

# Chapter 4

## Commonwealth Law Guidelines

---

### Part 1

### General

---

#### Guideline 1

#### General

---

##### 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 2 of this Part 1 (unless otherwise specified in these Guidelines), and
  - (e) meets the merits test in 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)(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), 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.

## **Guideline 2**

## **Means Test**

### **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.

## **Guideline 3**

## **Merits Test**

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

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

## **Guideline 4**

## **Test Cases**

### **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.

Note: The National Partnerships Agreement on Legal Assistance Services provides for the Commonwealth Legal Aid Guidelines and Service Priorities for Family Law matters. These priorities, in no hierarchical order, are Family Law matters that involve a grant of legal aid being provided to assist:

- a) children, including the appointment of a court appointed independent children's lawyer;
- b) people who have experienced, are experiencing or are at risk of experiencing family violence;
- c) family members resolve complex issues relating to the living arrangements, relationships and financial support of their children; and
- d) State/ Territory law matters in which a child's safety or welfare is at risk, and there are other connected family law priorities for which a grant of assistance could be made.

### **Guideline 1**

### **Priority for Matters**

#### **1.1 Priority for 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 in relation to an application to the court 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; and/ or
  - (e) other exceptional circumstances exist that require urgent legal assistance.

## **1.2 Non-urgent matters**

- (1) If the Commission determines that a family law matter that falls within the family law priorities is not urgent, a Grant of Legal Assistance should not be granted until the relevant parties have been separated for a sufficient period of time to enable them to be sure that there are real issues in dispute.
- (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; and
  - (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 relating to child abuse are currently taking place;
- (c) a party's safety or ability to negotiate effectively is jeopardised by behaviour of the other party such as violence, intimidation, control or coercion, or a history of such behaviour; and/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 for 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/ or
  - (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/ or
  - (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 relating to 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
  - (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,
  - (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
    - (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*

1. The likelihood of violence, or physical or mental harm, to the applicant or a child.
  2. The removal or risk of removal of a child from an applicant who has primary residence responsibilities.
  3. The removal or risk of removal of a child from the jurisdiction of the Court.
  4. The need for an applicant with primary residence responsibilities to move permanently overseas, interstate or elsewhere with a child, if consent is unreasonably refused by another person.
- (2) If the material change in circumstances referred to in guideline 4.2(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 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 where care and protection proceedings**

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

### **Guideline 5** **Child Maintenance and Child Support** **Child Support and Maintenance**

---

The Grant of Legal Assistance under Guideline 5 should usually be limited to administrative remedies under the child support legislation, and proceedings in State or Territory magistrates or local courts or the Federal Circuit Court, unless such proceedings are unavailable.

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

The Commission may make a Grant of Legal Assistance in relation to a the *Child Support (Assessment) Act* or *Child Support (Registration and Collection) Act*.

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

The Commission may make a Grant of Legal Assistance in relation to:

- (a) Appeals under the child support legislation to the SSAT for review of a Child Support Agency decision; or
- (b) Appeals under the child support legislation to the AAT for review of a decision of the SSAT; or
- (c) 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 in relation to a child maintenance matter under the *Family Law Act 1975*, in order to

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

### **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 (Cth) or the Family Court Act 1997 (WA)**

---

### **6.1 Assistance for applications for spousal maintenance**

The Commission may make a Grant of Legal Assistance in relation to a spouse maintenance matter under the *Family Law Act 1975* or the *Family Court Act (WA) 1997*, in order to:

- (1) apply for, or respond to, an application for a spouse maintenance order; or
- (2) 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, and
- (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**

---

### **7.1 Assistance for proceedings for arrears of 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**

---

### **8.1 Assistance for proceedings relating to determining the parentage of a child**

- (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**

### **9.1 Assistance for parents**

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

## **Guideline 10 Recovery, location and information orders**

### **10.1 Assistance for recovery, location and information orders**

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

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

### **11.1 Assistance for divorce or 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, or
- a need to dispense with service of the application.

## **Guideline 12**

## **Property**

### **12.1 Assistance for certain property settlement disputes under the Family Law Act 1975 or the Family Court Act 1997 (WA)**

- (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 *Family Court 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
  - (b) 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.

### **12.2 Urgent Injunctive Relief**

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.

### **12.3 Lawyer-Assisted Family Law Property Mediation Trial**

- (1) The Commission may make a Grant of Legal Assistance under the Lawyer-Assisted Family Law Property Mediation Trial only if the matter is a priority matter under Chapter 4, Part 2, Guideline 1 and:

- (a) the estimated net property pool in the disputed property is not more than \$500,000 excluding superannuation;
  - (b) the Commission is satisfied from the material provided to it that the separation of the parties is final; and
  - (b) 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 court when:
- (a) the merit test outlined at Chapter 4, Part 1, Guideline 3 is met;
  - (b) it is likely the further grants will resolve the dispute; and
  - (c) the applicant has shown commitment to the early resolution of the dispute.
- (3) A grant of legal assistance will not normally be granted when the disputed property pool includes overseas property and/or complex financial arrangement such as businesses and family trusts.

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

### **13.1 Assistance not available**

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

- (a) applications to discharge or vary parenting orders or 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

- (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**

### **14.1 Assistance for appeals**

- (1) The Commission may make a Grant of Legal Assistance for an appeal in relation to a family law or child support order, including for the participation of 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**

### **15.1 Assistance for enforcement proceedings**

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

### **16.1 Assistance for contempt of court or contravention of court orders**

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

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

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

## **Guideline 17** **International child abduction matters**

### **17.1 Assistance in relation to international child abduction matters**

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

## **Guideline 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, and

**costs of a matter** means the total costs paid by the Commission in a family law or child support matter in which a Grant of Legal Assistance has been made (taking into account the costs paid by any other legal aid commission, if the matter has been transferred from one or more of the States or Territories), including counsels fees, fees for expert reports and other disbursements (except interpreter and translator fees, rural travel and accommodation costs), less any Contributions collected by the Commission from the Legally Assisted Person and any Costs Recovered by the Commission.

- (2) The 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;
  - (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 \$12,000.
- (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
  - (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 should 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.

## **Guideline 19                      Family Law Stage of Matter Funding Model**

### **FAMILY LAW COST MANAGEMENT METHODOLOGY**

#### **Stages of Matter Model (the Model)**

*General notes*

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

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

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

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

### **Application of the Model**

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

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

- (6) Matters for which the Model may not be appropriate include:
  - (a) matters considered complex by the Commission, taking into account advice from the Family Court of Australia or the Federal 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 Family Court's Magellan Project.
- (7) Matters for which the Model is not appropriate must be identified as soon as possible.
- (8) If the Model is not appropriate, the Commission may apply particular stages of the Model or variations of the stages.

*For example*, the matter may be managed by early intervention reports, 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

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

*Note:* The Commission must 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 Aid Guidelines).

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

### Stage 2 - Litigation

- (14) If a substantial amount of work is completed before a Grant of Legal Assistance is made for Litigation Services in the litigation stages, the fees for the matter will be reduced on a pro rata basis.
- (15) The hearing length of a trial should be estimated, taking into account the estimate given by the court at the pre-hearing conference.
- (16) If a trial exceeds the original estimates for unforeseen reasons, no additional payment will be allowed unless a decision not to make an additional payment would be clearly unjust, and a Judge certifies that up to 1 day of extra hearing time was required for the effective disposal of the case.

- (17) Any unused portions of stages before litigation can be raised only in relation to the trial (stage 5), and the unused portions may be taken into account at the discretion of the Commission.
- (18) If work is undertaken and the Legally Assisted Person cannot be found before all of the work covered by the Grant of Legal Assistance is completed, the legal practitioner may negotiate with the Commission for fees to be paid on a pro rata basis, at the discretion of the Commission.
- (19) If a matter is listed for hearing (final or otherwise) and not reached by the court on the date set, funding outside the stage of matter grant under this Model must be negotiated with the Commission.
- (20) The payment of fees for an agent used in any stage of matter must be negotiated with the Commission.

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

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

#### Stage 4 - Preparation for trial

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

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

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

#### **Stage 1 (a) - FDR early intervention stage**

**Allocation of hours**

**Up to**

- taking instructions and preparing for participation in FDR Service 2 hours
- representing Legally Assisted Person at PDR session 4 hours
- preparing consent orders, if appropriate 1 hour

*Total:* 7 hours

**Stage 1 (b) - FDR litigation interventions (at any stage)**

**Allocation of Hours Up to**

- taking instructions and preparing for participation in FDR Service 2 hours
- representing Legally Assisted Person at PDR session 4 hours
- preparing consent orders, if appropriate 1 hour

*Total:* 7 hours

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

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

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

*Total:*

Family Court 7 hours

State or Territory Magistrates Court 5 hours

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

**Allocation of hours**

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

- court attendance ♠

*Total:*

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

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

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

**Allocation of hours**

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

*Total:*

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

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

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

**Allocation of hours**

- instructions for application and affidavit
- court documents

- obtaining short service
- court attendance ♠

*Total:*

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

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

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

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

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

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

<b>Allocation of hours</b>	<b>Lump sum */up to</b>
<input type="checkbox"/> file management	
<input type="checkbox"/> instructions	

- prepare client for family report process
- read family report
- court attendance ♠
- consent order, if appropriate

*Total:* 5 hours

**Stage 2 (g) - Application for recovery order in the Family Court of the Federal 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:* **Lump sum\*/up to**

Documents etc 3 hours

**Up to**

Court attendance ♠ 3 hours

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

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

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

*Total:* 3 hours

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

<b>Allocation of hours</b>	<b>Negotiated maximum fee</b>
<input type="checkbox"/> taking instructions	Negotiated, based on estimated preparing time worked out using the Commission's hourly rate and the Commonwealth Legal Aid Guidelines. Usually this is limited to 11 hours
<input type="checkbox"/> interviewing witnesses	
<input type="checkbox"/> preparing documents	
<input type="checkbox"/> preparing Legal Assisted Person for family report process	
<input type="checkbox"/> subpoena	
<input type="checkbox"/> case management guideline trial documents	
<input type="checkbox"/> preparing and delivering brief to counsel	
<input type="checkbox"/> reading family report	
<input type="checkbox"/> conference with counsel	
<input type="checkbox"/> attending list conference	

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

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

*Totals:*

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

## **Stage 6 - Appeals from the Family Court and the Federal Circuit Court**

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

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

*Note:* The National Partnership Agreement on Legal Assistance Services provides for the Commonwealth Legal Aid Guidelines and Service Priorities for Criminal Law matters. Priority is to be given to Commonwealth Criminal Law matters that involve a grant of legal aid being provided to assist people facing Commonwealth criminal offences or undergoing Commonwealth criminal proceedings where the defendant is a child, or is a person who, if convicted, is likely to receive a sentence involving a period of imprisonment.

### **Guideline 1**

### **General**

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

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

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

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

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

the Commission may only make a Grant if:

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

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

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

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

## **Guideline 2 Summary Criminal Prosecutions**

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

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

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

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

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

---

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

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

*Example*

An aggravating circumstance may be:

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

## **Guideline 3**

## **Committal Proceedings**

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

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

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

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

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

## **Guideline 4** **Superior Court Criminal Prosecutions**

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

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

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

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

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

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

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

## **Guideline 5** **Youth Justice Court Proceedings**

### **5.1 Assistance for Proceedings in Youth Justice Courts**

The Commission may make a Grant of Legal Assistance for criminal law matters in a Youth Justice Court.

## **Guideline 6** **Bail Applications**

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

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

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

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

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

---

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

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

## Guideline 8

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

---

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

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

## Guideline 9

## National Security Matters

---

### 9.1 Requirement for Security Clearance

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

*Example*

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

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

**10.1 Appeals against Criminal Conviction or Sentence**

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

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

**10.2 Response to Crown Appeals**

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

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

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

*Example*

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

- (2) If the Commission does not consider it can fund a criminal law trial without significantly impacting on its ability to provide assistance in other Commonwealth Law Matters in accordance with the Agreement, it may make an application to the Commonwealth Criminal Law - Expensive Cases Fund.

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

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

## **Guideline 12**

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

---

### **12.1 Purpose of Fund**

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

### **12.2 Administration of Fund**

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

### **12.3 Application for Funds**

- (1) An application to the Attorney-General's Department for an allocation from the Fund may only be made by the Commission.
- (2) A separate application must be made to the Attorney-General's Department for each criminal law matter for which an allocation from the Fund is sought by the Commission.
- (3) Cases for which an application may be made include:

- (a) cases where a potential stay of a Crown criminal prosecution may be granted in accordance with the High Court's decision in Dietrich 's case
- (b) criminal conspiracy cases
- (c) criminal cases arising under the Corporations Act 2001
- (d) drug importation cases, or
- (e) a class of criminal cases that are similar in nature to each other.

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

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

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

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

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

*Note:* The National Partnership Agreement on Legal Assistance Services (2015) provides for the Commonwealth Legal Aid Guidelines and Service Priorities for Commonwealth Civil Law matters. These priorities, in alphabetical order, are Civil Law matters that involve a grant of legal aid being provided for:

- (a) bankruptcy matters;
- (b) consumer law matters
- (c) employment matters;
- (d) extradition matters;
- (e) human rights and discrimination matters;
- (f) insurance law matters;
- (g) migration matters; and
- (h) social security law matters (including matters relating to military entitlements and military compensation claims).

### **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 legal representation where the applicant for aid falls within one or more of the priority client groups listed below and/or is experiencing problems that are likely to have a significant adverse impact if not resolved. This includes where there are implications for a person's safety, health and wellbeing, access to government benefits and pensions, or homelessness.
  
- (2) The priority client groups are:
  - (a) children and young people (up to 24 years);
  - (b) indigenous Australians;
  - (c) older people (aged over 65);
  - (d) people experiencing, or at risk of, family violence;
  - (e) people experiencing, or at risk of, homelessness;
  - (f) people in custody or prisoners
  - (g) people residing in rural or remote areas;
  - (h) people who are culturally or linguistically diverse;
  - (i) people with a disability or mental illness;
  - (j) people with low education levels; and
  - (k) single parents.

## **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**

## **Extradition proceedings**

### **2.1 Assistance for certain extradition proceedings**

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

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

## **Guideline 3**

## **Human rights and discrimination cases**

### **3.1 Assistance for certain matters if substantial benefit**

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

## **Guideline 4**

## **Migration cases**

### **4.1 Assistance for migration matters**

- (1) The Commission may make a Grant of Legal Assistance for proceedings in the Federal Court, Federal Circuit 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, or
  - (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.

**5.1 Military entitlements and military compensation claims**

- (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.

**5.2 Representation at Administrative Appeals Tribunal**

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, or
- (b) the case is complicated, or



## **Part 5      Legal Financial Assistance provided by the Commonwealth Attorney-General - Administered by the Financial Assistance Section**

---

This part was amended in 2014, though the scheme changed some time prior to that.

### **1.      Legal financial assistance direct from Commonwealth Attorney General**

Legal financial assistance is available direct from the department of the Commonwealth Attorney-General. These schemes, which have limited eligibility criteria, are administered by the Financial Assistance section.

The department administers the payment of costs certificates issued by federal courts.

The department provides legal financial assistance under the following schemes:

- Overseas child abduction scheme
- Disbursement support scheme
- Commonwealth public interest and test cases scheme
- Native title respondent funding scheme
- Serious overseas criminal matters scheme
- Special circumstances scheme
- Royal Commission into Institutional Responses to Child Sexual Abuse legal financial assistance schemes

The department also provides assistance under a number of other statutory schemes.

For full details of the schemes please contact the Financial Assistance section.

### **2.      If legal aid is available from the Commission apply first to the Commission**

In considering whether to make a grant of aid the Commission may take into account whether legal financial assistance is available from the Commonwealth Attorney General's Department. .

Where the Legal Aid Review Committee refuses a grant of legal aid for a Commonwealth matter, the application for legal aid is to be referred by the Commission to the Legal Aid Branch for consideration.

### **3.      Applications to the Financial Assistance section and criteria for determination of applications**

The criteria for determining applications under these schemes varies considerably. For up to date information contact the Financial Assistance section on:

Within Australia: 02 6141 4770

Outside Australia: +61 2 6141 4770

Email: [finass@ag.gov.au](mailto:finass@ag.gov.au)

For more information see the website on:

<http://www.ag.gov.au/LegalSystem/Legalaidprograms/Commonwealthlegalfinancialassistance/Pages/default.aspx>

#### **4. Time limits**

Applicants who have applied to the Commission should contact the Financial Assistance section as soon as possible because time limits may apply.