

**Legal Aid ACT**



# Legal Assistance Guidelines

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## INTRODUCTION

The Legal Aid Commission (ACT) is established under the *Legal Aid Act 1977* (“the Act”) to provide legal aid services in the ACT.

The Commission comprises two entities:

- **Legal Aid Commission (ACT)**, which is a body corporate governed by the Chief Executive Officer and board of commissioners; and
- **Legal Aid ACT** which is the name under which the Commission provides legal aid services under the Act.

A copy of the *Legal Aid Act 1977* can be obtained from:

- the ACT Legislation register      <http://www.legislation.act.gov.au/>
- the Legal Aid ACT website      <http://www.legalaidact.org.au/>

The Legal Assistance Guidelines are on the Legal Aid ACT website and copies can be obtained from Legal Aid ACT at 2 Allsop Street, Canberra City 2601.

## Legal Aid Services

Legal Aid ACT provides the following Legal Aid services:

### Information

Information about the law and limited legal advice can be obtained by telephoning the Legal Aid Helpline on 1300 654 314, or by visiting Legal Aid ACT’s office.

### Legal advice

Legal advice is available by appointment at Legal Aid ACT’s office.

### Duty lawyer

Duty lawyers are available at the Magistrates Court, Children’s Court, Federal Circuit Court and Family Court of Australia and Federal Magistrates Court to advise and assist people in criminal and family proceedings.

### Legal Tasks

Legal tasks are discrete pieces of legal work provided to assist a person resolve a legal problem or a particular stage of a legal problem.

## **Legal Assistance**

Legal assistance is available under section 28 of the Act for representation in legal proceedings if:

1. the person needs legal assistance but cannot afford a private lawyer (*'Means test'*);
2. it is a type of case in which legal assistance may be granted (*'Guidelines'*); and
3. it is reasonable in all circumstances to provide the assistance (*'Reasonableness test'*).

### ***Means test***

In deciding whether a person is in need of assistance because they cannot afford to pay a private lawyer, the Commission applies a means test which looks at their income, expenses, assets and liabilities (see 'The Means Test' page 41).

### ***Guidelines***

The Legal Assistance Guidelines are made by the Commission under section 12 of the Act and explain the types of matters in which assistance may be provided.

### ***Reasonableness test***

The reasonableness test is set out in section 28 of the *Legal Aid Act 1977* and provides that legal assistance may be granted only if it is reasonable in all the circumstances to do so. In making a decision whether it is reasonable in all the circumstances to provide legal assistance regard is had to the benefit the person may receive from legal assistance, any disadvantage they may suffer if assistance is not granted, and if assistance is sought for legal proceedings, whether the outcome of the proceedings is likely to be favourable to the person. In applying this test the Commission has regard to all relevant circumstances including whether:

1. A prudent self-funding litigant would risk their own financial resources in funding the matter for which legal assistance is sought; and
2. The costs involved in providing the assistance are warranted by the likely benefit to the applicant or, in appropriate circumstances, the community.

Assistance will usually be provided to a person if the means and reasonableness tests are satisfied, and the matter is covered by the Guidelines. However, in providing legal assistance Legal Aid ACT must have regard to the amount of money available in the legal aid fund. When funds are limited Legal Aid ACT may have to refuse or limit assistance in matters which would, but for lack of funds, qualify for assistance.

Applications for legal assistance must be made in writing on the prescribed form. Application forms can be obtained from Legal Aid ACT's office, or from welfare organisations and many private law firms.

## **Community Legal Education**

This program aims to raise community awareness about Legal Aid services and the law in general. Presentations on a range of topics are available for schools, colleges, social clubs and community groups. Please call 6243 3411 for more information.

## GUIDELINES FOR ASSISTANCE IN TERRITORY MATTERS

The classes of matters in which legal assistance may be granted in matters involving Territory law are as follows:

- Representation in prosecutions where a conviction is likely, in the opinion of the Chief Executive Officer, to result in imprisonment or dismissal from employment or loss of livelihood or vocation, provided that in the case of a defended matter a legal practitioner certifies that it is reasonable in all the circumstances to defend the prosecution.
- Representation of Aboriginal and Torres Strait Islander people in prosecutions, provided that in the case of a defended matter a legal practitioner certifies that it is reasonable in all the circumstances to defend the prosecution.
- Representation of children in non-traffic prosecutions.
- Proceedings under the *Domestic Relationships Act 1994*.
- Proceedings pursuant to the *Children and Young People Act 2008*.
- Initiating or responding to applications for protection orders under the *Family Violence Act 2016*.
- Initiating or responding to applications for protection orders under the *Personal Violence Act 2016* where there are substantial issues of personal safety or where the applicant for assistance may experience significant personal detriment if assistance is not granted.
- Proceedings under the *Mental Health Act 2015*.
- Applications for the grant or restoration of a licence to drive a motor vehicle where the applicant is, in the opinion of the Chief Executive Officer, more likely than not to be dismissed from employment or is otherwise likely to suffer exceptional hardship if the order sought is not granted.
- Actions for damages for death or personal injury.
- Applications for criminal injuries compensation.
- Applications for employment related compensation.
- Personal debt matters involving an issue of such substance as to warrant the representation of the applicant.
- Family provision matters.
- Inquests, inquiries under the *Inquiries Act 1991* and similar proceedings involving issues of substantial public interest.
- Proceedings under the *Terrorism (Extraordinary Temporary Powers) Act 2006*.
- Matters which in the opinion of the Chief Executive Officer raise real questions of denial or breach of human rights.

The Chief Executive Officer may at his/her absolute discretion grant assistance in a matter not falling within one of the classes listed above.

**Legal assistance will not normally be granted for the following classes of matters:**

- Proceedings where the likely monetary benefit to the applicant will not, in the opinion of the Chief Executive Officer, exceed \$5,000.
- Preparation of Wills.
- Conveyancing.
- Applications for Probate or Letters of Administration.
- Proceedings arising from a commercial or business relationship between the applicant and the other party or parties.
- The institution of proceedings for damages for defamation.
- Employment disputes.
- Proceedings in a court or before a tribunal outside the Australian Capital Territory.
- The institution of proceedings in a court or before a tribunal which should, in the opinion of the Chief Executive Officer, be more appropriately commenced outside the Australian Capital Territory.

**Expenditure limits in Territory matters**

The guidelines set out below are to be applied for the purposes of determining whether legal assistance may be provided.

**Criminal Proceedings**

Legal assistance will not be granted to an applicant, or to a number of applicants who are to be tried at the same time, if the total cost to the Commission of granting legal assistance is, in the opinion of the Chief Executive Officer, likely to exceed \$100,000.

**Child Care Matters**

Legal assistance will not be granted to a person for representation in proceedings under the *Children and Young People Act 2008* where the total cost to the Commission of granting assistance is, in the opinion of the Chief Executive Officer, likely to exceed \$15,000 in respect of that person.

**Inquests, Inquiries and Similar Proceedings**

Legal assistance will not be granted to a person for representation in proceedings brought under the *Coroners Act 1997*, the *Inquiries Act 1991* or in similar proceedings where the total cost to the Commission of granting assistance is, in the opinion of the Chief Executive Officer, is likely to exceed \$20,000 in respect of that person.



## **Interpretation**

For the purpose of these guidelines the cost to the Commission of a Grant of Legal Assistance includes the estimated cost of the provision of legal services by an officer of the Commission calculated as if those services were provided by a private legal practitioner.

## **Discretion**

In matters other than criminal proceedings in circumstances which are in the opinion of the Chief Executive Officer exceptional, a Grant of Legal Assistance may be made to a person notwithstanding the provisions of these guidelines.

## **GUIDELINES FOR ASSISTANCE IN COMMONWEALTH MATTERS**

The National Partnership Agreement on Legal Assistance Services between the Commonwealth Government and ACT Government requires Commonwealth funded legal assistance services to be provided in accordance with the service priorities outlined below.

Commonwealth funded services include services in matters involving Commonwealth law and legal representation of people whose problems involve a mixture of Commonwealth family law issues and Territory law family violence and/or child protection issues.

### **Legal Aid Service Priorities**

The following provides guidance on the prioritisation of legal assistance services delivered by legal aid commissions and community legal centres under the National Partnership Agreement on Legal Assistance Services.

#### **Priority Clients**

- B1 The legal assistance priority client groups recognise people whose capability to resolve legal problems may be compromised by circumstances of vulnerability and/or disadvantage. People who fall within the priority client groups are more likely to experience legal problems, less likely to seek assistance and/or less able to access services for a range of reasons.
- B2 Legal assistance service providers should focus their services on people experiencing financial disadvantage.
- B3 Where appropriate, legal assistance service providers should also plan and target their services to people who fall within one or more of the priority client groups (in alphabetical order):
  - (a) children and young people (up to 24 years);
  - (b) Indigenous Australians;
  - (c) older people (aged over 65 years);
  - (d) people experiencing, or at risk of, family violence;
  - (e) people experiencing, or at risk of, homelessness;
  - (f) people in custody and prisoners;
  - (g) people residing in rural or remote areas;
  - (h) people who are culturally and linguistically diverse;
  - (i) people with a disability or mental illness;
  - (j) people with low education levels; and
  - (k) single parents.

- B4 The list of priority client groups is for guidance only and is not exhaustive. Service providers are not excluded from assisting clients that fall outside these groups.

### **Service priorities**

- B5 The use of Commonwealth funding provided under this Agreement by legal aid commissions and community legal centres should be broadly consistent with the principles and service priorities set out in this Schedule, where applicable.

### **General principles**

- B6 Commonwealth funding must be prioritised:
- B7 for the delivery of frontline services and focused on meeting the legal needs of individuals, with a specific focus on priority clients; and
- B8 to directly enable legal assistance providers to undertake activities required by the NLAP.
- B9 Mainstream, specialist and Aboriginal and Torres Strait Islander specific legal assistance services must be delivered in a manner consistent with the National Strategic Framework.
- B10 Family or civil law disputes should be resolved through alternative dispute resolution processes rather than through litigation, where appropriate.
- B11 The legal assistance sector should consider whether other services (legal as well as non-legal) may be relevant to a client's needs and make referrals to these services where appropriate. Suitable collaborative arrangements should be established for this purpose.

### **Family law priorities**

- B12 Legal assistance services related to family law should focus on:
- i. matters where the safety or welfare of children are at risk;
  - ii. matters involving allegations of family violence;
  - iii. matters involving complex issues about the living arrangements, relationships and financial support of children; and
  - iv. assisting people with property settlement matters if they are experiencing financial disadvantage or are at risk of homelessness.
- B13 For Legal Aid Commissions, the representation of children in family law proceedings and family dispute resolution processes should also be a focus.

### **Civil law priorities**

- B14 Legal assistance service providers should focus on assisting people with civil law problems that are likely to have a significant adverse impact if not resolved. For example, where there are implications for a person's safety, health and wellbeing, access to government benefits and pensions, or homelessness status.

B15 Key Commonwealth civil law areas are listed below (in alphabetical order):

- (a) Legal assistance services related to Commonwealth civil law should focus on:
- (b) bankruptcy matters;
- (c) consumer law matters;
- (d) employment matters;
- (e) extradition matters;
- (f) human rights and anti-discrimination matters;
- (g) insurance law matters;
- (h) migration matters; and
- (i) social security law matters (including matters relating to military entitlements and military compensation claims).
- (j) The list of Commonwealth civil law areas is for guidance only. The legal assistance sector should consider how to best meet civil law need collectively (arising from Commonwealth or State laws).

B16 Legal assistance service providers should respond collectively to emerging civil law issues identified through service planning, such as providing legal help for victims of natural disasters.

### **Criminal law priorities**

B17 Legal assistance services related to Commonwealth criminal law should focus on:

- i. matters where the defendant is a child;
- ii. matters where the defendant is being charged with a criminal offence for which a sentence of imprisonment is likely to apply should the defendant be found guilty; and
- iii. assisting persons being detained in custody.

## **FAMILY LAW COST MANAGEMENT METHODOLOGY**

### **Stages of Matter Model**

The model set out in the Table at paragraph 25 assists 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), however it may be used as a guide for the management of family law matters for which the model may not be wholly appropriate (see paragraph 8).

The Commission will 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. Assistance for a family law matter will be provided 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 will be made on a pro rata basis for work completed in the stage.
3. If an assisted person loses contact with a legal practitioner, payment for the work completed will 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 provision of any further legal assistance.
5. The stages of the model approximate the management of a matter in the Federal Circuit Court and 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 Federal Circuit Court and Family Court of Australia or the Federal Circuit 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 Federal Circuit Court and Family Court of Australia's Magellan Project.
7. If the model is not appropriate, the Commission may apply particular stages of the model or variations of the stages.

*Example* the matter may be managed by early intervention reports, FDR 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 — Family dispute resolution**

8. The Commission may refer an applicant for legal assistance to a Family Dispute resolution (FDR) service at any time.
- Note* The Commission will give consideration to resolving family law matters by referring an applicant for legal assistance to a FDR service, unless it is clearly inappropriate (see the Commonwealth Legal Assistance Guidelines).
9. Timing of referral will be affected by the nature of the dispute and any need for urgent intervention.
10. In many cases, referring an applicant to a FDR service will be the first stage of funding for a matter.
11. The provision of legal assistance for participation in a FDR service must be in accordance with stage 1(a) or 1(b).
12. If agreement is reached by the parties to the dispute as part of participation in a FDR service, the provision of legal assistance for participation in FDR extends to preparation work and work in filing consent orders.

### **Stage 2 — Litigation**

13. If a substantial amount of work is completed before legal assistance is provided for services in the litigation stages, the fees for the matter will be reduced on a pro rata basis.
14. The hearing length of a trial should be estimated, taking into account the estimate given by the court at the pre-hearing conference.
15. 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 one day of extra hearing time was required for the effective disposal of the case.
16. 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.
17. If work is undertaken and the assisted person cannot be found before all of the work covered by the 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.

18. 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.
19. 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**

20. This stage will enable the early consideration of merit and funding for trial.
21. Early release of the family report should be sought if possible.

**Stage 4 — Preparation for trial**

22. This stage is used for matters classified by the Federal Circuit Court and Family Court of Australia as direct, standard and complex matters, including for respondents under Hague Convention matters.
23. 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.
24. Funding for this stage is subject to the Commonwealth Legal Assistance Guidelines and is determined by the Commission on a case by case basis.

25. **Table; Stages of Matter Model**

**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): FDR early intervention stage

#### Allocation of hours

- taking instructions and preparing for participation in FDR
- representing assisted person at FDR session
- preparing consent orders, if appropriate

Total:

**Up to:**  
2 hours  
4 hours  
1 hour  
7 hours

### Stage 1(b): FDR litigation intervention (at any stage)

#### Allocation of hours

- representing assisted person at FDR session
- preparing consent orders, if appropriate

Total:

**Up to:**  
4 hours  
1 hour  
5 hours

### Stage 2(a): Initiating court proceedings - up to conclusion of directions hearings in the Federal Circuit Court and Family Court of Australia

#### Allocation of hours

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

Total:

Federal Circuit Court and Family Court of Australia  
Federal Circuit Court

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

7 hours  
5 hours

### Stage 2(ab): Initiating applications to the Federal Circuit Court

#### Allocation of hours

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

Total:

Documents etc

Court attendance

**Lump sum\*/up to:**  
6 hours

**Up to:**  
5 hours

### Stage 2(b): Initiating court proceedings - up to conclusion of directions hearing/s including application for interim relief in the Federal Circuit Court and Family Court of Australia

This is for 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:

Documents etc

**Lump sum\*/up to:**  
7 hours



Court attendance

**Up to:**  
5 hours

**Stage 2(c): Interim or summary hearing - as a discrete event - in the Federal Circuit Court and Family Court of Australia**

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:*

Documents etc

**Lump sum\*/up to:**  
6 hours

Court attendance

**Up to:**  
5 hours

**Stage 2(d): Up to conclusion of conciliation conference (if any) in the Federal Circuit Court and Family Court of Australia or the Federal Circuit Court**

**Allocation of hours**

- file management
- instructions
- court attendance
- consent orders, if appropriate

*Total:*

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

3 hours

**Stage 2(e): Case review (if any) in the Federal Circuit Court and Family Court of Australia**

**Allocation of hours**

- court documents - if any
- instructions
- court attendance
- consent orders, if appropriate

*Total:*

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

3 hours

**Stage 2(f): Up to conclusion of pre-hearing conference in the Federal Circuit Court and Family Court of Australia**

**Allocation of hours**

- file management
- instruction
- prepare client for family report process
- read family report
- court attendance
- consent orders, if appropriate

*Total:*

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

5 hours

**Stage 2(g): Application for recovery order in the Federal Circuit Court and Family Court of Australia or the Federal Circuit 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:*

Documents etc

Court attendance

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

3 hours

**Up to:**

3 hours

**Stage 2(h): Any subsequent appearance in the Federal Circuit Court**

**Allocation of hours**

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

*Total:*

Documents etc

Court attendance

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

6 hours

**Up to:**

5 hours

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

**Allocation of hours**

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

*Total:*

**Lump sum\*/up to**

3 hours

**Stage 4: Preparation for trial in the Federal Circuit Court and Family Court of Australia and the Federal Circuit Court**

**Allocation of hours**

- taking instructions
- interviewing witnesses
- preparing documents
- preparing Legal Assisted Person for family report process
- subpoena
- case management guideline trial documents
- preparing and delivering brief to Counsel
- reading family report

**Negotiated maximum fee**

Negotiated, based on estimated preparation time worked out using the Commission's hourly rate and the Commonwealth Legal Assistance Guidelines.

- conference with Counsel
- attending list conference

**Stage 5: Trial costs for legal practitioner in the Federal Circuit Court and Family Court of Australia and the Federal Circuit Court**

**Allocation of hours**

- attending each day of hearing
- advocacy allowance, if any
- to take judgement

**Lump sum\*/up to**

*Totals:*

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

**Stage 6: Appeals from the Federal Circuit Court and Family Court of Australia and the Federal Circuit Court**

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

**Allocation of hours**

- appeal to single Judge of the Federal Circuit Court and Family Court of Australia
- appeal to the Full Court of the Federal Circuit Court and Family Court of Australia

**Lump sum\*/up to**

12 hours  
10 hours

# LEGAL ASSISTANCE GUIDELINES IN COMMONWEALTH MATTERS

The Commission has determined the following guidelines under section 12 of the *Legal Aid Act 1977* for the provision of legal assistance in Commonwealth law matters.

In order to achieve national consistency in the provision of legal assistance in Commonwealth law matters, the guidelines are based on national model guidelines which have been adopted by all legal aid commissions.

## Assistance subject to availability of funds

Assistance will ordinarily be provided where the eligibility criteria in the *Legal Aid Act 1977* are satisfied and the matter falls within the Legal Assistance Guidelines determined by the Commission. However, in granting legal assistance the Commission must have regard to the amount of money available in the legal aid fund for that purpose. When available funds are limited the Commission may refuse or limit assistance in matters which would, but for lack of funds, qualify for assistance.

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## Part 1 General

### 1.1 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 Service 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 1.2 of this Part 1 (unless otherwise specified in these Guidelines); and
  - (e) meets the merits test in 1.3 of this Part 1 (unless otherwise specified in these Guidelines).
- (2) When determining whether a Grant of Legal Assistance is to be made, the Commission should apply guideline 1.1(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 1.1(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.

### 1.2 The means 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.

### 1.3 The merits test

- (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 1.3(2);
  - (b) the ***prudent self-funding litigant*** test in 1.3(3); and
  - (c) the ***appropriateness of spending limited public legal aid funds*** test in 1.3(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:

- 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;
- 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 contract 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.

## **1.4 Test cases**

- (1) In considering whether to make a Grant of Legal Assistance, the Commission may take into account whether funding is available from another Commonwealth scheme such as the Commonwealth Public Interest and Test Cases Scheme.

## **Part 2 Family law guidelines**

*Note* For the family law priorities see Schedule A of the National Partnership Agreement, the Commonwealth Legal Aid Service Priorities and the Family Law Priorities set out at page 11.

### **Guideline 1 – Priority for urgent matters**

#### **1.1 Urgent matters**

- (1) Although each of the family law priorities in the Commonwealth Legal Aid Service Priorities are generally of equal priority, in deciding whether to make a Grant of

Legal Assistance for a family law matter for an interim order or injunction, the Commission will 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 Non-urgent matters**

- (1) If the Commission determines 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.
- (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).
- (3) In prioritising funds available for non-urgent matters and deciding whether a Grant of Legal Assistance is to be made and if so, the nature and extent of that Grant, the Commission may take into consideration whether:
  - (a) there is, or is a likelihood of, domestic violence, especially if an allegation of domestic violence has been made;
  - (b) concerns as to the safety, welfare and psychological wellbeing of a child have been identified and require further investigation;
  - (c) the applicant has a language or literacy problem;
  - (d) the applicant has an intellectual, psychiatric or physical disability
  - (e) it is difficult for the applicant to obtain legal assistance because the applicant lives in a remote location; or
  - (f) the child/children are Aboriginal or Torres Strait Islander as defined under section 4 of the *Family Law Act 1975*.

## **Guideline 2 – Family Dispute Resolution (FDR) Services**

### **2.1 Consideration of resolution processes other than litigation**

- (1) 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 FDR Services before it considers making a Grant of Legal Assistance to that applicant for Litigation Services at any stage in the proceedings.



## **2.2 Appropriateness of participation in FDR Services**

- (1) The Commission will only make a Grant of Legal Assistance requiring an applicant to participate in FDR Services if it considers that this is appropriate in the particular case. Participation in FDR 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 about 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; or
  - (d) one or more of the parties to the proceedings is unable to participate effectively in family dispute resolution (whether because of an incapacity of some kind, physical remoteness from dispute resolution services or for some other reason).

## **Guideline 3 – Independent representation of children**

### **3.1 Assistance for independent representation of children's interests**

- (1) The Commission may make a Grant of Legal Assistance for the independent representation of children's interests in court proceedings if:
  - (a) a court makes an order that the child's interests be independently represented by a lawyer and asks the Commission to arrange for a lawyer to provide the independent representation; and
  - (b) the Commission decides that it is reasonable to provide a Grant of Legal Assistance for the Independent Children's Lawyer.

*Note* A court order that an Independent Children's Lawyer be appointed in a matter does not impose an obligation on the Commission to make a Grant of Legal Assistance for the independent representation.

- (2) The Commission should make a Grant of Legal Assistance for the independent representation of a child's interest 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 independent representation by a party not receiving legal assistance**

- (1) If the Commission makes a Grant of Legal Assistance for an Independent Children's Lawyer the Commission must give consideration as to the ability of the parties to the proceedings to:
  - (a) contribute to the costs associated with a single expert report; and

- (b) contribute to the costs and disbursements associated with the Grant of Legal Assistance for the Independent Children’s Lawyer.
- (2) The Commission may determine an amount to be paid by each party taking into account:
  - (a) the party’s capacity to pay;
  - (b) the party’s legally aided status; and
  - (c) contributions assessed on existing files.
- (3) Taking into account that the parties are equally liable to pay a single expert witness’s reasonable fees and expenses incurred in preparing a report (Family Law Rules, R15.47) ordinarily, if a party is unaided, they will be required to contribute to an equal portion of the cost of the single expert.
- (4) Guideline 3.2(1) does not apply to proceedings for special medical procedures involving a child in which a Grant of Legal Assistance for independent representation of the child’s interest 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.
- (5) If a party refuses or fails to pay the amount required by the Commission under this guideline 3.2, legal assistance for the Independent Children’s Lawyer should continue to be provided on the condition that the Independent Children’s Lawyer in appropriate circumstances seek an order for costs against that party at an appropriate time in the court proceedings.

## **Guideline 4 – Parenting orders**

### **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. the party has a certificate under section 60I of the *Family Law Act 1975* in relation to the dispute; or
  - ii. participation in FDR Services is inappropriate in accordance with guideline 2 of this Part 2.

### **4.2 Assistance for applications to discharge or vary parenting arrangements**

- (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 to set aside 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; and
  - (b) any of the following circumstances apply:
    - i. the party has a certificate under section 60I of the *Family Law Act 1975* about the dispute; or
    - ii. participation in FDR Services is 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*

- The likelihood of violence, or physical or mental harm, to the applicant or a child.
- The removal or risk of removal of a child from an applicant who has primary residence responsibilities.
- The removal or risk of removal of a child from the jurisdiction of the Court.
- 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(1)(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**

- (1) 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.

- (2) Notwithstanding guideline 4.1(a) above, in circumstances where a child protection authority is involved and is supportive of the third party, the Commission may grant aid to the extent necessary to secure the child's best interests.

#### **4.4 Assistance in 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.

### **Guideline 5 – Child maintenance and child support**

#### **5.1 Assistance for child support matters**

The Commission may make a Grant of Legal Assistance for to a child support matter under the *Child Support (Assessment) Act 1989* or *Child Support (Registration and Collection) Act 1988*.

## **5.2 Social Security Appeals Tribunal (SSAT) review of Child Support Agency decisions**

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

- (a) in the SSAT for review of a Child Support Agency decision;
- (b) in the AAT for review of a decision of the SSAT; or
- (c) involving an appeal under the child support legislation to a Court on a question of law from a decision of the SSAT.

if the Commission considers that circumstances exist that affect the person's ability to adequately represent himself or herself.

## **5.3 Assistance for child maintenance matters**

The Commission may make a Grant of Legal Assistance for a child maintenance matter under the *Family Law Act 1975* to:

- (1) apply for, or respond to, an application for a child maintenance order (including an adult child maintenance order); or
- (2) apply for or respond to an application to vary a child maintenance order.

## **5.4 Assistance for applicant children**

The Commission may make a Grant of Legal Assistance to a child (including an adult child) seeking a child maintenance order.

## **5.5 Application of Part 2 to the maintenance of ex-nuptial children in Western Australia**

- (1) A Grant of Legal Assistance may be made for a matter in Western Australia involving the maintenance of an ex nuptial child only if the matter is provided for by the child support legislation as it extends to Western Australia.
- (2) This Part, and any amendments to this Part, apply to a matter in Western Australia involving the maintenance of an ex nuptial child in the same way that the child support legislation, and any amendments to the child support legislation, apply to the matter.

*Note see section 13 of the Child Support (Assessment) Act 1989 and section 5 of the Child Support (Registration and Collection) Act 1988.*

## **Guideline 6 – Spousal maintenance under the *Family Law Act 1975* or the *Federal Circuit Court and Family Court of Australia Act 1997 (WA)***

The Commission may make a Grant of Legal Assistance for a spouse maintenance matter under the *Family Law Act 1975* or the *Federal Circuit Court and Family Court of Australia Act 1997 (WA)* to:

- (a) apply for, or respond to, an application for a spouse maintenance order; or
- (b) apply for, or respond to, an application to vary a spouse maintenance order.

The Commission should be satisfied that:

- (a) the applicant for assistance cannot obtain the order by consent;

- (b) the applicant for assistance cannot adequately prepare or defend the court application without legal assistance; and
- (c) the applicant for assistance cannot obtain appropriate legal assistance from another source.

### **Guideline 7 – Arrears of spousal or child maintenance or child support**

The Commission may make a Grant of Legal Assistance to negotiate or prepare court proceedings for payment of arrears of child support, or spousal or child maintenance, 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 – Parentage**

- (1) The Commission may make a Grant of Legal Assistance to an applicant for the purpose of determining a parentage dispute, including the provision of funding for parentage testing.
- (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) Assistance may only be provided if the finding in relation to parentage is necessary for the determination of the substantive proceedings.
- (4) A Grant of Legal Assistance for parentage testing should only be made on the condition that steps are taken to seek recovery of the costs of the testing where appropriate.

### **Guideline 9 – Special medical procedures involving children**

- (1) The Commission should make a Grant of Legal Assistance to the parents of a child in any court proceedings for 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**

- (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 for 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.

### **Guideline 11 – Divorce and nullity of marriage**

The Commission will not make a Grant of Legal Assistance to an applicant for assistance for a court application relating to divorce or nullity of the person's marriage unless special circumstances exist and 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.
- A need to dispense with service of the application.

### **Guideline 12 – Property**

- (1) The Commission may make a Grant of Legal Assistance for the resolution of a property dispute under the *Family Law Act 1975* or the *Federal Circuit Court and Family Court of Australia Act 1997* (WA) only if:
  - (a) the estimated equity in the disputed property is more than \$20,000;
  - (b) the Commission is satisfied from the material provided to it that the separation of the parties is final; and
  - (c) the dispute relates to:
    - i. property; and/or
    - ii. funds from which the applicant for assistance may receive only a deferred benefit, such as superannuation benefits.
- (2) Ordinarily a Grant of Legal Assistance will only be granted for the resolution of the dispute through participation in a Commission FDR service.
- (3) A Grant of Legal Assistance for litigation for a dispute about property may only be made if the applicant for assistance is also seeking the resolution of another related family law matter by the court or 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.
- (4) Where the dispute relates to the preservation of property and there is a risk that property will be disposed of then a limited Grant of Legal Assistance may be made for injunctive relief.

### **Guideline 13 – Assistance after final court orders**

A Grant of Legal Assistance will not be made for any action undertaken after final orders for 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 set aside 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 14;
- (d) enforcement of orders in accordance with guideline 15;
- (e) variation of a child maintenance or child support order under guideline 5 or 6; or
- (f) in exceptional circumstances, limited ongoing work by an Independent Children's Lawyer associated with or necessary for the implementation of orders.

### **Guideline 14 – Appeals**

- (1) The Commission may make a Grant of Legal Assistance for an appeal in a family law or child support order, including for the participation of an Independent Children's Lawyer 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 14.

### **Guideline 15 – Enforcement of court orders**

- (1) The Commission may make a Grant of Legal Assistance for court proceedings to enforce a final or interim court order for a family law or child support matter.
- (2) A Grant of Legal Assistance under this guideline 15:
  - (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.

### **Guideline 16 – Contempt of court and breach of court orders**

The Commission may make a Grant of Legal Assistance to an applicant for assistance in 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 17 – 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; or
  - (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 for an applicant to intervene in proceedings for the return of a child under the Convention.

## **Guideline 18 – Family law costs management**

### **18.1 General**

- (1) In this guideline 18:

***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, 15 and 18.2 of this Part 2.

***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 Commission should treat the following proceedings as a new matter for the purposes of the Family Law Costs Management Methodology:
- (a) recovery, location and/or information order relating to the location and/or recovery of a child;
  - (b) appeals; or
  - (c) enforcement proceedings.
- (3) The costs management principles in this guideline 18 apply to all Grants of Legal Assistance made by the Commission for family law matters.

### **18.2 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 party in a family law or child support matter regardless of whether legal assistance in the matter is provided in-house by the Commission or by an External Service Provider, is limited to \$14,000.



- (2) The limit on costs does not apply to Grants of Legal Assistance to Independent Children’s Lawyers.

### **18.3 If costs likely to exceed limit**

- (1) Subject to guideline 18.3(2), (3) 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, having regard to the following factors:
  - (a) whether the applicant for assistance has incurred significant additional costs due to circumstances of a kind listed in guideline 1.2(3);
  - (b) whether it would be unreasonable to expect the applicant for assistance to adequately represent himself or herself due to circumstances of a kind listed in guideline 1.2(3);
  - (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; and
  - (e) the likelihood of risk to a child’s safety or welfare.
- (2) Before making a decision under guideline 18.3(1), the Commission will 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 18.3(1) to increase the costs cap for a particular Grant of Legal Assistance will be subject to strict limits on costs, and the nature and extent of the additional cost will 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.

## **Part 3 Criminal law guidelines**

*Note* For the criminal law priorities see Schedule A of the National Partnership Agreement, the Commonwealth Legal Aid Service Priorities, Criminal Law Priorities set out above at page 12.

### **Guideline 1 – Commonwealth Criminal Law Matters**

The guidelines to be applied by the Commission are the guidelines used by the Commission, at the date of the relevant application for assistance, for applications for assistance in State or Territory Criminal law matters.

## **Part 4 Civil law guidelines**

*Note* For the civil law priorities see Schedule A of the National Partnership Agreement, the Commonwealth Legal Aid Service Priorities, Civil Law Priorities set out above at page 11.

### **Guideline 1 – General**

#### **1.1 Consideration of resolution processes other than litigation**

- (1) In a Civil law matter under this Part 4, the Commission must consider making a Grant of Legal Assistance for an applicant for assistance to participate in dispute resolution services before it considers making a Grant of Legal Assistance to that applicant for Litigation Services at any stage in the proceedings.
- (2) The Commission may make a Grant of Legal Assistance for an applicant for assistance to participate in dispute resolution services at any stage of a matter.
- (3) The Commission may make a grant to investigate and report on the merits of a case.

#### **1.2 Assistance for Civil Proceedings other than those dealt with in this Part 4**

- (1) The Commission may make a Grant of Legal Assistance for litigation where the applicant for aid falls within the category of disadvantaged client.
- (2) In determining if a client is disadvantaged the Commission may take into account
  - (a) the practical or material benefit/detriment/loss at risk;
  - (b) whether the matter is of such complexity that it could not be represented to the court without legal representation; and
  - (c) whether the applicant's ability to communicate, and/or self-represent is affected by:
    - i. mental illness or impairment;
    - ii. physical disability;
    - iii. a first language other than English;
    - iv. literacy levels;
    - v. existence of financial stress/material deprivation;
    - vi. housing disability;  
*Note* this may be indicated by homelessness or low income earners with private rental housing costs exceeding 30% household income
    - vii. remoteness of location and access to service providers; or
    - viii. issues of joblessness and/or long term unemployment.

#### **1.3 Assistance for damages actions**

Where a civil law action is likely to result in the applicant for assistance receiving an award of damages or property, the Commission will not ordinarily make a Grant of Legal Assistance if the Commission is satisfied from the material provided to it that:

- (a) the action could reasonably be expected to be conducted under a conditional costs agreement or similar arrangement with a private legal practitioner; or
- (b) the applicant for assistance can obtain appropriate legal assistance from another source.

## **Guideline 2 – Social security and other Commonwealth benefits**

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) requires significant medical evidence;
- (d) 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 Service Priorities, Special Circumstances of the Applicant priorities; or
- (e) the Commission determines that the appeal involves an important or complex question of law.

## **Guideline 3 – Migration cases**

### **3.1 Assistance for 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 is a difference of judicial opinion that relates to a substantive issue in dispute that has not been settled by the Full Court of the Federal Court or the High Court;
  - (b) the proceedings seek to challenge the lawfulness of detention; or
  - (c) there is an arguable error of law.
- (2) In making a decision under (1)(c), the Commission will have regard to:
  - i. the importance of the case; and/or
  - ii. whether the case is a suitable vehicle for establishing new legal precedent.

*Note* Guideline 3.1(1)(b) does not include a challenge to a decision about a visa or a deportation order.

- (3) In all other cases, applicants should be referred to the Immigration Advice and Application Assistance Scheme (IAAAS) for possible assistance.

### **3.2 Assistance for migration matters where family violence**

- (1) Notwithstanding 3.1 above, in circumstances where a member of a family unit has experienced family violence by their partner, the Commission may grant aid to the extent necessary to progress their application for permanent residence pursuant to

Division 1.5 of the Regulations (Family Violence Provisions) after the breakdown of their marital/defacto relationship where:

- (a) no alternative services can assist the client with their application within a reasonable period of time; and
- (b) the matter is complex; or
- (c) the particular circumstances of disadvantage of the client including:
  - i. the extent of the impact on the client; and
  - ii. practical difficulties in self representing, make it appropriate.

#### **Guideline 4 – Equal opportunity and discrimination cases**

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 real prospect of substantial benefit being gained by the applicant for assistance.

#### **Guideline 5 – War veterans’ matters**

- (1) 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.

#### **Guideline 6 – Other Federal and High Court proceedings**

Subject to the other guidelines in this Part 4, the Commission may make a Grant of Legal Assistance for any of the following types of matters if there is a strong prospect of substantial benefit being gained by the applicant for assistance in relation to the matter:

- (a) appeals from decisions of the Administrative Appeals Tribunal;
- (b) initiating proceedings in the Federal Court, the Federal Circuit Court or the High Court; and

- (c) appeals in the Full Court of the Federal Court or the High Court.

## **Guideline 7 – Proceeds of crime**

- (1) The Commission may make a Grant of Legal Assistance to an applicant for assistance in proceedings under the *Proceeds of Crime Act 2002* if the applicant has property that is covered by a restraining order under the Act, or is likely to be covered by such an order.
- (2) In assessing an applicant’s eligibility under the means test for the purpose of determining an application for a Grant of Legal Assistance under this guideline the Commission must disregard any property of the applicant that is subject to a restraining order or confiscation order under the *Proceeds of Crime Act 2002*, or is likely to be covered by such an order.
- (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 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**

The Commission may make a Grant of Legal Assistance to an applicant for assistance in 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**

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.

## **Guideline 10 – Consumer Protection**

### **10.1 Assistance for certain matters**

- (1) The Commission may make a Grant of Legal Assistance for Commonwealth consumer protection matters involving:
  - (a) credit (including mortgages and guarantees);
  - (b) unconscionable contracts and unfair contract terms;
  - (c) the purchase of goods and services;
  - (d) insurance contracts and superannuation; or

- (e) a claim or cause of action against a person retained to advise and/or represent a client for the purpose of consumer transaction.

## **10.2 Other consumer matters**

- (1) In other consumer protection matters the Commission is unlikely to grant aid unless the applicant for aid falls within the category of disadvantaged client. In determining if the client is disadvantaged the Commission may take into account those factors as set out in Part 4, Guideline 1.2 (2).
- (2) A grant of aid will not be available for:
  - i. matters about medical negligence;
  - ii. matters about disputes which are the result of commercial or investment transactions conducted by the applicant; or
  - iii. matters concerning building disputes

## **10.3 Consumer protection matters – External Dispute Resolution.**

- (1) The Commission may make a Grant of Legal Assistance for external dispute resolution in limited circumstances A grant of aid will only be made available where:
  - (a) no alternative services can assist the client to lodge or process their dispute within a reasonable period of time; and
  - (b) the matter is complex; or
  - (c) the particular circumstances of disadvantage of the client including:
    - i. the extent of the impact on the client; or
    - ii. practical difficulties in self representing make it appropriate.

## **10.4 Consumer protection – Lodging a complaint.**

The Commission may make a grant of aid to assist an applicant in lodging a complaint to the regulator in a consumer protection matter where:

- (a) no alternative services are available to assist the client; and
- (b) the matter is complex; or
- (c) the particular circumstances of disadvantage of the client including:
  - i. the extent of the impact on the client; or
  - ii. practical difficulties in self representing make it appropriate; or
- (d) the public interest would be advanced in assisting the applicant to lodge the complaint.

## **10.5 Consumer protection matters – Court proceedings.**

- (1) The Commission may make a Grant of Legal Assistance for court proceedings where:
  - (a) the applicant has already participated in IDR and EDR and the parties have not resolved the dispute;
  - (b) participating in IDR and EDR is unavailable, impracticable or not appropriate in the circumstances; or

(c) providing legal representation to the applicant for court proceedings would advance the public interest e.g. there is a significant point of law to be determined.

(2) Where the consumer matter is eligible for the small claims procedure set out at s199 *The National Consumer Protection Act 2009* aid is limited and in addition to guideline 10.5 (1) consideration of the:

(a) complexity of the matter; and

(b) the particular circumstances of disadvantage of the client including:

i. the extent of the impact on the client; or

ii. practical difficulties in self representing will be taken into account in determining the appropriateness of granting aid.

## **Supplementary Guidelines for Commonwealth matters**

The following Guidelines only apply to the extent they are not inconsistent with the Commonwealth Legal Assistance Guidelines.

### **Indictable Commonwealth Prosecutions**

Initially legal assistance may be limited to the provision of the services of an in-house practitioner for the purposes of assessing the likely cost of the applicant's representation and the prospects of acquittal.

In addition to the above, costs shall be calculated with an expectation that the accused will make any appropriate admissions of fact, the effect of which would be to reduce the length and/or cost of trial.

In any criminal trial the total cost of committal, if any, and trial shall not exceed \$100,000. Those costs to be calculated in the same manner as identified in respect of Territory matters in the Guideline titled "Expenditure Limits in Territory Matters".

### **Matters Arising Under the Family Law Act**

Legal assistance is limited to matters where the applicant satisfies the Office that there exists a substantial question of serious or imminent risk to the welfare of a child or that there is a substantial issue as to equality of bargaining capacity between the parties.

This Guideline does not apply to the funding of child representation.

### **Appeals of a Decision of a Judge of the Federal Circuit Court and Family Court of Australia or of a Federal Magistrate**

Legal assistance will be provided to an appellant only where there exists an issue of law which is of such substance, or where the appellant satisfies the Office that an appellate Court is likely to find that the appealed judgement was clearly wrong, such that it is in the public interest to fund the appeal.

## **Social Security and Other Commonwealth Benefits Appeals**

These matters may be funded only if there is no community legal centre reasonably capable of handling the applicant's matter.

### **Forum Test**

Having regard to funds available to the Commission and to the competing priorities resulting from the Commonwealth Legal Aid Services Priorities and the Commonwealth Legal Assistance Guidelines, legal assistance will not normally be granted for the institution of proceedings in a Court or before a tribunal which proceedings should, in the opinion of the Chief Executive Officer, be more appropriately commenced outside the Australian Capital Territory.



## THE MEANS TEST

To be financially eligible for legal assistance an applicant must satisfy both the income and assets tests.

Subject to all the provisions of this Means Test an applicant will be financially eligible for legal assistance if his/her total contribution is less than the estimated cost of the proceedings which are the subject of the application for legal assistance.

This may include an assessment of any financially associated persons.

In this Means Test, a financially associated person includes a person:

- from whom the applicant usually receives financial support;
- to whom the applicant usually provides financial support; or
- who would be likely to financially assist the applicant in obtaining legal services.

“Person” may include a relative, partner, spouse, corporation, trust, group, etc.

### 1. INCOME TEST

#### 1.1 Definitions

##### 1.1.1 *"Total Income"*

is all income, from whatever source, of the applicant and any financially associated person.

##### 1.1.2 *"Gross Income"*

is the result of the deduction of excluded income from total income.

##### 1.1.3 *"Excluded Income"*

is income derived from the following sources:

- (a) a financially associated person of the applicant:
  - i. from whom the applicant is separated;
  - ii. who has a contrary interest in the matter for which legal assistance is sought ;
  - iii. who is in such a relationship with the applicant that disclosure of the legal problem may damage the relationship; or
  - iv. who is in such special circumstances in relation to the applicant that it would not be appropriate to have regard to the income of the financially associated person.
- (b) basic family payment; and
- (c) board paid to the applicant, to reimburse actual expenses, by a child or relative with independent income.

#### **1.1.4 "Assessable Income"**

is calculated by deducting the following expenses from gross income:

- (a) income tax including Medicare levy;
- (b) housing costs, including rent, mortgage plus rates, or one half of board payments, to a maximum amount equal to the median rental of a three bedroom house in the ACT;
- (c) child care charges, necessarily incurred by the applicant or a financially associated person to work or to study, up to 50% of the average cost of long-day child care for a single child at a child care centre in the ACT;
- (d) dependant allowance:
  - first dependant and each subsequent dependant: 150% of relevant dependant allowance - Institute of Applied Economic and Social Research's poverty line figure for a single person, head in workforce and costs, other than housing (please note that a dependant allowance is deducted for a spouse with whom the applicant lives whether the spouse is actually dependent on the applicant or not); and
- (e) maintenance payments actually paid, to a maximum amount equal to the appropriate dependant allowance.

#### **1.1.5 "Allowed Income"**

Is;

- (a) 120% of the Institute of Applied Economic and Social Research's poverty line figure for - single person, head in workforce and costs, other than housing;
- (b) deemed to be equal to total income where total income is derived solely from an income support payment or benefit administered by Centrelink; or
- (c) deemed to be equal to total income where the applicant is seeking a Grant of Legal Assistance in relation to an NDIS appeal matter and funding for the matter has been approved under the NDIS Appeals (Legal Services) MOU between DSS and the Commission.

## **2. ASSETS TEST**

### **2.1 Definitions**

#### **2.1.1 "Gross Assets"**

are the total assets of the applicant and any financially associated person.

#### **2.1.2 "Assessable Assets"**

are gross assets excluding:

- (a) any assets owned, to the exclusion in part or whole of the applicant, by a financially associated person:
  - i. from whom the applicant is separated;
  - ii. who has a contrary interest in the matter for which legal assistance is sought;
  - iii. who is in such a relationship with the applicant that disclosure of the legal problem may damage the relationship; or
  - iv. who is in such special circumstances in relation to the applicant that it would not be appropriate to have regard to the assets of the financially associated person.
- (b) household furniture and effects which are reasonably necessary and which are not of exceptionally high value;
- (c) clothing;
- (d) tools of trade (excluding motor vehicles);
- (e) motor vehicle(s) needed for private or domestic use except to the extent that the equity exceeds the average price of a five year old 6 cylinder standard motor vehicle in reasonable condition. The equity in a second motor vehicle will normally be considered an asset if the total equity in both motor vehicles exceeds that average price;
- (f)

i. the equity in the principal home to a maximum amount referring to the monthly median price of an established house in the ACT:

The "principal home" includes:

- (a) dwelling or caravan where the applicant normally resides, or resided immediately prior to separation;
- (b) the land on which the applicant is building a home in which he/she intends to live; or
- (c) In the case of a farm the primary purpose of which is income production, the house and surrounding 2 hectares of land.

ii. The equity in a farm or business which provides the applicant's main source of income, up to the appropriate maximum allowance, viz:

- (a) homeowner - monthly median price of an established house in the ACT
- (b) non-homeowner - 150% of the amount allowed at paragraph (a).

*("Homeowner" refers to an applicant who has an equity in the principal home which is not included in the value of the farm or business.)*

In this paragraph equity in the principal home, farm or business to the maximum provided for will only be

excluded from calculation of assessable assets where the applicant, if required to do so, satisfies the Chief Executive Officer that he or she cannot fund the proposed proceedings by way of loan secured by the equity;

- (g) lump sum compensation payments in hand - if neither the applicant nor a financially associated person is working and if the compensation recipient is currently precluded under Part 17 *Social Security Act 1991* from receiving a pension or benefit (in these circumstances the applicant will be deemed to have a gross weekly income equal to male, full-time adult, ordinary time average weekly earnings during the Social Security preclusion period); and
- (h) lump sum child or spouse maintenance in hand - where the applicant is receiving a pension or benefit at a reduced rate under the maintenance income test.

**2.1.3 "Assets Allowance"**

for a single applicant is \$1,200.00 and for an applicant with one or more dependants is \$2,300.

**2.1.4 "Net Assets"**

is the value of assessable assets minus assets allowance.

**2.1.5 "Equity"**

means the market value less any debts secured against an asset by registrable instrument.

**2.2** Subject to all the provisions of this Means Test an applicant is eligible for legal assistance if (a) his/her net assets do not exceed, by more than the likely cost of the subject proceedings, the assets allowance, or (b) the applicant is seeking a Grant of Legal Assistance in relation to an NDIS appeal matter and funding for the matter has been approved under the NDIS Appeals (Legal Services) MOU between DSS and the Commission.

**2.3 Where Sale of Excluded Assets is Likely**

Where it appears reasonably likely that an excluded asset will be sold during the course of the matter and that the applicant will receive sufficient funds to pay privately for the required legal services, assistance may be refused.

**2.4 Discretion to Disregard Assessable Home Equity**

The Chief Executive Officer may disregard the equity in excess of the maximum permitted amount held by the applicant in his/her principal home

where the applicant is aged over 60 years, receives an income tested pension, has lived in the home for five or more years, and has no plans to sell or move. However, the Chief Executive Officer may require that legal assistance be conditional upon the applicant providing an equitable charge on the home to secure a full contribution.

## **2.5 Contingent Assets**

Where ownership of an asset is in dispute, it may, at the discretion of the Chief Executive Officer, be treated as an asset until the applicant's entitlement has been established.

- 2.6** Debts are not allowed as a set off against assets unless they are secured against specific assets by registrable instrument.

## **3. GENERAL DISCRETIONS**

Notwithstanding that an applicant's assessable income or net assets or both may be such as to make an applicant;

- i. ineligible for legal assistance; or
- ii. liable to pay an initial contribution;

where the Chief Executive Officer considers that the applicant;

- (a) will not have time to save enough from income to meet the private legal costs or initial contribution; and
- (b) could not reasonably be expected to borrow against future income to pay the costs or initial contribution;

assistance may be granted subject to later payment of full contribution.

The Chief Executive Officer shall consider all the circumstances, including any delay brought about by the applicant's actions, before deciding whether to grant assistance.

### **3.1 Discretion to Grant Aid for Proceedings in Respect to Repayments of Consumer Debts**

The Chief Executive Officer may:

- i. grant assistance with contribution to an applicant who would otherwise be ineligible for legal assistance; and
- ii. defer, reduce or waive a contribution on income;

where the applicant has commitments to repay consumer debts, has low household income (i.e., gross income less than male, full-time adult ordinary time average weekly earnings); and

- (a) seeks assistance for a dispute concerning a consumer credit transaction; or

- (b) has long-term difficulty in managing their financial affairs as may be indicated by the presence of circumstances such as the following:
  - i. the debts are in arrears;
  - ii. the debts were incurred for household goods, motor vehicles or repairs;
  - iii. the debts are to finance companies, credit card providers or other high interest lenders;
  - iv. the applicant has been left with a debt for which another person was expected by the applicant to be solely or jointly responsible;
  - v. the applicant has seen a financial counsellor; or
  - vi. the applicant has been unable to comply with previous debt restructuring arrangements offered by their creditors or by a Court.

**3.2** In arriving at an assessment of the net income of a business, the Chief Executive Officer has a discretion as to whether any expenses of the business proposed by the applicant as such should be considered to be reasonably incurred in or for the purpose of gaining or producing that income. Such expenses shall not be considered reasonably incurred merely because they have been, or are likely to be, allowed or allowable as deductions by the Commissioner of Taxation for the purposes of the *Income Tax Assessment Act 1936*.

**3.3** Where, notwithstanding the information furnished by the applicant in the form of an application for legal assistance, the Chief Executive Officer is of the opinion that the applicant is able to afford the cost of obtaining, from private legal practitioners, the legal services in respect of which legal assistance is sought, the applicant is deemed not to be within the Means Test.

#### **4. LIKELY COST OF PROCEEDINGS - CATEGORIES OF MATTERS**

**4.1** The likely cost of the proceedings for which legal assistance is sought is that cost reasonably determined by the Chief Executive Officer.

#### **6. OTHER MATTERS**

##### **6.1 Children**

Where a child who is supported by a parent applies for assistance, the means test is applied to the parent unless the parent has a contrary interest in the matter, disclosure to the parent of the legal problem would damage the relationship between child and parent or there are other special reasons why the parent's financial position should be disregarded.

For the purpose of this paragraph, a parent includes a guardian.

## **6.2 Trustees and Representatives**

Where legal services are sought by a person acting as executor or trustee, or as representative for another person or group, the means test will be applied to those persons who stand to benefit from the legal services.

Property held by an applicant under a genuine trust or in a representative or official capacity will not be taken into account in the means test.

A trust arrangement will not be recognised as genuine for the purposes of these means test guidelines, where:

- (a) the applicant, or a financially associated person, has actual or de facto control of the trustee (whether or not the trustee is apparently at arm's length from the applicant, or from the financially associated person);
- (b) the trustee has been accustomed to make distributions of the income or capital to the applicant upon request, or to provide for various expenses of the applicant; or
- (c) the trust arrangement was made in contemplation of an application for legal assistance, or with a view to divesting the applicant, or a financially associated person, of assets in order to qualify for legal assistance.

## **6.3 Criminal Proceedings**

Where assistance is sought in criminal proceedings by an applicant who did not apply for assistance at or before the commencement of committal proceedings (or in an appropriate case, the inquest), the Chief Executive Officer may, when determining the applicant's eligibility for assistance and the extent of assistance, have regard to such amounts as the applicant has already expended on the applicant's representation in the relevant proceedings and to any reasons given by the applicant for no application for legal assistance having been made in the first instance.

## TABLE A - MEANS TEST INDICATORS

Means test indicators are reviewed regularly and figures are usually based around the below indicators.

### Income and dependants allowance

The Commission uses the Poverty Line figures of the Institute of Applied Economic and Social Research (University of Melbourne):

- (a) for income, for a single person, head in workforce and costs, other than housing; and
- (b) for dependants, the Institute's dependant allowances for first and subsequent dependants.

### Average weekly earnings

Male full-time adult ordinary time earnings. This figure is published quarterly by the Australian Bureau of Statistics under the title "Average Weekly Earnings, States and Australia".

### Rent/mortgage/board

The current median rental of a vacant three bedroom house in Canberra. This figure is published by the Real Estate Institute of the ACT.

### Child care

The fee relief ceiling for family day care as determined by the Commonwealth Department of Health and Community Services.

### House values

A portion of the monthly median cost of an established three bedroom house in the ACT. This figure is published by the Real Estate Institute of the ACT.

### Farm/business values

The level at which fringe benefits cease to be payable under the pension assets test, published by the Department of Social Security.

INDICATOR AMOUNTS EFFECTIVE July 2024		
	Paragraph	Amount
Allowed income	1.1.5	498.00
Dependants allowance	1.1.4(d)	
<b>One</b> dependent		216.00
<b>Two</b> dependents		420.00



Three dependents		625.00
Four dependents		829.00
For <b>each additional</b> dependent		204.00
Child care charges	1.1.4(c)	325.00
Rent/Mortgage/Board	1.1.4(b)	560.00
Motor vehicle (5 yrs old, 6 cylinder)	2.1.2(e)	16,790.00
Equity in principal home	2.1.2(f)(i)	\$750,000.00
Equity in farm/business	2.1.2(f)(ii)	
Single homeowner		\$202,000.00
Single non-homeowner		\$339,250.00
Partnered homeowner (combined)		\$286,500.00
Partnered non-homeowner (combined)		\$433,500.00
Male, full-time adult, ordinary time average weekly earnings	2.1.2(g)	\$1,560.50

### Financial contributions

- Under section 26 and 31 of the *Legal Aid Act 1977* (the Act), Legal Aid ACT has the power to impose contributions as a condition of a grant of legal assistance. Section 31A of the Act provides for securing a contribution's payment by way of a charge on land and sets out the conditions to do so.
- Where a condition that an applicant pays a contribution is imposed, the terms of the condition and the amount specified will be notified to the applicant in writing at the time of notification that legal assistance has been granted and, where legal assistance is granted by making available the services of a private legal practitioner, the private legal practitioner will also be notified in writing.

#### ASSESSMENT OF NON-STANDARD INITIAL CONTRIBUTIONS:

In consideration of the assisted person's specific circumstances, the Chief Executive Officer (or the Chief Executive Officer's delegates) has discretion to:

- Impose an initial contribution that is **greater** than the standard initial contribution, up to 100% of the cost of the applicant's legal proceedings;
- Impose an initial contribution that is **less** than the standard one; or
- Waive** the initial contribution entirely.

- 7.2.1** In deciding the amount of the initial contributions, or that no initial contribution is required, Legal Aid **may** take into account:
- (a) The applicant's income and assets;
  - (b) The applicant's capacity to pay legal fees;
  - (c) Whether the applicant falls within any of the priority client groups listed in these guidelines;
  - (d) The funds available to Legal Aid when deciding the applicant's initial contribution;
  - (e) The nature, costs and prospects of the applicant's legal proceedings;
  - (f) The undue hardship that imposing an initial contribution could cause to the applicant; and
  - (g) Anything else that is considered relevant by Legal Aid ACT.

#### GENERAL DISCRETION

- 7.2.2** Where, notwithstanding the information furnished by the applicant in the form of application for legal assistance, the Chief Executive Officer is of the opinion that it is reasonable having regard to the financial circumstances of the applicant to require an initial contribution of a greater or lesser amount than is prescribed by this Means Test, **a condition may be imposed** that the applicant pays to Legal Aid ACT a **contribution in such amount as the Chief Executive Officer considers reasonable in all the circumstances**, provided that such amount shall not exceed the sum of the ordinary professional costs (including solicitor and client costs) of the legal services provided or to be provided and any disbursements (including barristers' fees) and out-of-pocket expenses incurred or to be incurred in connection with the provision of the legal services in respect of which the application is made.

#### ADDITIONAL CONSIDERATIONS

- 7.2.3** Initial contributions and asset contributions are cumulative as is any unpaid contribution applying to an earlier finalised grant of assistance which, having regard to the applicant's financial circumstances, should reasonably be expected to be recovered from the applicant.
- 7.2.4** Assistance may be granted subject to a condition that the applicant provide a charge over any asset (whether an assessable asset or not) to secure a contribution.

3. The Commission will at the time of the Grant of Legal Assistance direct the legally assisted person as to the manner of payment of the contribution to the Commission and the time within which the contribution is required to be paid.

Normally the contribution will be required to be paid prior to any legal work being performed in relation to the matter but, where inconvenience or hardship might be occasioned to an applicant, the Commission may permit an extension of time for payment and may permit payment by instalments.

#### Reassessed contributions

4. A decision making the provision of legal assistance subject to a condition that the legally assisted person pay a contribution may be changed under section 27 or varied on reconsideration or review under section 36 of the Act so as to increase or reduce the amount specified if:
  - (a) there has been a material change as a result of the proceeding or matter or otherwise in the financial position of the legally assisted person;
  - (b) the value of the assets or income of the legally assisted person is substantially greater than appeared from the material available to the decision maker at the time the condition was imposed; or
  - (c) to require the legally assisted person to pay the amount originally specified would impose unreasonable hardship on the person or any dependents of the person.
  
5. Any decision to change a contribution under section 27 or vary it on reconsideration or review under section 36 of the Act must also take into account:
  - (a) the amount of money in the legal aid fund;
  - (b) the need for the Commission to recoup, where appropriate, the costs and expenses incurred in providing legal assistance so as to maximise the amount of legal assistance available to the community;
  - (c) the need to ensure as far as possible that the limited funds available for legal aid are allocated and that contributions are imposed and recovered consistently, equitably and fairly; and
  - (d) that a legally assisted person should be placed at the conclusion of a matter in a financial position in relation to the payment of legal costs which as far as practical is no better than that of an unassisted person.

The Chief Executive Officer may provide to the decision maker an opinion on a matter in paragraph 5A and the decision maker must take account of that opinion.

6. The granting of an application by a person for legal assistance may be on the basis that the assistance will be provided without charge only where in the opinion of the officer of the Commission making the decision to grant an application for legal assistance:
  - (a) the person is completely without income or assets; or
  - (b) it would be futile to impose a condition that the person pay a contribution of any amount towards the cost to the Commission of providing the assistance.

## PROVISION OF LEGAL ASSISTANCE TO BODY CORPORATES

(Pursuant to subsection 28(7) of the *Legal Aid Act 1977*)

Legal assistance will not be provided under the Act to a body corporate except in the following circumstances:

- (a) Where the body corporate exists solely or primarily for charitable purposes and where, if legal assistance were not provided, substantial hardship would be caused to individual beneficiaries of the charity who are within the Means Test determined by the Commission;
- (b) Where the body corporate is itself within the Means Test determined by the Commission, and where, if legal assistance were not provided, substantial hardship would be caused to one or more members or officers or employees of the body corporate as a result of the outcome of the proceeding or matter in respect of which legal assistance is sought; or
- (c) Where the Commission, on the recommendation of the Chief Executive Officer, approves the provision of legal assistance.

## **PAYMENT OF COSTS AWARDED AGAINST LEGALLY ASSISTED PERSONS**

1. A request that the Commission pay to another party on behalf of a legally assisted person an amount representing the whole or a part of costs directed to be paid by the legally assisted person shall be made in writing to the Chief Executive Officer and shall be supported by such material as the Chief Executive Officer may require, verified by the statutory declaration of the person making the request.
2. The Commission shall not pay any amount pursuant to such a request unless the officer deciding the request is satisfied that the legally assisted person will suffer substantial hardship unless the amount requested to be paid, or some lesser amount, is paid.
3. The Commission shall not pay an amount upon the request of the legally assisted person if, in the opinion of the officer deciding the request, the legally assisted person's application for legal assistance failed to disclose any significant and relevant matter.
4. In determining whether or not a person will suffer substantial hardship, regard shall be had by the officer to, inter alia, the following matters:
  - (a) whether the person or another person who usually resides with the person will lose or be forced to vacate his or her home;
  - (b) whether the person will lose a motor vehicle or the use of a motor vehicle, reasonably necessary for domestic or employment purposes;
  - (c) whether the person will lose furniture or effects reasonably necessary for the well-being of the person and of any dependants of the person; and
  - (d) whether the person's employment or livelihood will be lost.
5. In making a decision upon the request, the officer shall have regard, inter alia, to the following matters:
  - (a) the effect on the person making the request and on the legally assisted person of the result of the proceedings;
  - (b) the effect on the person making the request and on the legally assisted person of a refusal to meet the request in whole or in part;
  - (c) the amount at issue in the proceedings;
  - (d) the amount at issue between the parties by way of costs;
  - (e) any other action or remedy available to the person making the request or to the legally assisted person;
  - (f) the conduct of the person making the request during the proceedings;
  - (g) the conduct of the legally assisted person during the proceedings;

- (h) whether or not the Commission was given any notice of the likelihood of the making of an order for costs against the legally assisted person and of the likely amount of such costs;
- (i) whether or not the matter or proceeding was in the nature of a test case having a potential benefit to persons other than the legally assisted person or the person making the request, being persons likely to be within the means test determined by the Commission; and
- (j) the funds available to the Commission for the purpose of meeting the request and the effect of meeting the request in whole or in part on the capacity of the Commission to provide legal assistance in the future.

## PAYMENT OF COSTS AWARDED TO LEGALLY ASSISTED PERSONS

1. Where an order is made in a proceeding that the costs, whether or not including disbursements, of a legally assisted person be paid by another party to the proceeding, the amount to be determined by the Chief Executive Officer shall include the whole of those costs and the whole of any disbursements so recoverable.
2. Where, by virtue of a settlement or compromise, another person has agreed to pay a specified amount in respect of the costs, or of the costs and disbursements, of a legally assisted person, the amount to be determined by the Chief Executive Officer shall include the whole of such amount.
3. The amount to be determined by the Chief Executive Officer shall equal the sum of the ordinary professional costs (including solicitor and client costs) of the legal services provided to the person in the proceeding or matter in respect of which legal assistance was provided and any disbursements (including barristers' fees) and out-of-pocket expenses incurred in or in connection with the provision of those services unless, in the opinion of the Chief Executive Officer, such a determination would operate unfairly to or cause hardship to the applicant or their dependants.
4. In forming his opinion as to whether or not a determination might operate unfairly to or cause hardship to an applicant or their dependants, the Chief Executive Officer shall have regard to the following considerations:
  - (a) the amount recoverable by the legally assisted person in the proceeding or matter;
  - (b) the age of the applicant;
  - (c) the state of health of the applicant;
  - (d) the income of the applicant;
  - (e) the outgoings to which the applicant is committed;
  - (f) any other special needs of the applicant;
  - (g) the age, state of health and special needs (if any) of the dependants of the applicant;
  - (h) the purpose to which the applicant proposes to apply the amount recoverable in the proceeding or matter;
  - (i) the actual cost to the Commission of the proceedings or matter; and
  - (j) the effect of the outcome of the proceeding or matter on the financial or domestic situation of the legally assisted person and of their dependants.

## **DUTY LAWYER SERVICES IN FAMILY VIOLENCE & PERSONAL PROTECTION ORDER PROCEEDINGS**

Duty lawyer services in respect of proceedings brought under the *Family Violence Act 2016* and *Personal Violence Act 2016* will not be provided to a person unless:

- (a) the applicant is able to establish to the satisfaction of the Chief Executive Officer or their delegate that the applicant has reasonable prospects of obtaining an order in the terms sought by the applicant; and
- (b) it is appropriate in all the circumstances, (including the ability of the applicant to be represented privately) for the legal services to be provided by the duty lawyer.



## ALLOCATION OF WORK

### Preamble

Under section 8 of the *Legal Aid Act 1977* (“the Act”) the Commission may provide legal assistance by making available the services of officers of the Commission, or by arranging for the services of private legal practitioners to be made available at the expense of the Commission.

Section 10 of the Act imposes duties on the Commission to be observed when performing its functions under the Act. These functions include the allocation of work between officers of the Commission and private legal practitioners. Section 10 requires the Commission to:

- ensure that legal assistance is provided in the most effective, efficient and economical manner;
- ensure that its activities are carried on consistently with, and do not prejudice, the independence of the private legal profession; and
- have regard to the amount of money for the time being standing to the credit of the fund and of any money likely to be received by the commission for the purposes of the fund.

Section 11 of the Act requires the Commission to determine guidelines for the allocation of work between officers of the Commission and private legal practitioners having regard to the following considerations:

- (a) the need for legal services to be readily available and easily accessible to disadvantaged people;
- (b) the need to make the most efficient use of the money available to the commission;
- (c) the desirability of enabling a legally assisted person to obtain the services of the legal practitioner of his or her choice;
- (d) the desirability of maintaining the independence of the private legal profession; and
- (e) the desirability of enabling officers of the commission to utilise and develop their expertise and maintain their professional standards by conducting litigation and doing other kinds of professional legal work.

The Work Allocation Guidelines are designed to maintain an appropriate balance in the allocation of work within the framework of the Commission’s statutory duties and the considerations in section 11.

## Work Allocation Guidelines

- 1(a) Subject to guideline 1(b), legal assistance will be provided by making available the services of an officer of the Commission in the following circumstances:
- i. where an assisted person expresses a preference for an officer of the Commission to act;
  - ii. where an assisted person is charged with an offence that is to be dealt with in a superior court, or related proceedings are to be dealt with in a superior court;
  - iii. where a matter involves family law;
  - iv. where assistance is sought for an inquest, inquiry under the *Inquiries Act 1991* or similar proceedings;
  - v. where a matter is capable of resolution as a small civil claim; or
  - vi. where in the opinion of the Chief Executive Officer legal assistance can be provided at less cost by utilising the available capacity of officers of the Commission.
- (b) In the following circumstances, legal assistance to which guideline 1(a) refers may be provided by making available the services of a private legal practitioner selected by the Commission in accordance with guideline 2:
- i. where the Commission is unable to act due to a conflict of interest;
  - ii. where in the opinion of the Chief Executive Officer there are special circumstances that make it desirable that legal assistance be provided by making available the services of a private legal practitioner; or
  - iii. where an assisted person is charged with an offence that is to be dealt with in a superior court and it is necessary in the interests of justice that legal assistance be provided by making available the services of a private legal practitioner.
- (c) For the purposes of paragraph 1(b)(ii) 'special circumstances' include but are not limited to:
- i. the urgency of the matter for which legal assistance is provided;
  - ii. any hardship which might be occasioned to the assisted person due to the location of Commission offices;
  - iii. the desirability of a lawyer being able to converse with the assisted person in a language other than English; and
  - iv. the existence of a prior professional relationship between the assisted person and a private legal practitioner that would be of material benefit to the conduct and outcome of the case.

- 2(a) Where legal assistance is to be provided by making available the services of a private legal practitioner the Commission will select a private legal practitioner from a panel maintained by the Commission under section 31E of the Act (a panel).
- (b) In selecting a private legal practitioner from a panel in a particular case the Chief Executive Officer will have regard to the interests of the legally assisted person, the nature of the practice conducted by the private legal practitioner and the expertise of the private legal practitioner in the relevant field of law, and subject to these considerations will allocate work among private legal practitioners as equitably as possible.

### **Change of practitioner**

- 4(a) Subject to this guideline, the Chief Executive Officer may approve a request by an assisted person to assign the conduct of their matter to another private legal practitioner, or to an officer of the Commission.
- (b) The Chief Executive Officer may, as a condition of approving a change of practitioner, require the assisted person to pay any cost incurred as a result of the change as a contribution under section 31 of the Act.
- (c) Other than in exceptional circumstances, the Chief Executive Officer will not approve requests by an assisted person for more than two changes of practitioner in the same or a related matter.

## LEGAL TASK GUIDELINES

### Legal Task

1. A **legal task** means completing a discrete piece of legal work to assist a person resolve a problem or a particular stage of a problem.

*Examples of legal tasks are:*

- *preparation or assistance with the drafting of documents (such as an application)*
- *writing a submission letter to the DPP to negotiate charges*
- *writing a letter to another party asking them to do something or stop doing something, or*
- *advocating on behalf of a person without taking ongoing carriage of the matter*

2. Legal tasks will only be performed in matters in areas of law in which the Commission's Legal Practice operates.

*Example* It would not be appropriate to prepare, or assist a person to prepare, their own will or a commercial or business document.

3. Legal tasks may be performed for a person if it is reasonable and appropriate in the circumstances having regard to factors including;
  - (a) the person's capacity for self-help;
  - (b) the urgency of the matter for which assistance is required;
  - (c) the person's financial and personal circumstances; and
  - (d) the practicality of obtaining assistance from another service provider.
4. Legal tasks do not extend to taking carriage of a matter in an ongoing, representative capacity.

## **PROVISION OF LEGAL ASSISTANCE IN EXPENSIVE CASES**

The following direction was given by the Commission pursuant to section 26(3) of the *Legal Aid Act 1977*.

Where in the reasonable opinion of the Chief Executive Officer it is likely that a Grant of Legal Assistance, if made, would so impact upon the capacity of the legal aid fund that the Commission could not be assured that the general level of the legal assistance that had been provided from the Fund to date could be maintained, then the Chief Executive Officer shall refer the relevant application for legal assistance to the Commission for determination by the Commission.

The Commission may then determine whether the matter is one within the meaning of the above paragraph and if it so decides then it may make a decision as if it were a decision-maker acting pursuant to the Legal Aid Act.

If in the view of the Commission the matter is not of the nature described above then the Commission may refer the matter to the Chief Executive Officer for determination in the usual manner.

### **Explanatory note to this Direction**

It is the intention of the Commission that it deal only with matters which to an extraordinary extent affect the provision of legal assistance in the Territory and it would not ordinarily expect to make a decision in a matter where the anticipated costs are less than \$100,000.

## COMMUNITY SAFETY ORDERS

The following direction was given by the Commission pursuant to section 26(3) of the *Legal Aid Act 1977*.

A Grant of Legal Assistance will generally be made to provide legal assistance to a person responding to, seeking the variation of, seeking revocation of or appealing an extended supervision order, continuing supervision order, continuing detention order or other Community Safety Order arising from a Commonwealth Offence.

Funding may be subject to means testing.