S.W. Legal Aid Commission in providing assistance to veterans in respect of AAT matters free of a means test, the number of section 69 applications could be expected to decrease and the scheme would better reflect its function as a special case provider of assistance. If this were to happen, the potential for access problems caused by a centralised file based decision making system would also be decreased.

Information on section 69 given to applicants

51. When an acknowledgment of receipt of an application for review by the Administrative Appeals Tribunal is given to an applicant, the applicant is advised that he or she may be able to obtain legal advice and assistance from the Australian Legal Aid Office or a legal aid commission in the applicant's State or Territory or, alternatively, under section 69 of the AAT Act. Aid is said to be available from 2 sources and there is no qualification stated in respect of assistance under section 69. It is described as a direct and unfettered alternative.

52. However, in practice if an applicant to the AAT chooses to write to the Attorney-General's Department seeking assistance before approaching a State or Territory legal aid authority, the applicant will receive a reply stating that the application cannot be considered unless and until the applicant is refused assistance by the relevant State or Territory

authority. This procedure is unnecessarily complex and confusing. Table 1 at paragraph 20 above indicates that many of the applicants under section 69 'withdraw' by not being heard from after the initial reply from the Department.

53. The issue of what information should be provided with notification of a decision was examined by the Council in Report No. 27, *Notification of Decisions and Rights of Review*. Recommendation 5 of that report sets down a code of practice for notification of decisions and rights of review. Paragraph 5 of the code provides that agencies should consider for inclusion in notices about review rights information concerning the availability of legal, financial and other forms of assistance. The code of practice does not deal with notices provided by the AAT itself, but the Council notes that the AAT's practice in notifying applicants about the possibility of legal advice and assistance is consistent with the code.

54. It is not, however, of assistance to applicants to the AAT to present assistance under section 69 as a direct alternative to assistance from the State or Territory legal aid authorities. In the Council's opinion, applicants should not be advised that section 69 is a direct alternative. It should be made clear that section 69 is a special case provider of assistance.

55. Consistently with the recommendations made in Report No. 27, the Council is further of the view that the primary responsibility for informing applicants about the possibility of legal and financial assistance should rest upon the agency whose decision is subject to review by the AAT. Notices should also inform applicants about the possibility of assistance being available under the non-statutory scheme for public interest and test cases. If the brochure setting out the guidelines for legal and financial assistance is revised as recommended by the Council in this report, that brochure should be made available to agencies so that they can supply it to applicants who may wish to have decisions of the agencies reviewed.

Recommendation 2: Notification and advice about legal and financial assistance schemes

- (1) When, in a notice concerning the right to have a decision reviewed by the AAT, an agency includes information about the availability of legal and financial assistance, the information should-**
 - (a) inform the person concerned of the potential for assistance from a State or Territory legal aid authority and the procedures for making an application for such assistance; and**
 - (b) inform the person that assistance may be available under section 69 of the Administrative Appeals Tribunal Act, or under the non-statutory scheme relating to public interest and test cases, but, ordinarily, only if the person's application for assistance has been rejected by the relevant State or Territory legal aid authority.**
- (2) The Attorney-General's Department should make available to Commonwealth agencies the brochure concerning legal and financial assistance schemes so that agencies may bring the brochure to the attention of their clients.**

Initiation by State or Territory legal aid authorities of applications for assistance under Commonwealth scheme

56. Once an applicant has been rejected by a State or Territory legal aid authority, the applicant (or his legal representative) who wishes to pursue an application under section 69 must make a separate application to the Attorney-General's Department. It was mentioned

above that the separate application form is seen to be necessary because of the centralised administration of the scheme and the consequent perceived need for all relevant information concerning the applicant to be gathered in one comprehensive step so far as that is possible. Nonetheless, the duplication of information already provided to the State or Territory legal aid authority is a cause of confusion to applicants and involves delay. In many cases the applicant will have been informed of the availability of section 69 assistance by the relevant State or Territory legal aid authority. This duplication in relation to a provision identical in the way it is administered to section 69 was criticised by Justice Burchett in *Cameron Unit Services Pty Ltd & Anor v Kevin R Whelpton & Associates & Anor* (unreported 24 September 1986) who said that:

gross delays, productive of hardship and injustice, not only for an applicant for legal aid but also for other parties, can be caused when one Government body, charged with the administration of legal aid, takes the course of deferring an applicant's hopes, rather than dealing fully with his application, by sending him to some other Government body. If the Australian Legal Aid Office thought the case one more appropriate to be dealt with under s.170 of the Trade Practices Act than under the general provisions of legal aid, I am unable to understand why it could not itself have raised that question with the Attorney-General's Department in the course of its own consideration of the application made to it. Both parties in this case have suffered from its failure to do so.

57. With the agreement of the applicant, it would be desirable for the relevant State or Territory authority itself to approach the Attorney-General's Department in cases where assistance has not been granted by that body but where it feels that the matter is of such a nature that it should be considered under section 69. The State or Territory authority when referring a case to the Attorney-General's Department should provide whatever additional information in respect of the applicant that the Attorney-General's Department has previously indicated will be necessary for the consideration of an application under section 69. If the authority thinks that the matter is not of sufficient merit to attract the possibility of assistance under section 69, it should simply inform the applicant of the existence of the scheme and indicate the shortcomings of the applicant's case. The forwarding of applications by the State and Territory bodies would mean that an applicant would not be required to duplicate information already provided. Furthermore, some of the difficulty faced by an applicant in being required to address uncertain concepts such as public interest may be avoided. The applicant should, however, be given an opportunity of making additional submissions in respect of the application especially where his or her circumstances have changed since the original application was made to the State or Territory body. The Attorney-General's Department would then assess the claim on the basis of all information provided by the State or Territory body and obtain any additional information required from the applicant.

58. The operation of the scheme outlined above for dealing with section 69 applications is dependent upon the State and Territory legal aid authorities having up to date information about the administration of section 69. The Office of Legal Aid Administration in the Attorney-General's Department should take steps to ensure that such information is regularly provided to the State and Territory authorities.

Recommendation 3: Initiation of applications by State or Territory legal aid authorities

(1) Where an application for assistance has been rejected by a State or Territory legal aid authority and the authority believes that the application may reasonably be considered to come within the guidelines relating to section 69 of the Administrative Appeals Tribunal Act or the non-statutory scheme relating to public interest and test cases, the State or Territory authority should, if the

applicant agrees, forward the application to the Office of Legal Aid Administration in the Attorney-General's Department and inform the applicant of the requirements of section 69, and of the non-statutory scheme, so that the applicant may make additional submissions to the Attorney-General's Department.

- (2) The Office of Legal Aid Administration should treat an application so forwarded as an application under section 69, or under the non-statutory scheme, and should not require the applicant to fill out a separate application form.
- (3) Where an application for assistance has been rejected by a State or Territory legal aid authority and the authority believes that the application is unlikely to attract assistance under section 69, or under the non-statutory scheme, the State or Territory authority should nonetheless inform the applicant that the applicant has a right to apply for assistance under the section 69 scheme or the non-statutory scheme and should advise the applicant of the requirements of those schemes and the procedures for making an application under them.

Financial assistance other than legal assistance under section 69

59. Section 69 provides for financial assistance together with, or independently of, legal assistance. The Attorney-General's Department accepts that the provision extends to payment for expenses that are associated with attendance at or conduct of AAT proceedings. However, the Office of Legal Aid Administration in the Department has only rarely received an application for financial assistance independently of an application for legal assistance.

60. The major categories of need for assistance are:

- (a) costs of expert evidence, in particular of doctor's reports;
- (b) transport and accommodation to enable attendance at the Tribunal;
- (c) costs of care of dependants to enable attendance at the Tribunal.

61. The Council understands that it is common for a grant of assistance to cover the costs of getting medical opinions, where necessary, and that occasionally transport and accommodation costs to enable attendance at the Tribunal may be covered. In the Council's view, however, financial assistance to cover these costs and also the costs of providing care to dependants of the applicant while the applicant attends the Tribunal hearing should be available independently of the provision of legal assistance. The provision in appropriate cases of assistance of this kind without legal assistance necessarily being provided may often prove to be a cost effective use of limited legal and financial assistance funds.

62. It is desirable that State and Territory legal aid authorities also provide such assistance in administrative review matters. However, the relevant State and Territory legislation under which the legal aid commissions are established generally only refers to the grant of legal assistance and arguably does not empower them to grant financial assistance. In the Council's view, the Commonwealth should endeavour, by means of guidelines or the attaching of conditions to the provision of funds, to persuade the State and Territory governments to provide such assistance. The provision of financial assistance without legal assistance in appropriate cases is likely to prove cost effective in the long run. If necessary, the Commonwealth should encourage the State and Territory governments to seek amendments of their legislation to empower the legal aid commissions to be the providers of such assistance.

Recommendation 4: Provision of financial assistance other than legal assistance

- (1) As a means of improving access to review and of potentially decreasing the cost to the community of certain AAT hearings, financial assistance for certain non-legal costs incurred in the conduct of proceedings before the AAT such as-
 - (a) costs related to the production of evidence reasonably required for the purpose of the proceedings (eg medical evidence);
 - (b) travel and accommodation costs for the purpose of attending at the proceedings; and
 - (c) costs of providing care to dependants of the applicant necessitated by attendance at the hearing, should be available under the Commonwealth legal and financial assistance schemes and also through the legal aid schemes administered by, State and Territory legal aid authorities.
- (2) The Commonwealth should enter into arrangements with the State and Territory governments to facilitate the provision of such assistance through their legal aid bodies.
- (3) The provision of assistance for the non legal costs referred to in this recommendation should not be dependent upon an applicant having legal representation.

Link between section 69 assistance and assistance in public interest and test cases

63. Section 69 (2) of the AAT Act requires the Attorney-General to be satisfied that it would involve hardship to a person to refuse the person's application under section 69. As a result, assistance under the section cannot be provided where the applicant is considered to have sufficient funds to meet the costs of the case. The non-statutory scheme on the other hand provides the Attorney-General with flexibility where assistance is considered desirable in such a case. However, the distinction between the non-statutory scheme and the section 69 scheme is not clear on the face of the guidelines. In the Council's view, the guidelines should be clarified to stress that where, under a statutory scheme such as section 69, a condition precedent such as hardship is not met, it may still be possible for assistance to be granted if the case raises a novel or unresolved issue, the resolution of which is of public importance, or the case is a test case.

64. The Council secretariat has been advised of an instance where a person was given legal assistance by a State legal aid authority in respect of an administrative law case that raised major issues of public importance but the State authority did not provide an indemnity for an award of costs against the person. Without such an indemnity the matter would not proceed. Assistance was not given by the Attorney-General, however, as the matter did not come within the practice under the Commonwealth guidelines, aid being available from a State or Territory legal aid authority. This was notwithstanding that the case would not proceed without an indemnity for costs and notwithstanding a very strong public interest element. Earlier in this report (para. 17) the Council commented on the unavailability of assistance under section 69 by way of an indemnity against an award of costs. The case for such assistance to be available under the non-statutory scheme relating to public interest cases is considerably stronger. In the Council's view, such assistance should be available under that scheme and the guidelines relating to that scheme should be amended to indicate that such assistance may be available.

Recommendation 5: Revision of guidelines relating to assistance in public interest and test cases

- (1) **The guidelines for the provision of legal or financial assistance by the Commonwealth should be revised to indicate that where, under a statutory scheme, a condition precedent such as hardship is not met, it may still be possible for assistance to be granted if the case raises a novel or unresolved issue, the resolution of which is of public importance, or the case is a test case.**
- (2) **Assistance by way of an indemnity against an award of costs should be available under the non-statutory scheme relating to public interest cases, and the guidelines should be amended to indicate that such assistance may be available.**

Consistency in provision of aid

65. The Council notes that the question of consistency in the provision of legal aid in federal matters between all States and Territories was addressed in the report of the Legal Aid Task Force referred to in paragraph 11. The task force concluded, amongst other things, that Australians do not have equal access to legal aid funds. Because of variations in the means tests applied in the States and Territories, some persons will be eligible for substantive legal assistance yet other persons in similar financial circumstances will not be eligible. The task force recommended that as a long term objective attempts be made to achieve total uniformity of means testing for eligibility purposes. The Council has been informed that the State and Territory legal aid commissions and the Commonwealth are presently looking into this matter.

66. It is beyond the scope of this report to examine in depth the highly complex questions of the provision of legal aid in Australia. The Council notes, however, that in the social security jurisdiction it is open to an applicant to commence proceedings in any registry of any of the tribunals concerned. It is not equitable that the choice of registry, by determining the forum for the purposes of legal aid, might make a difference as to eligibility for legal aid. There is a strong case, in federal administrative review matters particularly, for greater consistency in eligibility criteria of the ALAO and State and Territory commissions. The Council considers that the Commonwealth should attempt to achieve consistency, perhaps through mechanisms by way of guidelines or the attaching of conditions to the provision of funds.

Recommendation 6: Consistency in eligibility requirements for assistance
The government should take steps to encourage greater consistency between different States and Territories in relation to eligibility requirements for assistance in federal administrative review matters.

CHAPTER 4

CONSIDERATION AND IMPLEMENTATION OF RECOMMENDATIONS

67. In December 1986 the Attorney-General announced that a new structure to administer, coordinate and provide advice to the government on legal aid was to be established. This structure is set out in the *Commonwealth Legal Aid Amendment Act 1988*. The Act received Royal Assent on 1 March 1988. It provides for the creation of 2 bodies to advise the Attorney-General on legal aid needs, funding, organisation and delivery methods on a national basis. The bodies are the National Legal Aid Representative Council and the National Legal Aid Advisory Committee.

68. The National Legal Aid Representative Council will consist of members appointed directly by all major legal aid interest groups such as the legal aid authorities in the States and Territories, the private legal profession, legal aid consumers, community legal centres and the Commonwealth. The Council will have about 20 members and, because of its size and nature, will meet normally only once a year. The National Legal Aid Advisory Committee will consist of 7 members appointed directly by the Attorney-General for their individual expertise in legal aid. The Committee will be able to raise matters on its own initiative but the Attorney-General will have the ability to direct it as to the issues he wishes it to examine. The Committee will be a smaller, tighter body than the Council and will meet more frequently than the Council (probably up to 5 times per year).

69. The Council believes that it would be appropriate for the National Legal Aid Advisory Committee to consider the recommendations made in this report and that the Attorney-General should forward the recommendations to that Committee. A further matter which the Council considers the Committee should consider is the lack of a formal merits review or appeal mechanism for decisions on assistance under the ALAO scheme, the statutory legal and financial assistance schemes (including the scheme under section 69 of the AAT Act) and the non-statutory scheme. The absence of a formal review mechanism was commented upon at paragraph 32 above.

Recommendation 7: Consideration of recommendations made in this report
The National Legal Aid Advisory Committee should be requested to consider the recommendations made in this report and the question of an appropriate formal merits review or appeal mechanism for decisions on legal and financial assistance under the Commonwealth schemes.

APPENDIX 1

GUIDELINES FOR THE PROVISION OF LEGAL OR FINANCIAL ASSISTANCE BY THE COMMONWEALTH OTHER THAN UNDER THE CONCILIATION AND ARBITRATION ACT

These Guidelines are concerned with the provision by the Commonwealth of legal or financial assistance in-

- Aboriginal Land Commissioner Hearings
- Administrative Appeals Tribunal Cases
- Australian Security Intelligence Organisation (Security Appeals Tribunal) Cases
- Racial Discrimination Cases
- Repatriation Appeals Tribunal Cases
- Trade Practices Cases
- Non-Statutory Schemes, e.g. Public Interest and Test Cases, Overseas Custody (Child Removal) Cases and Environmental Cases

Statutory Provisions

2. Under the following provisions:

section 69 -Administrative Appeals Tribunal Act 1975;

section 72 -Australian Security Intelligence Organisation Act 1979;

section 45 -Racial Discrimination Act 1975;

section 170 -Trade Practices Act 1974;

legal or financial assistance may be granted, for the purposes and to the persons specified in these sections, unconditionally or subject to conditions, where the Attorney-General is satisfied that:

- it would involve hardship to the applicant to refuse the application, and
- it is reasonable in all the circumstances to grant the application.

3. Under section 54C of the Aboriginal Land Rights (Northern Territory) Act 1976 the Attorney-General may grant assistance, for the purposes and to the persons specified in that section, unconditionally or subject to conditions, where the Attorney-General is satisfied that it is reasonable in all the circumstances to do so. In considering the question of reasonableness, the Attorney-General takes into account the question of hardship.

Guidelines

4. It is a condition precedent to the exercise of the discretion that the Attorney-General is satisfied in regard to hardship and reasonableness. If he is so satisfied the exercise of the discretion is unfettered and accordingly each case must be in the end determined on its own merits and all relevant circumstances must be taken into account.

5. 'Hardship' is interpreted to mean financial hardship and consideration is given to all relevant matters such as income, expenditure, assets and liabilities of the applicant and the estimated costs of the proceedings.

6. The broad test of 'hardship' is whether the applicant has the means to meet the cost of the proceedings without incurring of 'hardship' are more relaxed than in other serious financial difficulty. However, in making this judgment, reference is made to the conditions of eligibility for the grant of legal aid generally.

7. Where the applicant is not a natural person consideration will be given to what other financial resources may be available to it, e.g. guarantees from directors, provision of further funds from shareholders and levies or contributions from members.

8. In determining whether it is reasonable to provide assistance regard is had, amongst other things to:

- (a) the prospects of success
- (b) the nature and extent of the benefit or detriment that may accrue to the applicant
- (c) the availability of legal aid generally
- (d) the benefit to the public or any section of the public.

9. The Attorney-General may decline to grant assistance if it is available from another source and there is no element of public interest in the proceedings.

10. The Attorney-General has regard to the legislative purpose of the provision under which assistance is sought. Each statutory provision is based upon an element of public interest but its degree may vary from case to case.

11. If there is little or no public interest, aid will normally be granted only in circumstances similar to those which govern the grant of legal aid generally.

12. Where a person seeks assistance in regard to proceedings in connection with section 55 of the Trade Practices Act, particular attention is given to the question whether there is likely to be substantial benefit to the public or a significant section of the public arising out of the proceedings.

13. Under section 54c of the Aboriginal Land Rights (Northern Territory) Act 1976 the same guidelines in determining reasonableness and hardship are applied. However, the terms of the provision require

reasonableness that hardship and, accordingly, the conditions required to satisfy the test of 'hardship' are more relaxed than in other cases.

14. The Attorney-General will have regard to the long standing obligation of the Commonwealth to provide legal aid in some war service matters free of any means test. The same consideration may arise in certain cases under section 69 of the Administrative Appeals Act 1975.

15. In deportation cases under section 69 of the Administrative Appeals Act 1975, the Attorney-General will not usually give much weight to the prospects of success as the liberty of the subject is involved.

16. A contribution will be required from the applicant towards the cost of the proceedings commensurate with the applicant's financial circumstances or having regard to the outcome of the proceedings. The applicant may also be required to pay a percentage of the costs.

17. Conditions are imposed to ensure that the costs incurred are reasonable and proper costs. The assistance granted will be a specified percentage of those costs. Alternatively, lump sum fees may be set. The engagement of counsel is not approved as of course.

NON-STATUTORY SCHEMES (e.g. Public Interest and Test Cases, Overseas Custody (Child Removal) Cases and Environmental Cases)

18. *Public Interest and Test Cases*: 'Public interest cases' are those involving questions arising under a law of the Commonwealth the resolution of which by the courts is, in the opinion of the Attorney-General, of public importance. 'Test cases' are those brought for the purpose of resolving an important question arising under Commonwealth law that, in the opinion of the Attorney-General, affects the rights of a section of the public which is, or a group of person who are, for the most part, socially or economically disadvantaged. The guidelines applicable to applications for assistance in these cases are those that apply to applications for assistance under the

somewhat greater consideration to

statutory provisions set out above.

19. Overseas Custody (Child Removal)

Cases: Financial assistance may be provided to assist a parent to institute legal proceedings overseas for recovery of his or her children removed from Australia by other parent. An applicant for financial assistance in an Overseas Custody (Child Removal) case should satisfy the guidelines generally applying to the statutory provisions set out above except that the applicant is not required to demonstrate that a degree of public interest is present in the matter.

20. Environmental Cases: The environmental issue must affect the national interest or such a substantial public interest as to be of national concern. The 'national interest' is assessed by having regard to sources such as:

- the Australian Heritage Commission,
- the National Trust,
- the report of the Committee of Inquiry into the National Estate,
- Reports of Parliamentary Committees dealing with environmental and conservation matters,
- Reports of Commissions of Inquiry made pursuant to the Environmental Protection (Impact of Proposals) Act 1974, and
- The Commonwealth Department concerned with the conservation, management and protection of the environment.

The matter in issue should relate to preservation of the environment or wildlife from damage or destruction adverse to the national interest. Ordinarily the environmental issue will only arise in relation to Commonwealth activity or under a law of the Commonwealth.

21. The applicant should be a conservationist group which, or an individual who, in the national interest, is prepared to be a party to proceedings and possible personally liable for costs. The applicant should, by reason of lack of means, be prevented from pursuing the proceedings if financial assistance is not provided. The applicant must be prepared to contribute 'self help' in terms of financial contribution, voluntary effort or expertise and effort in obtaining evidence and preparing material.

22. Regard is had to all the circumstances including the nature of the proceedings and the extent to which they will assist in bringing to issue the environmental problem.

23. Counsel's opinion as to the prospects of success of the proposed proceedings will ordinarily be required.

24. Applications for legal or financial assistance in environmental cases will be determined after considering the items mentioned in paragraphs 20 to 23 above.

Applications for Assistance

25. Applications for assistance, or enquiries relating to the provision of legal or financial assistance by the Commonwealth, should be addressed to:

The Secretary,
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON A.C.T. 2600

ATTORNEY-GENERAL'S DEPARTMENT
1981