

# Chapter 4

## Commonwealth Law Guidelines

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### Part 1

### Application

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#### Guideline 1

#### Interpretation

Unless the contrary intention appears, the terms and expressions used in these Commonwealth Legal Aid Guidelines have the meaning as given to them either:

- (a) in the Commonwealth legislation that the relevant guideline refers to, or
- (b) in clause 28 (interpretation and definitions) of the Agreement, which are reproduced below:

Allowed Surplus	means the amount determined in accordance with subclause 8.1
Attorney-General's Department	means the Australian Government Attorney-General's Department
Commission	means the Northern Territory Legal Aid Commission
Commonwealth	means the Commonwealth of Australia
Commonwealth Criminal Law – Expensive Cases Fund	the fund described in guideline 12 of Part 3 (Criminal Law Guidelines) of the Commonwealth Legal Aid Guidelines
Commonwealth Law Matter	means any legal matter that arises under a law of the Commonwealth
Commonwealth Legal Aid Guidelines	means the Commonwealth guidelines set out at Schedule 3 which are issued by the Commonwealth Minister from time to time to be applied in relation to the provision of PDR Services and Litigation Services under this Agreement

Commonwealth Legal Aid Monies	has the meaning given to it be subparagraph 3.5.2
Commonwealth Legal Aid Priorities	means Commonwealth Law Matters that are defined as Commonwealth priorities in clause 6.
Commonwealth Liaison Officer	means the officer nominated at Item C of Schedule 5 as the Liaison Officer for the Commonwealth in connection with this Agreement, or a person nominated for the purpose by the Commonwealth Liaison Officer from time to time and advised to the Commission.
Contributions	means any amounts levied by the Commission upon Legally Assisted Persons in accordance with the Act as a condition of a Grant of Legal Assistance.
Costs Recovered	means any amounts recovered by the Commission, other than by way of a Contribution, for the cost of a Legally Assisted Person's Grant of Legal Assistance made under this Agreement, for example by way of a costs order made by a court or costs paid under a settlement that are over and above the amount to be paid to the Legally Assisted Person by way of settlement.
Duty Lawyer Services	means the services set out at Item D of Schedule 1
External Service Providers	means persons or organisations external to the Commission who provide any of the Legal Aid Services pursuant to this Agreement under an arrangement, agreement or subcontract with the Commission.
Family Law Costs Management Methodology	means the method by which the Commission agrees to manage the costs of family law matters as described at Item D of Schedule 2 and set out at Appendix C to Schedule 2.
Financial Year	means a period of 12 months commencing on 1 July and ending on the following 30 June apart from the First Financial Year.

Grant of Legal Assistance	means a grant for the provision of PDR Services or Litigation Services made by the Commission to a person (a Legally Assisted Person) in accordance with the Act and with the terms and conditions of this Agreement. A Grant comprises the initial grant made when an Application is approved and any extensions of assistance approved in relation to that Application.
Legally Assisted Person	means a person who is receiving or has received a Grant of Legal Assistance from the Commission.
Litigation Services	means the services set out in Item F of Schedule 1.
Northern Territory Liaison Officer	means the officer nominated at Item C of Schedule 5 as the Liaison Officer for the Commission in connection with this Agreement, or a person nominated for the purpose by the Northern Territory Liaison Officer from time to time and advised to the Commonwealth.
Primary Dispute Resolution (PDR Services)	means the services set out at Item E of Schedule 1.

## **Guideline 2 Basis of Determination of Grant of Legal Assistance**

- (1) The Commission may make a Grant of Legal Assistance for an application for assistance that:
  - (a) is for assistance for a Commonwealth Law Matter
  - (b) is within a Commonwealth Legal Aid Priority
  - (c) meets any guidelines set out in these Commonwealth Legal Aid Guidelines that are relevant to the application
  - (d) meets the means test in guideline 3 of this Part 1 (unless otherwise specified in these Guidelines), and
  - (e) meets the merits test in guideline 4 of this Part 1 (unless otherwise specified in these Commonwealth Legal Aid Guidelines)

- (2) When determining whether a Grant of Legal Assistance is to be made, the Commission should apply guideline 2(1) (a), (b), (c), (d) and (e) in that order.
- (3) If an application for a Grant of Legal Assistance meets the criteria in this guideline 2(1), the Commission must determine, in accordance with these Commonwealth Legal Aid Guidelines and after giving consideration to available Commonwealth Legal Aid Monies and competing Commonwealth Legal Aid Priorities, whether a Grant is to be made and, if so, the nature and extent of that Grant.
- (4) If, apart from this Part 1, there is no guideline relating specifically to a Commonwealth Legal Aid Priority, the Commission may make a Grant of Legal Assistance in the manner, and to the extent, it considers appropriate in that priority area.
- (5) In a case involving domestic violence in relation to an applicant or a child, in deciding whether to make a Grant of Legal Assistance, and the nature and extent of any such assistance, the Commission should have regard to any guidelines or procedures used in the Commission's State or Territory for determining grants of legal assistance for domestic violence matters arising under its State or Territory legislation.

*Note:* This is not intended to pick up matters that are properly classed as State or Territory law matters. The intention is to ensure that domestic violence matters arising under Commonwealth laws are treated consistently with domestic violence matters arising under State or Territory laws.
- (6) The Commission must ensure that any litigation, for which a Grant of Legal Assistance is made under these Commonwealth Legal Aid Guidelines, is conducted in a cost effective manner.

### **Guideline 3**

### **The Means Test**

Unless the Commonwealth Minister directs the Commission, in writing, to apply a different test, the means test to be applied by the Commission is the means test used by the Commission, at the date of the relevant application for assistance, for applications for assistance in State or Territory law matters.

*Note:* The Commonwealth's strong preference is for the Commission to use the simplified means test developed for Legal Aid Queensland, and for this test to be adopted nationally.

- (1) To satisfy the merits test, the applicant for assistance must meet each of the following 3 tests:
  - (a) the *reasonable prospects of success* test in guideline 4(2)
  - (b) the *prudent self-funding litigant* test in guideline 4(3), and
  - (c) the *appropriateness of spending limited public legal aid funds* test in guideline 4(4).
- (2) The *reasonable prospects of success* test is met only if, on the information provided to the Commission, it appears to the Commission that, on the legal and factual merits, the proposed action, application, defence or response for which a Grant of Legal Assistance is sought is more likely than not to succeed.
- (3) The *prudent self-funding litigant* test is met only if the Commission considers that a prudent self-funding litigant would risk his or her own financial resources in funding the proposed action, application, defence or response for which a Grant of Legal Assistance is sought.

*Note:* Legal aid is a benefit funded by Australian taxpayers. Many taxpayers who are above the means test threshold for the granting of legal assistance have their own access to justice constrained in whole or in part because of limited financial resources. To reduce the inequity between those who have access to assistance and those who are marginally excluded, the Commonwealth aims to have strategies adopted that will provide solutions to assisted clients' problems at minimum cost. The test of the 'prudent self-funding litigant', one without 'deep pockets', is one such strategy. It aims to put assisted litigants into an equal but not better position than private litigants without 'deep pockets' who risk their own funds.

- (4) The *appropriateness of spending limited public legal aid funds* test is met only if the Commission considers that the costs involved in providing the assistance are warranted by the likely benefit to the applicant or, in appropriate circumstances, the community.

*Note:* The Commonwealth has numerous competing interests for its legal aid resources, and accordingly requires the Commission to be satisfied that the matter for which legal assistance is sought is an appropriate expenditure of Commonwealth legal aid program resources. Examples of what the Commonwealth considers to be inappropriate expenditures of Commonwealth legal aid resources are:

- (a) applications to the court to dispense with a spouse's consent to a passport so that the applicant and child can travel overseas (as the Commonwealth considers that the contingent documentary costs of overseas travel should form part of the overall expense of the trip), and
- (b) some aspects of family law contact and property disputes, where the issue appears to be of minor significance in relationship to the legal costs that will be incurred in providing the legal assistance, for example, in a contact dispute, where the issue in dispute is who will pay for the child's bus or taxi fare, or who washes the child's clothes, or who provides the child's morning or afternoon tea.

- (5) The merits test is to be applied to all applications for a Grant of Legal Assistance, unless otherwise specified in these Commonwealth Legal Aid Guidelines.

## **Guideline 5**

## **Test Cases**

- (1) The Commission may make a Grant of Legal Assistance for a matter that it considers may be a test case within the meaning of the Commonwealth Public Interest and Test Cases Scheme if the Commission determines that a Grant may be made in accordance with guideline 2 of this Part 1.
- (2) If the Commission does not make a Grant of Legal Assistance for an application for assistance that it considers may be a test case within the meaning of the Commonwealth Public Interest and Test Cases Scheme, the Commission should refer the matter to the Commonwealth Attorney-General's Department for consideration in accordance with the Scheme.

## **Guideline 6**

## **Matters Referred by Attorney-General under Subsection 69(3) of *Judiciary Act 1903***

Matters to which these Commonwealth Legal Aid Guidelines apply include matters referred to the Commission by the Commonwealth Minister under subsection 69(3) of the *Judiciary Act 1903*.

### **Guideline 1**

### **Priority for Urgent Matters**

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*Note:* For the family law priorities in the Commonwealth Legal Aid Priorities, see subclause 6.4 of the Agreement.

#### **1.1 Priority for Urgent Matters**

- (1) Although each of the family law priorities in the Commonwealth Legal Aid Priorities are generally of equal priority, in deciding whether to make a Grant of Legal Assistance for a family law matter in relation to an application to the court for an interim order or injunction, the Commission must give the highest priority to urgent matters.
- (2) Urgent matters are matters in which the Commission determines that:
  - (a) a child's safety or welfare is at risk
  - (b) the applicant's safety is at risk
  - (c) there is an immediate risk of removal of a child from Australia or to a remote geographic region within Australia
  - (d) there is a need to preserve matrimonial property, or
  - (e) other exceptional circumstances exist that require urgent legal assistance.

#### **1.2 Priority for Non-Urgent Matters**

- (1) If the Commission determines that a family law matter that falls within the family law priorities is not urgent, a Grant of Legal Assistance should not be granted until the relevant parties have been separated for a sufficient period of time to enable them to be sure that there are real issues in dispute.

*Note:* Some legal aid commissions refer to this as the 'six-week rule'.

- (2) Guideline 1.2(1) does not apply where the Commission considers that a non-urgent matter warrants a Grant of Legal Assistance for an

application to the court for an interim order or injunction prior to the passing of the sufficient period of time referred to in guideline 1.2(1).

## **Guideline 2                      Primary Dispute Resolution (PDR) Services**

### **2.1 Consideration of Resolution Processes Other than Litigation**

- (1) The Commission must give consideration to resolving disputes in family law matters that are within this Part 2 through the use of PDR Services.
- (2) In a family law matter under this Part 2, the Commission must consider making a Grant of Legal Assistance for an applicant for assistance to participate in PDR Services before it considers making a Grant of Legal Assistance to that applicant for Litigation Services for the matter.
- (3) The Commission may make a Grant of Legal Assistance for an applicant for assistance to participate in PDR Services at any stage of a matter.

### **2.2 Appropriateness of Participation in PDR Services**

- (1) The Commission will only make a Grant of Legal Assistance requiring an applicant to participate in PDR Services if it considers that this is appropriate in the particular case.
- (2) The Commission must give an applicant for assistance the opportunity to give reasons if the applicant is strongly opposed to participating in PDR Services, and the Commission should have regard to these reasons when considering whether or not it is appropriate for the Commission to require the applicant to participate in PDR Services.
- (3) Participation in PDR Services is usually inappropriate where:
  - (a) the matter is considered to be an urgent matter under guideline 1.1 of this Part 2
  - (b) for family law matters relating to a child of the parties, there are any current reported allegations of child abuse, or investigations or court proceedings relating to child abuse are currently taking place
  - (c) a party's safety or ability to negotiate effectively is jeopardised by behaviour of the other party such as violence, intimidation, control or coercion, or a history of such behaviour



- (b) the Commission decides that it is reasonable to provide a Grant of Legal Assistance for the separate representation.

*Note:* A court order that a child representative be appointed in a matter does not impose an obligation on the Commission to make a Grant of Legal Assistance for the separate representation.

- (2) The Commission should make a Grant of Legal Assistance for the separate representation of a child in any court proceedings relating to special medical procedures (including sterilisation).
- (3) An application for a Grant of Legal Assistance under this guideline 3.1 is not subject to the means test.

### **3.2 Payment for the Costs of Separate Representation by a Party not Receiving Legal Assistance**

- (1) If the Commission makes a Grant of Legal Assistance for the separate representation of a child in court proceedings in relation to which at least one of the parties is not receiving legal assistance under a Grant of Legal Assistance, the Commission must:
  - (a) notify each party not receiving legal assistance that each may be required to pay an equal portion of the total costs and disbursements of the child representative
  - (b) taking into account each such party's capacity to pay, determine whether to waive or reduce the amount to be paid by that party, and notify each such party of the amount he or she is required to pay the Commission, and
  - (c) require each such party to pay the required amount in the manner determined by the Commission.
- (2) Guideline 3.2(1) does not apply to proceedings relating to special medical procedures involving a child in which a Grant of Legal Assistance for separate representation of the child has been made, regardless of whether or not any of the parties to the proceedings are receiving legal assistance under a Grant of Legal Assistance.
- (3) If a party refuses or fails to pay the amount required by the Commission under this guideline 3.2, legal assistance for the separate representation should continue to be provided on the condition that the child representative seek an order for costs against that party at an appropriate time in the court proceedings.

**4.1 Assistance for Parenting Orders**

The Commission may make a Grant of Legal Assistance for a court application for a parenting order under the *Family Law Act 1975* if the Commission is satisfied that:

- (a) there is a dispute about a substantial issue, and
- (b) any of the following circumstances apply:
  - (i) recent participation in PDR Services has not resolved the dispute
  - (ii) the other party has refused or failed to attend PDR Services on the issue, or
  - (iii) participation in PDR Services is impractical or inappropriate in accordance with guideline 2 of this Part 2.

**4.2 Assistance for Applications to Discharge or Vary Parenting Orders or Registered Parenting Plans**

(1) Subject to guideline 4.2(2), the Commission may make a Grant of Legal Assistance for a court application to discharge or vary a parenting order or a registered parenting plan under the *Family Law Act 1975* if the Commission is satisfied that:

- (a) there is a dispute about a substantial issue,
- (b) any of the following circumstances apply:
  - (i) recent participation in PDR Services has not resolved the dispute
  - (ii) the other party has refused or failed to attend PDR Services on the issue, or
  - (iii) participation in PDR Services is impractical or inappropriate in accordance with guideline 2 of this Part 2, and
- (c) any of the following circumstances apply:

- (i) there has been a material change in circumstances since the parenting order was made or the parenting plan was registered, or
- (ii) the court application is imperative.

*Examples*

1. The likelihood of violence, or physical or mental harm, to the applicant or a child.
  2. The removal or risk of removal of a child from an applicant who has primary residence responsibilities.
  3. The removal or risk of removal of a child from the jurisdiction of the Court.
  4. The need for an applicant with primary residence responsibilities to move permanently overseas, interstate or elsewhere with a child, if consent is unreasonably refused by another person.
- (2) If the material change in circumstances referred to in guideline 4.2(l)(c)(i) has been caused by the applicant for assistance, the Commission must consider the circumstances surrounding that change in determining whether it is appropriate to make a Grant of Legal Assistance to the applicant.

### **4.3 Assistance to Parties who are not Parents**

The Commission may make a Grant of Legal Assistance to a party who is not a parent in court proceedings relating to a parenting order under the *Family Law Act 1975* if:

- (a) the party is significant to the care, welfare and development of the relevant child, or
- (b) the Commission considers it to be in the child's best interests.

*Example*

It may be in the child's best interests if the child's safety or welfare is at risk.

### **4.4 Assistance where Care and Protection Proceedings**

The Commission may make a Grant of Legal Assistance for a court application for a parenting order under the *Family Law Act 1975* even if there are current care or protection orders in force under a State or Territory law, or court proceedings under a State or Territory child welfare law are currently taking place, in respect of the child.

**5.1 Assistance for Child Maintenance - *Stage 1 matters***

- (1) For the purposes of this guideline 5.1, a child maintenance matter is a *stage 1 matter*-if:
- (a) it relates to a child born before 1 October 1989
  - (b) the parents of the child:
    - (i) have never lived together, or
    - (ii) separated before 1 October 1989, and have not resumed living together, and
  - (c) the child does not have a full blood sibling born on or after that date.
- (2) The Commission may make a Grant of Legal Assistance for a child maintenance application to the court under the *Family Law Act 1975* involving a *stage 1 matter* if the Commission has first determined that it is inappropriate for the matter to be referred for assistance, from either the Commission or an External Service Provider, as follows:
- (a) if the applicant for assistance is a low income earner and is seeking maintenance or increased maintenance - for the applicant to be referred to a child support unit or service, or
  - (b) if the applicant for assistance is a liable parent making application for variation, discharge or suspension of maintenance - for the applicant to be referred to a liable parents information service.

*Example:*

It may be inappropriate for a referral to be made where:

1. the case is very complex
2. the applicant needs urgent orders
3. it is impractical for the applicant for assistance to use one of the service provided by a Commission or an External Service Provider, such as a community legal centre service
4. the applicant will not benefit from attending one of the services because of a language or literacy problem, or an intellectual, psychiatric or physical disability
5. a Grant of Legal Assistance has been made for other court proceedings and maintenance is ancillary to, but cannot be separated from, those proceedings
6. the child is over the age of 18.
7. the applicant is defending an application for a child maintenance order or increased maintenance, and the case is complex or urgent, or
8. paternity is in dispute.

## 5.2 Assistance for Child Support - *Stage 2 matters*

- (1) For the purposes of this guideline 5.2, a child support matter is a ***stage 2 matter*** if it relates to:
  - (a) a child born on or after 1 October 1989
  - (b) a child born before 1 October 1989 whose parents separated after that date, or
  - (c) a child who has a full blood sibling born on or after 1 October 1989.
- (2) The Commission may make a Grant of Legal Assistance for an application for a departure order under the child support legislation in a ***stage 2 matter*** if the services referred to in guidelines 5.1(2)(a) or (b) are unable to assist, and:
  - (a) the applicant seeks departure from a review decision made before 1 July 1992
  - (b) the applicant wishes to oppose an application for a departure order, or
  - (c) the applicant is not satisfied with the decision of an objections officer following a determination made by a senior case officer.
- (3) The Grant of Legal Assistance should usually be limited to proceedings in State or Territory magistrates or local courts or the Federal Magistrates Court, unless such proceedings are unavailable.

## 5.3 Assistance for Applicant Children

The Commission may make a Grant of Legal Assistance for a ***stage 1 matter*** or a ***stage 2 matter*** to a child seeking maintenance, child support or a variation of child support or a child maintenance order if the Commission is satisfied that the child is the most appropriate person to seek the order.

**6.1 Assistance for Applications for Spousal Maintenance**

The Commission may make a Grant of Legal Assistance for a court application under the *Family Law Act 1975* for an order for spousal maintenance or to increase spousal maintenance, if:

- (a) the applicant for assistance cannot obtain the order by consent
- (b) the other party's whereabouts are known, or substituted service is likely to be successful
- (c) there is good reason to believe that the other party has the capacity, or is likely to have the capacity in the future, to pay spousal maintenance or increased maintenance (as the case may be), and
- (d) the applicant for assistance cannot obtain appropriate legal assistance from another source.

**6.2 Assistance to Defend Applications for Spousal Maintenance**

The Commission may make a Grant of Legal Assistance to an applicant for assistance to defend a court application for spousal maintenance or for increased spousal maintenance, if:

- (a) it is unlikely that the court will make an order for the amount sought by the party making the court application, and
- (b) the applicant for assistance cannot adequately defend the court application without legal assistance.

**6.3 Assistance for Applications to Reduce Spousal Maintenance**

The Commission may make a Grant of Legal Assistance for a court application to reduce the amount payable under a spousal maintenance order if the applicant for assistance cannot adequately prepare the court application without legal assistance.

## **Guideline 7**

## **Arrears of Spousal or Child Maintenance or Child Support**

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### **7.1 Assistance for Proceedings for Arrears of Maintenance or Child Support**

The Commission may make a Grant of Legal Assistance for court proceedings for payment of arrears of spousal or child maintenance or child support, if:

- (a)
  - (i) the applicant for assistance cannot adequately prepare the court application or present the case to the court without legal assistance, and
  - (ii) appropriate legal assistance cannot be obtained from another source, or
- (b) the applicant for assistance is also seeking the resolution of another family law matter by the court.

## **Guideline 8**

## **Paternity**

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### **8.1 Assistance for Proceedings Relating to Paternity of a Child**

- (1) The Commission may make a Grant of Legal Assistance to an applicant for assistance who is seeking or opposing a finding of paternity by the court, or seeking an order for parentage testing, if:
  - (a) the Commission's Child Support Unit or Service or some other appropriate service cannot assist
  - (b) either party denies that the male party is the child's father
  - (c) the male party's whereabouts are known, and
  - (d) in a case where a finding of paternity is sought for child maintenance or child support matters —
    - (i) the services referred to in guidelines 5.1(2)(a) or (b) of this Part 2 are unable to assist, and
    - (ii) there is good reason to believe that the other party has the capacity to pay child maintenance or child support (as the case may be) for the child.

- (2) If a male applicant for assistance denies he is the father of the relevant child, the Commission should not make a Grant of Legal Assistance unless the applicant gives the Commission adequate reasons to support the denial and agrees to submit to parentage testing.
- (3) A Grant of Legal Assistance for parentage testing should only be made on the condition that the applicant for assistance seek an order from the court for the costs of the testing, unless the other party to the proceedings is also receiving legal assistance under a Grant of Legal Assistance.

## **Guideline 9                      Special Medical Procedures Involving Children**

### **9.1 Assistance for Parents**

- (1) The Commission should make a Grant of Legal Assistance to the parents of a child in any court proceedings relating to special medical procedures (including sterilisation) involving the child.
- (2) An application for a Grant of Legal Assistance under this guideline 9 is not subject to the merits test

## **Guideline 10                      Recovery, Location and Information Orders**

### **10.1 Assistance for Recovery, Location and Information Orders**

- (1) The Commission may make a Grant of Legal Assistance for proceedings under the *Family Law Act 1975* for a recovery, location and/or information order relating to the location and/or recovery of a child.
- (2) A Grant of Legal Assistance under this guideline 10:
  - (a) should usually be limited to \$2,000, and
  - (b) should only be made on the condition that the applicant for assistance seek a costs order against the respondent to the court application, unless that party is also receiving legal assistance under a Grant of Legal Assistance.
- (3) The Commission should treat proceedings for a recovery, location and/or information order relating to the location and/or recovery of a child as a new matter for the purposes of the Family Law Costs Management Methodology.

## **Guideline 11** **Dissolution (Divorce) and Nullity of Marriage**

### **11.1 Assistance for Dissolution or Nullity of Marriage**

The Commission may make a Grant of Legal Assistance to an applicant for assistance for a court application relating to the dissolution or nullity of the person's marriage if:

- (a) the court application is imperative

*Example*

An application may be imperative if the dissolution or nullity would end continued harassment or ill-treatment of the applicant.

- (b) the applicant for assistance suffers particular hardship, or

*Example*

An applicant may suffer particular hardship if it would be unreasonable to expect the applicant to adequately represent himself or herself due to special circumstances of a kind listed in the Commonwealth Legal Aid Priorities.

*Note:* Special circumstances are set out in subclause paragraph 6.7.2 of the Agreement.

- (c) certain aspects of the court application have a complexity warranting legal assistance, and because of this complexity it would not be reasonable to expect the applicant for assistance to conduct the proceedings.

*Example:*

The following types of cases may warrant a Grant of Legal Assistance:

- difficulties in proving the marriage
- a need to obtain recognition of an overseas dissolution
- a need for substituted service, or
- a need to dispense with service of the application.

## **Guideline 12** **Property**

### **12.1 Assistance for Certain Property Settlement Disputes**

- (1) The Commission may make a Grant of Legal Assistance for the resolution of a matrimonial property dispute only if:

- (a) the Commission is satisfied from the material provided to it that the separation of the parties is final, and

*Note* Final separation of the parties is normally demonstrated by the parties being separated for at least 6 months.

- (b) the dispute relates to:
  - (i) the matrimonial home
  - (ii) the preservation of matrimonial property, and/or
  - (iii) funds from which the applicant for assistance may receive only a deferred benefit, such as superannuation benefits.
- (2) A Grant of Legal Assistance under this guideline 12 should usually be limited to proceedings in State or Territory magistrates or local courts or the Federal Magistrates Court.

## **12.2 Limitations on Assistance for Matrimonial Home Dispute**

- (1) For a dispute relating to the matrimonial home, a Grant of Legal Assistance may only be made to an applicant for assistance if:
  - (a) at the time of making the application, a one-half share of the equity in the matrimonial home does not exceed:
    - (i) \$200,000, or  

*Note:* This means that, irrespective of which of the parties to the marriage is the registered owner of the matrimonial home or how the property is held, if 50% of the equity in the home is less than \$200,000, the applicant for assistance may be granted legal assistance.
    - (ii) another amount agreed between the Commonwealth and the Commission for the purposes of this guideline 12.2; and
  - (b)
    - (i) the applicant for assistance is also seeking the resolution of another related family law matter by the court, or
    - (ii) the Commission decides that it is appropriate to make a Grant of Legal Assistance to the applicant for assistance because of his or her personal circumstances.

**13.1 Assistance for Consent Orders**

The Commission may make a Grant of Legal Assistance for the preparation and filing of consent orders in any family law matter if:

- (a) all of the parties involved in the matter agree on arrangements
- (b) the Commission considers that formal court orders are necessary, and
- (c) the applicant/s for assistance cannot obtain appropriate legal assistance from any other source.

**14.1 Assistance not Available**

A Grant of Legal Assistance is not available for any action undertaken after final orders in relation to a family law or child support matter have been made, except for the following types of matters under this Part 2:

- (a) applications to discharge or vary parenting orders or registered parenting plans in accordance with guideline 4.2
- (b) applications for recovery, location and/or information orders in accordance with guideline 10
- (c) appeals in accordance with guideline 15, and
- (d) enforcement of orders in accordance with guideline 16.

**15.1 Assistance for Appeals**

- (1) The Commission may make a Grant of Legal Assistance for an appeal in relation to a family law or child support order, including for the participation of a child's representative in an appeal, only if the matter is eligible for assistance under another guideline in this Part 2.

- (2) The Commission must take the provisions of the *Federal Proceedings (Costs) Act 1981* into account before making a Grant of Legal Assistance under this guideline 15.
- (3) The Commission should treat an appeal as a new matter for the purposes of the Family Law Costs Management Methodology.

## **Guideline 16** **Enforcement of Court Orders**

### **16.1 Assistance for Enforcement Proceedings**

- (1) The Commission may make a Grant of Legal Assistance for court proceedings to enforce a final or interim court order relating to a family law or child support matter.
- (2) A Grant of Legal Assistance under this guideline 16:
  - (a) should usually be limited to \$2,000, and
  - (b) should only be made on the condition that the applicant for assistance seek a costs order against the respondent to the court application, unless that party is also receiving legal assistance under a Grant of Legal Assistance.
- (3) The Commission should treat enforcement proceedings as a new matter for the purposes of the Family Law Costs Management Methodology.

## **Guideline 17** **Contempt of Court and Breach of Court Orders**

### **17.1 Assistance for Contempt of Court or Contravention of Court Orders**

The Commission may make a Grant of Legal Assistance to an applicant for assistance in relation to a family law or child support matter, to be dealt with for:

- (a) contempt of court, or
- (b) contravention of an order of the court.

Where the applicant is a respondent to court proceedings, in determining whether to grant assistance, the Commission should have regard to the severity of any penalty to which the person is likely to be subject.

## **Guideline 18**

## **International Child Abduction Matters**

### **18.1 Assistance in Relation to International Child Abduction Matters**

- (1) The Commission may make a Grant of Legal Assistance to an applicant for assistance to:
  - (a) defend an application to the court under the Hague Convention on the Civil Aspects of International Child Abduction (the Convention) for:
    - (i) the return of a child who has been removed from a convention country to, or retained in, Australia, or
    - (ii) access to a child who is living in Australia
  - (b) make an application to the court under the *Family Law (Child Abduction Convention) Regulations 1986* for a declaration that the removal of a child from Australia to a convention country, or the retention of a child in a convention country, is wrongful within the meaning of the Convention
  - (c) make an application to the court under a bilateral agreement in relation to a child who has been wrongfully removed to Australia.
- (2) A Grant of Legal Assistance is not available to an applicant for assistance to intervene in proceedings relating to the return of a child under the Convention.

## **Guideline 19**

## **Family Law Costs Management**

### **19.1 General**

- (1) In this guideline 19:

*a family law or child support matter* includes any dispute that involves the same parties about the same or substantially the same issue, if there has not been a material change in circumstances or if any such change would not materially affect existing orders

*costs cap* means the costs limitations on a Grant of Legal Assistance as set out in guidelines 10, 16 and 19.2 of this Part 2, and

*costs of a matter* means the total costs paid by the Commission in a family law or child support matter in which a Grant of Legal Assistance

has been made (taking into account the costs paid by any other legal aid commission, if the matter has been transferred from one or more of the States or Territories), including counsels' fees, fees for expert reports and other disbursements (except interpreter and translator fees, rural travel and accommodation costs), less any Contributions collected by the Commission from the Legally Assisted Person and any Costs Recovered by the Commission.

- (2) The costs management principles in this guideline 19 apply to all Grants of Legal Assistance made by the Commission for family law matters.

## **19.2 Limit on Costs**

- (1) Under a Grant of Legal Assistance, payment of the costs of a matter under the Commission's usual fee scales for a family law or child support matter (other than proceedings to enforce court orders) that is commenced after 1 July 1998, regardless of whether legal assistance in the matter is provided in-house by the Commission or by an External Service Provider, is limited to:
  - (a) party professional costs of \$12,000, and
  - (b) child representative's costs of \$ 18,000.

*Note:* For limits to assistance for costs of proceedings to enforce court orders, see guideline 16 of this Part 2.

*Note:* The amounts mentioned in guideline 19.2(1)(a) and (b) are exclusive of GST.

- (2) This guideline 19.2 does not apply to payment of the costs of a matter where the matter is:
  - (a) managed under the Family Court's Magellan Project, and
  - (b) for which the Grant of Legal Assistance is made on or before 30 June 2005.

## **19.3 If Costs Likely to Exceed Limit**

- (1) Subject to guideline 19.3(2), (3) and (4), the Commission may increase the costs cap for a particular Grant of Legal Assistance if, in its opinion, undue hardship would otherwise be caused to an applicant for assistance or to a child who is the subject of an order for separate representation, having regard to the following factors:

- (a) whether the applicant for assistance has incurred significant additional costs due to special circumstances of a kind listed in the Commonwealth Legal Aid Priorities

*Note:* Special circumstances are set out in subclause paragraph 6.7.2 of the Agreement.

- (b) whether it would be unreasonable to expect the applicant for assistance to adequately represent himself or herself due to special circumstances of a kind listed in the Commonwealth Legal Aid Priorities

*Note:* Special circumstances are set out in subclause paragraph 6.7.2 of the Agreement.

- (c) whether the costs of the applicant for assistance have increased significantly through no fault of the applicant
- (d) the number and complexity of issues in dispute
- (e) the likelihood of risk to a child's safety or welfare, and
- (f) whether the applicant for assistance is a child representative.

- (2) Before making a decision under guideline 19.3(1), the Commission must have considered whether it is possible to contain costs by:

- (a) providing legal assistance for the matter in-house, or
- (b) considering whether alternative means of funding are appropriate, including negotiating a fee package that is not in accordance with the Commission's usual fee scales with an External Service Provider.

- (3) Any decision made by the Commission under guideline 19.3(1) to increase the costs cap for a particular Grant of Legal Assistance should be subject to strict limits on costs, and the nature and extent of the additional cost should be determined by the Commission or agreed between the Commission and the External Service Provider (as appropriate) having regard to the following factors:

- (a) advice from the court and the parties about the estimated length of time required for the hearing of the matter
- (b) the number and nature of witnesses who must be called or cross-examined, and
- (c) whether the other parties to the matter have legal representation.

## 19.4 Commission must Provide Quarterly Reports

The Northern Territory Liaison Officer must provide a quarterly report to the Commonwealth Liaison Officer in relation to cases in which the costs cap is increased under this guideline 19.

## 19.5 Family Law Costs Management Methodology

The Commission will manage the costs of a matter under a Grant of Legal Assistance made under this Part 2 in accordance with the Family Law Costs Management Methodology

# **Guideline 20                      Family Law Stage of Matter Funding Model**

**Schedule 2 - Appendix C**

## **FAMILY LAW COST MANAGEMENT METHODOLOGY**

### Stages of Matter Model (the Model)

*General notes*

The Model set out in the Table at paragraph (26) aims to assist the Commission in the financial management of family law matters.

The Model may not be appropriate for all Commonwealth family law matters (see paragraph (6) below), however it should be used as a guide for the management of family law matters for which the Model may not be wholly appropriate (see paragraph (8) below).

The Commission may determine whether funding a particular matter in accordance with the Model is appropriate.

The Commission may elect to use a lump sum or maximum amount basis for funding, where this option is provided for in the Table

### **Application of the Model**

- (1) If assistance is to be granted for a family law matter, the Commission must grant aid in accordance with the Model, unless the Model is not appropriate for the matter.

- (2) If there is a change of legal practitioner, the Model applies as if there were no change of legal practitioner and payments for each stage should be made on a pro rata basis for work completed in the stage.
- (3) If a Legally Assisted Person loses contact with a legal practitioner, payment for the work completed should be on a pro rata basis to be negotiated with the Commission.
- (4) If contact is re-established, funding already provided will be taken into account when considering the making of any further Grant of Legal Assistance.
- (5) The stages of the Model approximate the management of a matter in the Family Court of Australia. However the stages should be applied flexibly, and need not be applied chronologically.

### **Matters for which the Model may not be Appropriate**

- (6) Matters for which the Model may not be appropriate include:
  - (a) matters considered complex by the Commission, taking into account advice from the Family Court of Australia or the Federal Magistrates Court
  - (b) child representation cases
  - (c) applications for enforcement of final orders
  - (d) interlocutory duty list applications, such as Commonwealth information orders and location orders, and
  - (e) pilot projects such as the Family Court's Magellan Project.
- (7) Matters for which the Model is not appropriate must be identified as soon as possible.
- (8) If the Model is not appropriate, the Commission may apply particular stages of the Model or variations of the stages.

*For example*, the matter may be managed by early intervention reports, PDR Services, or by expediting hearings of the matter. However, repeat interim hearings should be avoided and steps should be taken to narrow the issues early.

### Stage 1 - Primary dispute resolution

- (9) The Commission may refer an applicant for legal assistance to a PDR Service at any time.

*Note:* The Commission must give consideration to resolving family law matters by referring an applicant for legal assistance to a PDR Service, unless it is clearly inappropriate (see the Commonwealth Legal Aid Guidelines).

- (10) Timing of referral will be affected by the nature of the dispute and any need for urgent intervention.
- (11) In many cases, referring an applicant to a PDR Service will be the first stage of funding for a matter.
- (12) A Grant of Legal Assistance for participation in a PDR Service must be in accordance with stage 1(a) or 1(b).
- (13) If agreement is reached by the parties to the dispute as part of participation in a PDR Service, the Grant of Legal Assistance for participation in the PDR Service extends to preparation work and work in filing consent orders.

#### Stage 2 - Litigation

- (14) If a substantial amount of work is completed before a Grant of Legal Assistance is made for Litigation Services in the litigation stages, the fees for the matter will be reduced on a pro rata basis.
- (15) The hearing length of a trial should be estimated, taking into account the estimate given by the court at the pre-hearing conference.
- (16) If a trial exceeds the original estimates for unforeseen reasons, no additional payment will be allowed unless a decision not to make an additional payment would be clearly unjust, and a Judge certifies that up to 1 day of extra hearing time was required for the effective disposal of the case.
- (17) Any unused portions of stages before litigation can be raised only in relation to the trial (stage 5), and the unused portions may be taken into account at the discretion of the Commission.
- (18) If work is undertaken and the Legally Assisted Person cannot be found before all of the work covered by the Grant of Legal Assistance is completed, the legal practitioner may negotiate with the Commission for fees to be paid on a pro rata basis, at the discretion of the Commission.
- (19) If a matter is listed for hearing (final or otherwise) and not reached by the court on the date set, funding outside the stage of matter grant under this Model must be negotiated with the Commission.
- (20) The payment of fees for an agent used in any stage of matter must be negotiated with the Commission.

### Stage 3 - Post pre-hearing conference and pre release of family report

- (21) This stage will enable the early consideration of merit and funding for trial.
- (22) The Commission should seek early release of the family report if possible.

### Stage 4 - Preparation for trial

- (23) This stage should be used for matters classified by the Family Court as direct, standard and complex matters, including for respondents under Hague Convention matters.
- (24) This stage is based on a negotiated maximum fee determined by the hourly rate of the Commission and the number of hours reasonably necessary to prepare for the trial.
- (25) Funding for this stage is subject to the Commonwealth Legal Aid Guidelines and should be determined by the Commission on a case by case basis.
- (26) *Table*

♣ *court attendance* includes waiting time and appearance in court but excludes travel time. Mileage may be payable subject to the practices and rates of the Commission.

\* *lump sum* means a fixed amount for an item of work, and is calculated on the basis of the hourly rate determined by the Commission (only if the Commission elects to use lump sums).

### Stage 1 (a) - PDR early intervention stage

<b>Allocation of hours</b>	<b>Up to</b>
<input type="checkbox"/> taking instructions and preparing for participation in PDR Service	2 hours
<input type="checkbox"/> representing Legally Assisted Person at PDR session	4 hours
<input type="checkbox"/> preparing consent orders, if appropriate	<u>1 hour</u>
<i>Total:</i>	7 hours

### Stage 1 (b) - PDR litigation interventions (at any stage

<b>Allocation of Hours</b>	<b>Up to</b>
<input type="checkbox"/> representing Legally Assisted Person at PDR session	4 hours
<input type="checkbox"/> preparing consent orders, if appropriate	<u>1 hour</u>
<i>Total:</i>	5 hours

**Stage 2 (a) - Initiating court proceedings – up to conclusion of directions hearings in the Family Court**

**Allocation of hours** **Lump sum \*/up to**

- taking instructions
- communications
- preparing documents
- attending to filing and service
- court attendance ♠
- consent order, if appropriate

*Total:*

Family Court 7 hours

State or Territory Magistrates Court 5 hours

**Stage 2 (ab) - Initiating applications to the Federal Magistrates Court**

**Allocation of hours**

- instructions for application and affidavit
- court documents
- obtaining short service
- court attendance ♠

*Total:*

**Lump sum\*/up to**

Documents etc 6 hours

**Up to**

Court attendance ♠ 5 hours

**Stage 2 (b) - Initiating court proceedings – up to conclusion of directions hearing/s including application for interim relief in the Family Court**

This is a combined Grant of Legal Assistance for an Application for Initiating Proceedings and an Application for Interim Relief filed at the same time

**Allocation of hours**

- instructions for initiating court proceedings and for affidavits
- court documents
- obtaining short service
- court attendance ♠

*Total:*

	<b>Lump sum*/up to</b>
Documents etc	7 hours
	<b>Up to</b>
Court attendance ♠	5 hours

**Stage 2 (c) - Interim or summary hearing – as a discrete event – in the Family Court**

This stage applies to an interim application commenced as a discrete event, or a summary proceeding of a type not otherwise addressed in this fee structure. It does not include the stages 2 (a) or 2 (b) fee component. (Refer to stage 2 (g) for application for recovery orders)

**Allocation of hours**

- instructions for application and affidavit
- court documents
- obtaining short service
- court attendance ♠

*Total:*

	<b>Lump sum*/up to</b>
Documents etc	6 hours
	<b>Up to</b>
Court attendance ♠	5 hours

**Stage 2 (d) - Up to conclusion of conciliation conference (if any) in the Family Court or the Federal Magistrates Court**

<b>Allocation of hours</b>	<b>Lump sum*/up to</b>
<input type="checkbox"/> file management	
<input type="checkbox"/> instructions	
<input type="checkbox"/> court attendance ♠	
<input type="checkbox"/> consent orders, if appropriate	
<i>Total:</i>	3 hours

**Stage 2 (e) - Case review (if any) in the Family Court**

<b>Allocation of Hours</b>	<b>Lump sum*/up to</b>
<input type="checkbox"/> court documents, if any	
<input type="checkbox"/> instructions	
<input type="checkbox"/> court attendance ♠	
<input type="checkbox"/> consent orders, if appropriate	
<i>Total:</i>	3 hours

**Stage 2 (f) - Up to conclusion of pre-hearing conference in the Family Court**

<b>Allocation of hours</b>	<b>Lump sum */up to</b>
<input type="checkbox"/> file management	
<input type="checkbox"/> instructions	
<input type="checkbox"/> prepare client for family report process	
<input type="checkbox"/> read family report	

- court attendance ♠
- consent order, if appropriate

*Total:* 5 hours

**Stage 2 (g) - Application for recovery order in the Family Court of the Federal Magistrates Court**

This stage applies to an application for a recovery order where there is an existing court order

**Allocation of hours**

- instructions
- court documents
- court attendance ♠

*Total:* **Lump sum\*/up to**

Documents etc 3 hours  
**Up to**

Court attendance ♠ 3 hours

**Stage 3 - After pre-hearing conference and before release of family report in the Family Court**

**Allocation of hours** **Lump sum\*/up to**

- prepare client for family report process
- read family report
- advise client
- consent order if appropriate

*Total:* 3 hours

**Stage 4 - Preparation for trial in the Family Court and the Federal Magistrates Court**

<b>Allocation of hours</b>	<b>Negotiated maximum fee</b>
<input type="checkbox"/> taking instructions	Negotiated, based on estimated preparing time worked out using the Commission's hourly rate and the Commonwealth Legal Aid Guidelines.
<input type="checkbox"/> interviewing witnesses	
<input type="checkbox"/> preparing documents	
<input type="checkbox"/> preparing Legal Assisted Person for family report process	
<input type="checkbox"/> subpoena	
<input type="checkbox"/> case management guideline trial documents	
<input type="checkbox"/> preparing and delivering brief to counsel	
<input type="checkbox"/> reading family report	
<input type="checkbox"/> conference with counsel	
<input type="checkbox"/> attending list conference	

**Stage 5 - Trial costs for legal practitioner in the Family and Federal Magistrates Court**

<b>Allocation of hours</b>	<b>Lump Sum*/up to</b>
<input type="checkbox"/> attending each day of hearing	
<input type="checkbox"/> advocacy allowance, if any	
<input type="checkbox"/> to take judgement	

*Totals:*

Each hearing date	6 hours
To take judgment and explain orders	1 hour

**Stage 6 - Appeals from the Family Court and the Federal Magistrates Court**

This stage is based on the allocation of a legal practitioner's time only. Counsel's fees are part of disbursements.

<b>Allocation of Hours</b>	<b>Lump sum*/up to</b>
<input type="checkbox"/> appeal to single Judge of the Family Court	12 hours
<input type="checkbox"/> appeal to the Full Court of the Family Court	10 hours

*Note:* For the criminal law priorities in the Commonwealth Legal Aid Priorities, see subclause 6.5 of the Agreement.

### **Guideline 1**

### **General**

#### **1.1 Assistance where Accused has Restrained Property**

- (1) Where the applicant for assistance is seeking a Grant of Legal Assistance to defend a criminal charge that is covered under the guidelines in this Part 3 and the applicant has property that is covered by a restraining order under the *Proceeds of Crime Act 2002*, the costs of providing legal assistance under a Grant will be reimbursed to the Commission in accordance with sections 292 and 293 of the Act.
- (2) For the purposes of this Part 3, in assessing an applicant's eligibility under the means test, any of the applicant's assets that are covered by a restraining order or confiscation order under the *Proceeds of Crime Act 2002* are to be disregarded.

#### **1.2 Assistance for Illegal Fishing or People Smuggling Offences**

Where the applicant for assistance is seeking a Grant of Legal Assistance for assistance with an illegal fishing offence under:

- (a) Division 5 of Part 6 of the *Fisheries Management Act 1991*, or
- (b) Part VI of the *Torres Strait Fisheries Act 1984*, other than an offence committed by a traditional inhabitant in the course of community fishing or traditional fishing, or
- (c) a people smuggling offence under Subdivision A of Division 12 of Part 2 of the *Migration Act 1958*, or
- (d) an offence ancillary to such illegal fishing or people smuggling offence due to the operation of Part 2.4 of the *Criminal Code Act 1995* (Cth),

the Commission may only make a Grant if:

- (a) the Commission considers that if the Grant is not made a court may stay the prosecution in accordance with the High Court's decision in *Dietrich 's case*<sup>1</sup>, or such a stay has been ordered by a court, and/or
- (b) the Commission considers that the 'interests of justice' requirement under Article 14(3) of the International Covenant on Civil and Political Rights would require that assistance be granted to the applicant.

*Note:* 'Traditional inhabitant', 'traditional fishing' and 'community fishing' are defined terms in the *Torres Strait Fisheries Act 1984*.

The 'interests of justice' will be determined based on the circumstances of each case. Examples of 'interests of justice' considerations include:

- (a) whether assistance is indispensable for effective access to the court
- (b) the need to develop appropriate arguments on complicated legal issues or the complexity of the procedure
- (c) the seriousness of the consequences, and
- (d) the capacity of the unrepresented defendant to present a legal argument, including the defendant's language abilities.

## **Guideline 2** **Summary Criminal Prosecutions**

### **2.1 Assistance for Trials in Magistrates or Local Courts**

The Commission may make a Grant of Legal Assistance for a criminal law trial in a State or Territory magistrates or local court if the applicant for assistance has a reasonable prospect of acquittal, and:

- (a) conviction would be likely to have a significantly detrimental effect on the applicant's livelihood or employment (current or prospective)
- (b) it would be unreasonable to expect the applicant to adequately represent himself or herself due to special circumstances of a kind listed in the Commonwealth Legal Aid Priorities
- (c) conviction would be likely to result in the applicant receiving a term of imprisonment, including a suspended term, or
- (d) the applicant is a child.

### **2.2 Assistance for Guilty Pleas**

The Commission may make a Grant of Legal Assistance for a plea of guilty in a criminal law matter if, because of the complexity of the matter or any other

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<sup>1</sup> 1 *Dietrich v The Queen* (1992) 177 CLR 292

aggravating circumstance, the Commission determines that the matter should not be dealt with by a Duty Lawyer Service.

*Example*

An aggravating circumstance may be:

- a likelihood that a lengthy term of imprisonment may be imposed
- a disability or disadvantage of the applicant, such as a language difficulty.

## **Guideline 3**

## **Committal Proceedings**

### **3.1 Assistance for Committal Proceedings**

- (1) The Commission may make a Grant of Legal Assistance for committal proceedings if:
  - (a) the proceedings are likely to contribute to reducing the duration and cost of any subsequent proceedings, or
  - (b) it would be unreasonable to expect the applicant for assistance to adequately represent himself or herself due to special circumstances of a kind listed in the Commonwealth Legal Aid Priorities.

*Note:* Special circumstances are set out in subclause paragraph 6.7.2 of the Agreement.

- (2) A Grant of Legal Assistance under this guideline 3 may be made for:
  - (a) preparing for, or appearing at, a pre-hearing conference or committal hearing
  - (b) identifying issues not in dispute between the parties, or
  - (c) resolving issues in negotiation with the Commonwealth Director of Public Prosecutions.

*Note:* The aim of this guideline is to ensure that all material issues are identified as early as possible to reduce the duration and cost of subsequent court proceedings. The fact that the committal hearing may result in the Prosecution having to disclose material aspects of its case is not intended to advantage the applicant for assistance over the Prosecution.

## **Guideline 4**

## **Superior Court Criminal Prosecutions**

### **4.1 Assistance for Superior Court Criminal Proceedings**

The Commission may make a Grant of Legal Assistance for superior court criminal proceedings for:

- (a) assistance for a plea of guilty
- (b) assistance to present a specific defence argument, or
- (c) any other form of assistance that the Commission considers appropriate in the circumstances.

### **4.2 Assistance for Charges on Indictment**

The Commission may only make a Grant of Legal Assistance for the hearing of charges on indictment where:

- (a) the applicant for assistance's charges are being heard on indictment, at the election of the applicant, and
- (b) the charges would normally be heard summarily

if the Commission is satisfied, on the information it has been given, that there are compelling reasons as to why the charges will be heard on indictment.

## **Guideline 5**

## **Children's Court Proceedings**

### **5.1 Assistance for Proceedings in Children's Courts**

The Commission may make a Grant of Legal Assistance for criminal law matters in a children's court.

## **Guideline 6**

## **Bail Applications**

### **6.1 Assistance for Bail Applications**

- (1) The Commission may make a Grant of Legal Assistance for bail applications in relation to criminal law matters only if:

- (a) bail is opposed by the Prosecution and, on the information provided, it is likely that bail will be granted by the court, or
  - (b) the applicant for assistance seeks to respond to a court application for revocation of bail.
- (2) This guideline 6 applies to bail applications regardless of whether a Grant of Legal Assistance is made:
- (a) as part of a Grant of Legal Assistance for the matter generally, or
  - (b) independently of a Grant of Legal Assistance for other elements of the matter

but does not apply to matters handled by the Duty Lawyer Service.

## **Guideline 7** **Criminal Law Matters Involving both Commonwealth and State or Territory Law**

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### **7.1 Matters Involving Commonwealth and State or Territory Law**

- (1) The Commission may make a Grant of Legal Assistance to an applicant for assistance who has been charged with breaches of both Commonwealth and State or Territory criminal laws.
- (2) However, for such Grants of Legal Assistance:
  - (a) Commonwealth Legal Aid Monies must be used if, in the nature of the charges and the course of the hearing, the matter is essentially a Commonwealth criminal law matter
  - (b) State or Territory funds must be used if, in the nature of the charges and the course of the hearing, the matter is essentially a State or Territory criminal law matter, and
  - (c) if there is a substantial mix of Commonwealth and State or Territory criminal law charges, Commonwealth and State or Territory funds must be used proportionately, as determined by the Commission.
- (3) For guideline 7.1(2)(a), a matter that is prosecuted by the Commonwealth Director of Public Prosecutions is taken to be essentially Commonwealth.

## Guideline 8

## Applications Arising from the Decision in *Dietrich's Case*

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### 8.1 Assistance for Applications Based on Decision in *Dietrich's Case*

- (1) The Commission should not normally make a Grant of Legal Assistance to an applicant for assistance who is an accused person to conduct an application seeking, on the basis of the High Court's decision in *Dietrich's Case*, an adjournment or stay of the case against the applicant until legal representation is available.
- (2) The Commission should not make a Grant of Legal Assistance for proceedings under section 360A of the *Crimes Act 1958* (Vic).

## Guideline 9

## National Security Matters

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### 9.1 Requirement for Security Clearance

- (1) Subject to guideline 9.1(2), the Commission may only make a Grant of Legal Assistance for a matter relating to Australia's national security, if the representatives hold, or obtain before the Grant is made, security clearances at the appropriate level.
- (2) If an applicant for assistance's representatives do not hold security clearances at the appropriate level when the application for a Grant of Legal Assistance is made, assistance may be provided under this guideline 9 only if:
  - (a) the matter is an urgent matter
  - (b) access to information relating to national security is not required for the proper conduct of the applicant's case, and
  - (c) lack of representation may seriously prejudice the applicant's interests.

*Example*

The applicant would be unrepresented in making a bail application, or the court might stay the matter until representation could be arranged

- (3) The Commonwealth Minister, or his or her delegate, may determine at the request of the Commonwealth or the Commission and for the purposes of this guideline 9 whether a matter is or is not a matter relating to Australia's national security.

**10.1 Appeals against Criminal Conviction or Sentence**

The Commission may make a Grant of Legal Assistance to an applicant for assistance to appeal against a court conviction or sentence in a criminal law matter if the matter is eligible for assistance under another guideline in this Part 3, and:

- (a) there is a strong likelihood that the appeal will result in the applicant's conviction being quashed or sentence materially reduced, or
- (b) the Commission determines that the appeal involves an important or complex question of law.

**10.2 Response to Crown Appeals**

- (1) The Commission may make a Grant of Legal Assistance to respond to a Crown appeal, Crown reference or case stated.
- (2) The Commission may make a Grant of Legal Assistance under this guideline 10.2 without regard to the merits test.

**11.1 Funding where costs exceed \$40,000**

- (1) If the costs to the Commission of a Grant of Legal Assistance for any one criminal law trial are likely to exceed \$40,000, the Commission must consider whether it is possible to contain costs by:
  - (a) providing legal assistance for the matter in-house, or
  - (b) determining whether any alternative means of funding, which are subject to strict limits in order to contain costs, are appropriate, including funding that may not be in accordance with the Commission's usual fee scales.

*Example*

The Commission may try to negotiate a fee package for a matter that is settled in advance with a legal practitioner who is an External Service Provider.

- (2) If the Commission does not consider it can fund a criminal law trial without significantly impacting on its ability to provide assistance in

other Commonwealth Law Matters in accordance with the Agreement, it may make an application to the Commonwealth Criminal Law - Expensive Cases Fund.

## **11.2 Commission must Provide Quarterly Reports**

The Northern Territory Liaison Officer must provide a quarterly report to the Commonwealth Liaison Officer in relation to criminal law matters in which the Grant of Legal Assistance exceeds \$40,000, though the Commission need not supply names or other information that might identify the applicants.

## **Guideline 12**

## **Commonwealth Criminal Law - Expensive Cases Fund**

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### **12.1 Purpose of Fund**

The Commonwealth Criminal Law— Expensive Cases Fund (the Fund) has been established to assist Commissions to cater for high, one-off costs associated with providing assistance for a particular criminal law matter.

### **12.2 Administration of Fund**

- (1) The Fund is administered by the Attorney-General's Department and the allocation of funds from the Fund is at the discretion of the Department.
- (2) In determining an application for an allocation from the Fund, the Attorney-General's Department must have regard to:
  - (a) the circumstances of the application
  - (b) the likely impact that approval of the application will have on the resources of the Fund, and
  - (c) other applications to the Fund.

### **12.3 Application for Funds**

- (1) An application to the Attorney-General's Department for an allocation from the Fund may only be made by the Commission.

- (2) A separate application must be made to the Attorney-General's Department for each criminal law matter for which an allocation from the Fund is sought by the Commission.
- (3) Cases for which an application may be made include:
  - (a) cases where a potential stay of a Crown criminal prosecution may be granted in accordance with the High Court's decision in Dietrich 's case
  - (b) criminal conspiracy cases
  - (c) criminal cases arising under the Corporations Act 2001
  - (d) drug importation cases, or
  - (e) a class of criminal cases that are similar in nature to each other.

*Note:* Guidelines 12.3(3)(a) to (d) are examples, and not an exhaustive list, of the types of matters that the Commonwealth is prepared to consider for applications for allocations from the Fund.

- (4) An application may be made before commencement of criminal law proceedings, or at any time during proceedings.
- (5) The Commission must include sufficient information in an application to satisfy the Attorney-General's Department that:
  - (a) the likely cost of the case is high, and is likely to significantly affect the capacity of the Commission to provide assistance for other Commonwealth Legal Aid Priorities
  - (b) in estimating the likely cost of the case, the Commission consulted with the Commonwealth Director of Public Prosecutions about the likely direction of the trial
  - (c) the Commission has taken or will take all necessary steps to manage the case in accordance with guideline 11 of this Part 3
  - (d) the Commission has made a reasonable estimate of likely expenditure on the case for the relevant Financial Year
  - (e) there is potential for a court to grant a stay of the matter in accordance with Dietrich 's case if funds are not allocated from the Fund for the case
  - (f) the Commission does not hold Commonwealth Legal Aid Monies in excess of the Allowed Surplus which are available to fund the matter, and

- (g) before the date of the Commission's application, the Commission has been managing its funding in accordance with the Agreement.

## **12.4 Terms and Conditions of Allocations from the Fund**

An allocation from the Fund may be made on any terms and conditions that the Attorney-General's Department considers appropriate, including that:

- (a) the Commission must provide the Commonwealth with the following reports:
  - (i) at the end of each Financial Year, a report of the expenditure of funds allocated to the Commission from the Fund, and
  - (ii) at the completion of each matter for which funds have been allocated to the Commission from the Fund, a report of the expenditure of those funds, and
- (b) on the completion of a matter, any funds allocated from the Fund to the Commission for a particular matter but not spent on providing legal assistance for that matter must be returned to the Commonwealth, unless otherwise directed in writing by the Commonwealth.

*Note:* For the civil law priorities in the Commonwealth Legal Aid Priorities, see subclause 6.6 of the Agreement.

## **Guideline 1**

## **General**

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### **1.1 Limited Initial Assistance**

The Commission may make a limited Grant of Legal Assistance to an applicant for assistance in a civil law matter for:

- (a) an investigation into and report on the merits of a case, or
- (b) the mediation of a dispute.

### **1.2 Assistance for Damages Actions**

Where a civil law action may result in the applicant for assistance receiving an award of damages or property, the Commission may make a Grant of Legal Assistance if the Commission is satisfied from the material provided to it that:

- (a) the applicant is likely to receive damages or property if the action is successful
- (b) the action could not reasonably be expected to be conducted under a conditional costs agreement or similar arrangement with a private legal practitioner, and
- (c) the applicant for assistance cannot obtain appropriate legal assistance from another source.

## **Guideline 2 Social Security and Other Commonwealth Benefits**

### **2.1 Representation at Administrative Appeals Tribunal**

Subject to guideline 2.2, the Commission may make a Grant of Legal Assistance to an applicant for assistance for representation at the Administrative Appeals Tribunal if:

- (a) it is considered that the applicant may incriminate himself or herself
- (b) the case is complicated
- (c) it would be unreasonable to expect the applicant for assistance to adequately represent himself or herself due to special circumstances of a kind listed in the Commonwealth Legal Aid Priorities, or

*Note:* Special circumstances are set out in subclause paragraph 6.7.2 of the Agreement.

- (d) the Commission determines that the appeal involves an important or complex question of law.

### **2.2 Appeals to Administrative Appeals Tribunal**

The Commission may make a Grant of Legal Assistance to an applicant for assistance to obtain instructions and necessary reports and prepare submissions for an appeal to the Administrative Appeals Tribunal, if:

- (a) the appeal may result in the applicant being charged with a criminal offence
- (b) the applicant cannot afford to pay for medical reports, and the appeal is about the health of the applicant or someone for whom the applicant has parental or legal responsibility
- (c) it would be unreasonable to expect the applicant for assistance to adequately represent himself or herself due to special circumstances of a kind listed in the Commonwealth Legal Aid Priorities, or

*Note:* Special circumstances are set out in subclause paragraph 6.7.2 of the Agreement.

- (d) the Commission determines that the appeal involves important or complex questions of law.

**3.1 Assistance for Limited Migration Matters**

- (1) The Commission may make a Grant of Legal Assistance for proceedings in the Federal Court, Federal Magistrates Court or High Court dealing with a migration matter, including a refugee matter, only if:
  - (a) there are differences of judicial opinion that:
    - (i) have not been settled by the Full Court of the Federal Court or the High Court, and
    - (ii) relate to an issue in dispute in the matter, or
  - (b) the proceedings seek to challenge the lawfulness of detention.

*Note:* Guideline 3.1 (1) (b) does not include a challenge to a decision about a visa or a deportation order.
- (2) Guideline 3.1(1) applies to a matter, even if the matter could also be characterised as falling within another Commonwealth Legal Aid Priority or guideline in these Commonwealth Legal Aid Guidelines.
- (3) In all other cases, applicants should be referred to the Immigration Advice and Application Assistance Scheme (IAAAS) for possible assistance.

**Guideline 4 Equal Opportunity and Discrimination Cases****4.1 Assistance for Certain Matters if Substantial Benefit**

Subject to guideline 1.2 in this Part 4, the Commission may make a Grant of Legal Assistance for an equal opportunity or discrimination case if there is a strong prospect of substantial benefit being gained by the applicant for assistance and also by the public or a section of the public in relation to the matter.

**5.1 Purpose**

- (1) To acknowledge the special contribution made by war veterans to protecting Australian society in time of war, the Commission may make a Grant of Legal Assistance to an applicant for assistance who is a war veteran or a dependent of a war veteran in relation to:
  - (a) appeals from decisions of the Veterans' Review Board about war-caused disability pension entitlement or assessment claims under Part II of the *Veterans' Entitlements Act 1986*, and
  - (b) appeals from decisions of the Veterans' Review Board about claims under the Military Rehabilitation and Compensation Act 2004 that relate to warlike or non-warlike service, in regard to:
    - (i) acceptance of liability (Chapter 2),
    - (ii) rehabilitation programs (Chapter 3, Part 2),
    - (iii) permanent impairment (Chapter 4, Part 2),
    - (iv) incapacity payments for former members (Chapter 4, Part 4),
    - (v) special rate disability pension (Chapter 4, Part 6), and/or
    - (vi) dependants' benefits (Chapter 5).
- (2) An application for a Grant of Legal Assistance under this guideline 5.1 is not subject to:
  - (a) the means test, or
  - (b) the applicant for assistance making any contribution to the cost of his or her legal assistance provided by the Commission in relation to the matter, other than to the extent of any costs recovered from the respondent in the matter.

**5.2 Assistance for Complex Matters**

- (1) The Commission may determine the most appropriate Grant of Legal Assistance to make in a war veterans' matter that it determines to be a complex matter.

- (2) The Commission may determine that a matter is complex at any time.
- (3) In determining whether a matter is complex, the Commission may have regard to:
  - (a) whether several conditions are being claimed, and reports are required from 3 or more areas of medical expertise
  - (b) whether there is a complex link between statements of principle and the condition claimed, and
  - (c) whether the matter involves unresolved questions of law.
- (4) In making its determination, the Commission may consult:
  - (a) the applicant for assistance
  - (b) the national office of the Department of Veterans' Affairs, and
  - (c) the Administrative Appeals Tribunal.

### **5.3 Assistance for Non-Complex Matters**

- (1) The Commission may make a Grant of Legal Assistance in a war veterans' matter that it determines to be a non-complex matter only in the following stages:
  - (a) stage 1 - funding for costs and disbursements in relation to:
    - (i) a maximum of 10 hours work up to and including the second preliminary conference (including all attempts to settle the matter), and
    - (ii) up to 2 medical reports, if necessary, and
  - (b) stage 2 - funding for costs and disbursements in relation to:
    - (i) a maximum of 12 hours work for the hearing (including all preparation and either the costs of a solicitor or the fees of a barrister for appearing at the hearing), and
    - (ii) witness expenses, if applicable.
- (2) The total amount of funding that may be made available for disbursements for a non-complex matter is \$2,500.



- (3) In assessing an applicant's eligibility under the merits test for the purpose of determining an application for a Grant of Legal Assistance under this guideline 7.2, the Commission should disregard the 'appropriateness of spending limited public legal aid funds' test.
- (4) The costs of providing legal assistance to an applicant for assistance under a Grant of Legal Assistance will be reimbursed to the Commission in accordance with sections 292 and 293 of the *Proceeds of Crime Act 2002*.
- (5) The Commission must ensure that the costs claimed by it in accordance with guideline 7.2(4) are fair and reasonable, and in accordance with the Commission's usual fee scales for civil law matters.

## **Guideline 8**

## **Extradition Proceedings**

### **8.1 Assistance for Certain Extradition Proceedings**

The Commission may make a Grant of Legal Assistance to an applicant for assistance in relation to the following types of proceedings under the Extradition Act 1988:

- (a) extradition proceedings under section 19, and
- (b) an appeal under section 21 in relation to a section 19 order.

## **Guideline 9**

## **Appeals**

### **9.1 Assistance for Appeals**

Subject to the other guidelines in this Part 4, the Commission may make a Grant of Legal Assistance for an appeal of a court decision in a civil law matter.

## 1. Commencement

- 1.1 These guidelines come into effect on 1 August 1996. They replace the guidelines for the Cases of National Importance Scheme, which ceased to have effect as from that date.
- 1.2 As a result of the introduction of the Commonwealth Public Interest and Test Cases Scheme, the Overseas (Special Circumstances) Scheme, which ceased to have effect as a separate scheme in January 1996 following the introduction of the Cases of National Importance Scheme is restored in operation. Separate guidelines for the Special Circumstances Scheme (which incorporates the Overseas (Special Circumstances) Scheme) are available on request.
- 1.3 The Commonwealth Public Interest and Test Cases Scheme does not apply to work performed and disbursements incurred prior to commencement of the Scheme on 1 August 1996.

## 2. Administration of Scheme

### 2.1 The Decision Maker

Delegates in the Attorney-Generals Department have been appointed by the Attorney-General to deal with applications for assistance under the Scheme.

## 3. How to Apply

### 3.1 Information Required

- (a) An application form must be completed by the solicitor handling the matter and/or the applicant personally. A copy of this form is attached to these guidelines. Solicitors who access the scheme

regularly are encouraged to make multiple copies of the form, for their own use.

- (b) The application must be accompanied by the following:
  - (i) verification of means as required;
  - (ii) copies of relevant opinion, and/or reports where required;
  - (iii) where appropriate, copies of any court documents filed.

Where the application relates to an appeal, or a proceeding in the nature of an appeal, the following should also be provided:

- A. copy of the decision appealed against;
  - B. copy of counsel's advice.
- (c) All sections of the application form must be completed. Where a section is not relevant to a particular application, it should be marked 'n/a'. It is important that an applicant completes all the questions on the form otherwise a decision on an application will be delayed or a decision will be made on the information that is provided which may lead to an application being refused.

### **3.2 Authority to Seek Information**

Applicants seeking assistance, or legally assisted persons seeking an extension of assistance, are required to give permission to the Attorney-General's Department to seek information regarding their application from government departments or agencies, including legal aid commissions.

### **3.3 Confidentiality of Information Provided**

Subject to paragraph 3.4, all information provided by an applicant for assistance, or on an applicant's behalf, will be treated in confidence and will not be disclosed to any other person or agency other than in accordance with an express authority by the applicant or, where required, by law.

### **3.4 Lodgement of Applications for Assistance**

All applications for assistance must be in the prescribed form and should be lodged with:

Assistant Secretary  
Legal Assistance Branch  
Family Law and Legal Assistance Division  
Attorney-General's Department  
National Circuit  
BARTON ACT 2600

Fax: (02) 6250 6521

### **3.5 Telephone Inquiries**

Telephone inquiries should be directed to (02) 6250 6770.

## **4. Scope of Scheme**

### **4.1 Who is Eligible for Assistance**

Individuals, partnerships, companies, small business and other organisations may be eligible for assistance. Common purpose groups such as consumer groups or environmental groups may also be eligible for assistance. Assistance is available to plaintiffs and respondents to proceedings.

### **4.2 Types of Matters for which Assistance is Available**

- (a) Assistance is available, subject to certain eligibility criteria, in cases involving questions arising under a law of the Commonwealth which, in the opinion of the Attorney-General, are of public importance either because they raise matters in the public interest or the questions are in the nature of a test case.
- (b) '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 a law of the Commonwealth that, in the opinion of the Attorney-General, affects the rights of a section of

the public which is, or a group of persons who are, for the most part, socially or economically disadvantaged.

### **4.3 Types of Assistance Available**

The Scheme covers some or all of the following:

- (a) professional legal costs;
- (b) counsel's fees;
- (c) court fees;
- (d) medico-legal reports from relevant specialists;
- (e) reasonable travelling expenses;
- (f) reports and records required for the preparation of the case;
- (g) transcripts;
- (h) interpreters' fee; and
- (i) other disbursements.

### **4.4 Types of Matters for which Assistance is not Available**

- (a) Cases involving the interpretation of State law or common law principles are not covered.
- (b) If the question has been determined previously and the law is settled assistance is not available as such a case is not considered a 'test case'.
- (c) The Scheme is subject to a merit test (paragraphs 5.18-5.21) and does not cover cases which are vexatious and have no prospect of success. Consistent with the Government's general policy of encouraging dispute resolution and case management guidelines parties are encouraged to avail themselves of alternative methods of dispute resolution, mediation, conferencing and arbitration prior to having the matter determined in a court.
- (d) Applications which will duplicate argument where the Commonwealth or a State or Territory Government is a party and is to present public policy arguments on behalf of the Australian community will not be funded, unless there are other cogent reasons, such as interests peculiar to the applicant, for approving assistance under the Scheme.

- (e) Cases where there is likely to be a benefit to one person only and where no legal questions are likely to be resolved will not be funded. Cases where the law has already been amended so that the provisions being tested are no longer current and few people were affected by the previous law will also not be funded.
- (f) If a similar case that covers the same questions of law or fact is currently before a court and a decision that will address the issues in that case is likely, then another case involving the same issues will not be funded.
- (g) The fact that a case is funded at first instance does not necessarily mean that any appeal from the decision, or proceeding in the nature of an appeal, will automatically be funded as different considerations may then be relevant.

#### **4.5 What Proceedings are Included**

All civil proceedings in Australian courts and tribunals are covered provided they deal with matters of public importance.

#### **4.6 Availability of Funds**

- (a) As there are only limited funds available in any given year, it is important that those cases that will assist the community to the greatest extent are funded. This means that not all cases can be funded.
- (b) Accordingly, in assessing an application for assistance regard is had to the availability of funds, in any given year, under the Scheme. Consideration is also given to the number and relative merits of other applications for assistance, whether made or reasonably expected to be made.

### **5. Relevant Considerations**

#### **5.1 Determining whether Assistance should be Authorised**

In determining whether assistance should be authorised regard is had to a number of factors. These will include:

- (a) hardship;

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

## **5.2 The Decision to Grant or Refuse Assistance**

The decision to grant or refuse assistance is a global assessment giving appropriate weight to the various considerations according to the circumstances of the case. Discretion can be exercised in these circumstances to ensure that the following factors, amongst others, are taken into account:

- (a) the likely cost of proceedings;
- (b) the overall financial position of the applicant and of associated persons; whether the applicant would suffer hardship if financial assistance was refused; and the public interest of the proceedings.

## **5.3 Hardship**

- (a) 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 any financially associated person. The estimated cost of the proceedings is also relevant. The broad test of hardship is whether the applicant has the means to meet the cost of the proceedings without incurring serious financial difficulty. In making this judgement, reference is made to the conditions of eligibility for a grant of legal aid from the relevant legal aid commission.
- (b) Regard is had to the ability of the applicant, and of any financially associated person, to meet the ordinary professional cost of the legal services which are the subject of the application.
- (c) For the purpose of considering eligibility for assistance, the applicant is regarded as the person on whose behalf assistance is sought. A financially associated person may include a relative, partner, spouse, trust, corporation, group. A financially associated person includes any person:

- (i) from whom the applicant usually receives financial support;
  - (ii) to whom the applicant usually provides financial support; and
  - (iii) who could reasonably be expected to financially assist the applicant in obtaining legal services.
- (d) There is a discretion to disregard the income and assets of a financially associated person in certain circumstances, for example, where it is considered that the income and/or assets are not available for the use or benefit of the applicant or that the applicant does not have access to that income or those assets, or where the financially associated person has a contrary interest in the matter for which assistance is sought.
- (e) Where the applicant is a corporation or a member of an unincorporated association, the hardship guidelines are applied to the income and assets of the corporation or of the association and also the income and assets of any person(s) whose interest it is considered will be directly and beneficially affected if assistance is granted to the applicant.
- (f) The applicant's eligibility for assistance is determined by:
  - (i) applicant's weekly disposable income;
  - (ii) applicant's net liquid assets; and
  - (iii) assessment of applicant's ability to pay legal costs.
- (g) Income from all sources is included in the assessment, including, but not limited to, the following:
  - (i) pensions/benefits;
  - (ii) wages/salaries;
  - (iii) business income;
  - (iv) workers compensation benefits;
  - (v) superannuation payments;
  - (vi) maintenance payments;
  - (vii) board or rent received; or

- (viii) interest earned and dividends paid on investments.
- (h) Liquid assets are readily realisable assets. Unless the value is unusually high, liquid assets do not include:
  - (i) clothes;
  - (ii) tools of trade;
  - (iii) household furniture;
  - (iv) equity in applicant's principal home; or
  - (v) motor vehicle which is reasonably necessary for domestic or employment purposes.
- (i) A further factor is an assessment of the applicant's ability to pay legal costs and assistance may be refused to applicants who prima facie do not have a high weekly disposable income or net liquid assets. This discretion may be exercised in the following situations:
  - (i) where the applicant should reasonably be able to afford the cost of legal proceedings having regard to his/her general assets, or assets of a person financially associated with the applicant;
  - (ii) where the applicant has substantial fixed assets or an interest in business assets that could be realisable, or against which the applicant could secure a loan to cover the cost of legal proceedings; or
  - (iii) where an applicant's lifestyle activities or interests are such that, in the opinion of the Attorney-General or a delegate, the applicant should have sufficient means to be able to afford the cost of legal proceedings. 'Lifestyle' in this context means a style or standard of living with features which are significantly above general community standards.

## **5.4 Initial Contributions**

If an applicant is granted assistance because he/she cannot meet the full cost of legal proceedings but has a reasonably high income or savings or some assets he/she may be asked to make a contribution towards the costs of a matter. If the applicant is a club or association or common interest group each member may be asked to contribute towards the cost of the proceedings. An applicant will be told at the time a decision is made of the

amount he/she will have to pay (see also paragraphs 6.16-6.18 dealing with final contributions).

## 5.5 Verification of Means

- (a) Applicants for assistance are required to verify their means (both income and assets) as disclosed on the application for assistance. The means of financially associated persons must also be verified, except where discretion has been exercised to disregard their means.
- (b) The following documents (or copies) must be forwarded to verify the applicant's income as disclosed on the application form:
  - (i) *for salaried applicants* - a recent pay slip. In the event of the applicant not having a pay slip, then some other evidence of income or employment must be provided, such as a letter from an employer or the most recent group certificate;
  - (ii) *for pensioners* - a pension or other benefit card;
  - (iii) *for self-employed applicants* - a copy of the most recent full tax return, together, where appropriate, with current verified financial particulars.
- (c) Verification of liquid assets must be provided in the form of recent statements (i.e. within the past six months) showing two months' operation on all accounts with financial institutions maintained by the applicant, as disclosed on the application form.
- (d) Verification of non-liquid assets may be requested when the officer determining the application considers it appropriate, eg. where there appears to be some inconsistency in the application.
- (e) There is discretion to waive the requirement for verification of means. Some circumstances where this discretion may be exercised by the Attorney-General or a delegate are:
  - (i) where it is apparent from the material contained in the application that the application will be refused; and
  - (ii) where the application is urgent.

## 5.6 Prospects of Success

- (a) Consideration is also given to whether it is reasonable in all the circumstances to grant assistance. Circumstances to be taken into

account include, but are not limited to whether the applicant has reasonable prospects of success in the proceedings.

- (b) The weight to be given to good prospects of success will depend to some extent on the importance of the case and the questions of law that will be resolved.
- (c) As these cases are 'public interest' or 'test cases', it is often difficult to determine what the prospects are likely to be. However it is necessary that a person have a reasonable case to argue; the case cannot be fanciful or raise only speculative arguments. Counsel's opinion as to the prospects of success of the proposed proceedings may be required.
- (d) In order for the application to be assessed as to its probability of success, it is essential that the application include the following information:
  - (i) details of the matter;
  - (ii) the action the applicant proposes to take; and
  - (iii) any information that will substantiate the claim, such as medical reports.

## **5.7 Benefit/Detriment to the Applicant**

In assessing an application for assistance regard is had to the nature and extent of any benefit that may accrue to the applicant by providing assistance or of any detriment that the applicant may suffer if assistance is refused.

## **5.8 Benefit to the Public**

- (a) In deciding whether to authorise assistance regard is had to the public importance of the proceedings. In determining public importance consideration is given to whether the outcome of the proceedings will be of benefit to the public in that it will resolve an important question of law that has been an area of uncertainty affecting a large section of the public.
- (b) Many test cases can be expensive to run because they have complex facts or need complex legal arguments to be developed. Because of this, before funding a particular case, an assessment will be made as to the benefit that the community will gain by the case being decided in court.

- (c) In deciding whether a particular case raises important issues an opinion from counsel may be sought, and the views of a relevant government organisation with responsibility for administering the relevant legislation or program may be taken into account; for example in environmental cases, the national interest is assessed by having regard to sources such as:
- (i) the Australian Heritage Commission;
  - (ii) the National Trust;
  - (iii) the Report of the Committee of Inquiry into the National Estate;
  - (iv) reports of Parliamentary Committees dealing with environmental and conservation matters;
  - (v) reports of commissions of inquiry made pursuant to the Environmental Protection (Impact of Proposals) Act 1974; or
  - (vi) the Commonwealth Department concerned with the conservation management and protection of the environment.

## **5.9 Availability of Funds**

In assessing an application for assistance regard is had to the availability of funds, in any given year, under the Scheme for the provision of assistance. Consideration is also given to the number and relative merits of other applications for assistance, whether made or reasonably expected to be made.

## **5.10 Availability of Legal Aid from Legal Aid Commissions**

- (a) Assistance is not available to applicants who have access to other funds or legal aid in order to pursue their claim.
- (b) In the first instance, and where an applicant may be eligible for legal aid from a state or territory legal aid commission, application should be made to that commission. Where legal aid has not been approved the certificate of legal aid refusal should be provided.

## **6. Conditions of Assistance**

### **6.1 Conditions Upon which a Grant of Assistance May be Made**

Conditions upon which a grant of assistance may be made have been determined. When the applicant's legal representative or the applicant are advised of the offer of a grant of assistance, a document containing the conditions of the grant will be forwarded. This must be signed by the solicitor and the applicant and returned to the Attorney-General's Department. No monies will be disbursed until this document is duly signed and received by the Attorney-General's Department. Where appropriate, and with agreement, the Department and/or the legal representative may delete, alter or add to the conditions of a grant.

### **6.2 Retrospective Grants and Dating of Grants**

- (a) Legal or financial assistance cannot be authorised retrospectively. Generally grants of assistance date from the date of receipt of the fully completed application for assistance.
- (b) Retrospective grants of assistance are defined as grants of assistance relating to applications received:
  - (i) after the proceedings are concluded;
  - (ii) after legal services have been provided and assistance is then requested for those services.
- (c) Generally all legal and associated costs will be covered. If a legal representative is not engaged only cash outlays will be paid. An applicant will not be provided with a money equivalent of lost earning or time spent in preparing a case.
- (d) Assistance does not extend to costs incurred in completing an application for assistance or interviews and consultations between an applicant and his/her legal representatives for the purpose of making an application for assistance or concerning the grant or refusal of assistance. Neither does assistance extend to attendances on, and correspondence with, the Attorney-General's Department in relation to the making of an application or the terms of assistance. Assistance will not extend to preparation for and work done in connection with any itemised bill of costs.

### **6.3 Assistance in Stages**

- (a) Usually funding will be provided in stages. At the end of each stage the Minister or a delegate will make a decision as to whether it is reasonable to continue funding. It should not be assumed that funding will continue beyond the stage for which approval has been given.
- (b) All applications for extensions must include an assessment of prospects of success, public interest, a statement of the costs to date and an assessment of the amount of costs required to conclude the matter.

### **6.4 Limits on Grants of Assistance**

- (a) Applicants will be advised of the upper limit that may be spent at any stage. It is essential that this amount not be exceeded. If it is considered that there will be a need for an additional amount to complete the work needed at any stage then the Attorney-General's Department must be contacted to seek an extension to the original amount.
- (b) Any work that is done above the original amount before any additional amount is approved will not be paid.

### **6.5 Solicitors' Costs**

- (a) The policy in respect of solicitors' costs is as follows:
  - (i) solicitors' professional costs may be claimed in accordance with the relevant scale in the jurisdiction where proceedings are instituted. Where there is no applicable scale, costs will be authorised, where relevant, in accordance with the scale applied by the local legal aid commission, or if there is no relevant scale, by agreement. Generally, solicitors' fees are paid at a maximum of 80% of the applicable scale;
  - (ii) no uplift for care skill and responsibility will be allowed unless there are exceptional circumstances and the prior approval of the Department has been obtained;
  - (iii) solicitors' professional costs incurred subsequent to the grant of legal aid will ordinarily be paid at the conclusion of the proceedings;

- (iv) where an applicant changes solicitors in the course of the proceedings, the newly instructed solicitors should ensure that costs previously incurred are claimed at the conclusion of the matter. Assistance will be paid to the first solicitor at the conclusion of the matter as necessary.

## **6.6 The Policy in Relation to Solicitors' Accounts is as Follows:**

- (a) solicitors should submit a resume of their work sufficient to enable a determination as to the reasonableness of their costs;
- (b) where the information supplied is insufficient to enable a determination to be made as to the reasonableness of their costs, the Attorney-General's Department may request the solicitor to supply further information and/or an itemised account;
- (c) where the Attorney-General's Department and the solicitor are unable to reach agreement in relation to the assessment of costs, the Department may request the solicitor to get the bill of costs taxed;
- (d) generally a solicitor is expected not to render his/her account until the conclusion of the matter. Interim payments, however, may be authorised where a solicitor has incurred disbursements exceeding \$500 in total or where proceedings have reached a stage where there will be a substantial delay before further work needs to be undertaken on behalf of an assisted person;
- (e) the Attorney-General's Department reserves the right to call for a solicitor's file in an assisted matter in relation to any account rendered for payment.

## **6.7 Counsel's Fees**

The policy in respect of counsel's fees is as follows:

- (a) if a matter is complex and counsel is needed full details should be provided. Counsel will only be funded in matters where the case is judged by the Attorney-General's Department to be complex;
- (b) counsel's fees will be allowed in accordance with the relevant scale applied by the local legal aid commission in the jurisdiction where the proceedings are instituted, or where there is no relevant scale by agreement;
- (c) solicitors should forward counsel's memoranda of fees to the Attorney-General's Department together with the bill of costs.

## **6.8 Disbursements**

The Scheme's policy is that in respect of disbursements the Attorney-General's Department:

- (a) requires the solicitor to furnish a copy of an account for any one disbursement which exceeds \$100;
- (b) will not advance payments for anticipated disbursements unless there are special circumstances requiring payment in advance. In such cases comprehensive details of the disbursements should be supplied;
- (c) will require approval to be obtained prior to incurring any one disbursement for an expert report which exceeds \$500;
- (d) disallows, except in exceptional circumstances, the fees claimed by a professional when a legally assisted person fails to attend an appointment.

## **6.9 Solicitors Prohibited from Demanding Payments from Assisted Persons**

A private legal practitioner is prohibited from demanding or receiving payment, other than an initial or final contribution determined in accordance with these guidelines, from a legally assisted person or any other person on his behalf in respect of work under a grant of assistance except with the approval of the Attorney-General's Department.

## **6.10 Recovery of Costs**

Applicants are expected to apply for a costs order from the other party or parties if they win the action. Any costs recovered from another party must be repaid to the Commonwealth to the extent that the Commonwealth has contributed towards the costs of the action. The Commonwealth has the first right to be paid from any recovered costs.

## **6.11 Final Contributions**

- (a) Where the applicant obtains an award of the court for costs in his/her favour all monies advanced under a grant of assistance must be reimbursed within 60 days of the date of receipt of

judgment/settlement monies or taxed/agreed costs, whichever is the relevant date.

- (b) Where the applicant negotiates a settlement of his/her claim, without recourse to the court, all monies advanced under a grant of assistance must be reimbursed within 60 days of receipt of settlement monies or taxed/agreed costs, whichever is the relevant date.
- (c) In cases of a favourable costs award, failure to reimburse the Commonwealth fully for monies paid out under a grant of assistance will result in recovery action being taken.

## **6.12 Indemnity for Costs**

A grant of assistance does not extend to an indemnity for costs that may be awarded against a legally assisted person.

## **6.13 Reporting**

- (a) An assisted person or his/her solicitor shall provide any information that may reasonably be requested from time to time in relation to the subject matter of their claim.
- (b) On completion of a matter the legal representative shall forward a report which shall provide the following information:
  - (i) the result of the action, including details of orders made;
  - (ii) particulars of any orders for costs; an itemised bill of costs.
- (c) In those cases where a matter is settled on the basis of undertakings as to confidentiality, such terms of settlement will not be relied upon as a basis for the non-disclosure of information to the Attorney-General's Department in relation to the subject matter of the grant of assistance.

## **6.14 Withdrawal, Discontinuance of Proceedings**

- (a) The Attorney-General's Department must be advised of the reasons for the withdrawal and/or discontinuance within seven days of the notice being filed.
- (b) Where the withdrawal and/or discontinuance is due to:

- (i) failure of a legal representative to comply with the requirements of the Court rules;
- (ii) the disclosure of false information in the application;
- (iii) failure of the applicant and/or his/her legal representatives to pursue the claim;

the Attorney-General's Department may terminate the grant of assistance and require reimbursement of any monies advanced.

## **6.15 Misrepresentation**

- (a) All information provided in support of the application must be true and correct at the time it is provided. Where it is shown that the applicant and/or his/her legal representative misrepresented the application in any particular, the Minister or delegate reserves the right to terminate the grant and require immediate reimbursement of monies advanced.
- (b) Legally assisted persons and/or their legal representatives are required to give an undertaking to notify the Attorney-General's Department of any changes to their financial circumstances which may have a bearing on their continuing eligibility for financial assistance.

## **7. Procedural Fairness**

### **7.1 Review of Decisions**

- (a) Where an application for financial assistance is refused, the reasons for refusal must be provided. The applicant will also be advised of the mechanism to seek a review of the decision and any request for review must be lodged within 28 days after reasons for refusal have been given to the applicant. The review shall be carried out by a nominated officer other than the original decision maker.
- (b) Similarly, where an application for assistance is approved subject to conditions and the applicant is dissatisfied with any part of the decision, the applicant may seek a review of the decision by lodging a request in writing. Applications for review must be made within 28 days after reasons for imposing the conditions have been given to the applicant. The review shall be carried out by a nominated officer other than the original decision maker.

## **7.2 Ombudsman & Complaints**

Where a person is dissatisfied with any aspect of the administration of his/her application, a complaint may be made to the Commonwealth Ombudsman.

## **7.3 Freedom of Information Act 1982**

Any person has the right to apply for access to documents under the Freedom of Information (FOI) Act 1982. Section 15 of the FOI Act sets out what is required for an application under the Act. The application has to:

- (a) be in writing;
- (b) refer specifically to the FOI Act;
- (c) be accompanied by payment of the fee required;
- (d) provide sufficient information to permit identification of the document;
- (e) be lodged at an office of the agency; and
- (f) request the particular form of access.

## **7.4 Privacy Act 1989**

The Privacy Act 1989 requires Commonwealth Government departments and agencies to comply with certain Information Privacy Principles (IPP). Where a person believes that his/her privacy has been infringed because of a breach of an IPP, that person may complain to the Privacy Commissioner.