Submission of the Federation of Community Legal Centres (Victoria) Inc

Victoria Legal Aid Guidelines and Fee Scales

October 1998

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The Federation of Community Legal Centres (Vic) Inc.

The Federation of Community Legal Centres (Vic) Inc. ("the Federation") is the peak organisation for 40 legal centres in urban and rural Victoria. Community Legal Centres include both specialist and generalist centres. Specialist centres exist for a range of disadvantaged groups including women, people with disabilities and refugees and in specialist areas including domestic violence, the environment, employment and welfare rights. Centre staff range from lawyers to financial counsellors, youth workers, social workers and other professionals. Centres are assisted by dedicated volunteers from both legal and non-legal backgrounds. Centres are also linked to many other community organisations who both refer and are referred clients.

Centres are dedicated to a preventative approach to solving client's problems and are actively involved in community education and law reform.

Overwhelmingly, the people who use community legal centres are on low incomes. Most receive some form of pension or benefit. A considerable, albeit declining, percentage are employed. Centres are particularly successful in meeting the needs of persons from non-English speaking backgrounds. In summary, Community Legal Centres work with people who, but for the assistance of the centres, would have extremely limited access to justice.

In light of the above the Federation is in a position to assess the impact of diminished legal aid funding and changes in legal aid arrangements on the community and, in particular, disadvantaged members of our community and persons in rural and regional areas.

Introduction

The Federation welcomes the opportunity to address the Board of VLA on the proposals it will consider at its meeting on 21 October, regarding the review of the legal assistance guidelines. Given the significant role of Community Legal Centres in Legal Aid service delivery, and the fact that Centres have faced a considerably increased demand for casework services as a result of tightened eligibility guidelines and the new Commonwealth funding arrangements introduced on 1 July, 1997, it is appropriate that the board consult with Community Legal Centres in its review of legal assistance guidelines.

However, the Federation is also strongly of the view that it is only one of several peak community organisations which have a significant stake hold in the discussion of legal assistance guidelines. Community based advocacy organisations and agencies have also, in recent years, faced increased demand for their services as a result of funding cutbacks to legal aid and tighter legal assistance guidelines. As legal aid consumers find legal aid assistance increasingly inaccessible as a result of tighter eligibility guidelines, and resultant increased waiting periods for appointments at Community Legal Centres, they are increasingly turning to the assistance of non legal community advocacy organisations and agencies to assist them in their legal needs. Accordingly, the Federation strongly urges the Board to also seek submissions from such peak organisations as the VCOSS, Youth Affairs Council of Victoria, Victorian Ethnic Communities Council, and other similar organisations.

Unmet legal need

The Federation notes with some concern the comments made on page 6 of the letter from VLA dated 18 September, 1998, under the heading 2.1 Summary Criminal Law Guidelines. In particular, we are concerned at the comments that the increase in duty lawyer services call into question much of the anecdotal publicity concerning the impact of VLA's guideline changes, and that VLA queries the basis on which any increase in these cases can be said to be directly attributable to VLA policies.

The Federation is of the firm belief that the implementation of the stricter legal assistance guidelines should not be undertaken without an in depth study and analysis of the likely impact of such guideline changes. In addition, it is essential that VLA accurately monitor the impact of such changes, in terms of the potential for such changes to exacerbate the problem of unmet legal need within the community. It is only after having undertaken such analysis can VLA make such assertions as outlined above, with any verifiable or statistical basis.

The Federation is also concerned that there is no properly researched study in existence to measure unmet legal need. It is clearly erroneous to determine unmet need by the number of legal aid applications made. In this regard the Federation is receiving increasing numbers reports of:

- agencies and private practitioners who are not making applications for legal aid because they know that the tightened guidelines will result in legal aid being refuse; and

- private practitioners who are not making applications for legal aid because the time consumed in making applications and the inability to carry out the legal work required for insufficient amounts granted if aid is in fact granted.

Any real consideration of unmet legal need and the ability of the system to meet this need, must factor in those people who are turned away; who in frustration decline to pursue legal remedies; who are faced with barriers such as language or disability; who are unable to access services; who are unaware of their legal rights and who are not able to obtain full advice due to an overworked and/or undertrained legal aid worker is not able to properly analyse their problem. Furthermore, unmet legal need must include aspects of legal education, law reform, test cases and other preventative law programs as these are essential to ensure the ongoing effectiveness and efficiency of our laws and the legal system.

Turning to the specific proposals before the Board:

1. COMMONWEALTH LAW MATTERS

While this submission seeks to respond directly to the specific amendments proposed in the letter dated 18 September, the Federation maintains the position that the imposition of monetary caps, when not accompanied by a real discretion to extend funding in deserving cases, is inappropriate in in any matter, matter, but most particularly in the notoriously unpredictable jurisdiction of family law.

In addition, the Federation is concerned that the savings which have been achieved largely as a result of the cuts imposed in Family Law matters, and the imposition of monetary ceilings, have caused a disproportionate burden for bearing these costs on women, given that they are more likely to require legal aid for Family Law matters. According the VLA's 1998 Client Survey, women only make up 35.55% of applicants. One of the justifications given by VLA at the time of introducing ceilings in Family Law matters was that more funds would become available for more cases at the lower levels of litigation. This does not seem to have occurred for women, given that they still only just over a third of all applicants.

1.1 Child representatives

The relaxation of the guidelines relating to the appointment of child representatives adds a welcome element of flexibility and gives greater recognition to the importance of the role they play in cases involving children, than the current guidelines. By including a discretion to fund court appointed child representatives, notwithstanding the unaided parties refusal to share the cost, the possibility of a disaffected party manipulating proceedings by effectively blocking the appointment, is reduced.

Given the comprehensive articulation of the circumstances in which it is appropriate to appoint a child representative in the case of *re K*(1994)FLC 92-462, it would be unnecessary and cumbersome for VLA to formulate additional criteria as to the reasonableness of *funding* the appointment. However the basic requirement could perhaps be that **the appointment be ordered by the court as opposed to by agreement between the parties.**

If, however, some kind of benchmark is deemed necessary, then that criteria should be expressed broadly, perhaps by stipulating that funding will be allowed **"...where the interests of the child is likely to be jeopardized if a children's representative is not appointed."** Any exercise of that discretion should be made by a VLA employee who is a practitioner experienced in family law.

The Federation agrees with the Women's Legal Resource Group in relation to the comments made in respect of the "remaining difficulty" on page 3 of the letter dated 18 September. The Federation is of the view that it is not appropriate for VLA Grants Officers to refuse assistance where a Family Court Judge has made an order for separate representation, given that such an order has been made by a judge in the best of interests of the child. Refusal of assistance in such circumstances potentially place children at risk.

1.2 Interim Applications (non-urgent matters)

As with the previous proposals, any expansion of the guidelines allowing greater access to legal assistance is welcomed. The Federation supports the inclusion of two additional circumstances allowing grants of assistance for interim applications not covered by the urgency provisions. However it is suggested that the following points be included:

- the first point should read "is refused all contact with the children **other than on a supervised basis"**
- the second point should read "is allowed such limited contact which for practical purposes amounts to little or no contact (for example, contact of only a few hours per month,

telephone contact only, contact of such limited duration as to make it impractical to exercise because of geographical distance **or, where supervised, the suggested supervision is deemed on reasonable grounds to be unacceptable."**

- An additional point should be included allowing aid for non urgent contravention matters (under s.112AD) to ensure prompt action against parties who breach orders.

1.3 Family Law fees

Increasing fees paid to practitioners doing aided matters is essential to stop the exodus of experienced and competent lawyers from legally aided work and the kind of corner cutting on files described in the Springvale Legal Service's "Hitting the Ceiling"report (referred to in previous correspondence).

Without any increase in the overall cap It seems that the two options for increasing fees on assignments are predicated on the basis of spreading the same (inadequate) amount of funding per case less thinly, thereby resulting in it running out earlier. While this would mean that more funds are available for the 95% of cases that resolve prior to a final hearing, it does nothing to provide adequately for the 5% of intractable cases reliant on a decision of the Court. Thus, in our submission it is essential that any increase in SOMLs be coupled with either a corresponding increase in overall caps or a discretion to extend over and above the present $2000 limit, where necessary. An alternative approach would be to exclude disbursements from the overall cap.

Notwithstanding, the following deals specifically with the proposals as we interpret them:

Option 1

SOMLs increased by 4.5%, thereby passing on the June 1998 increase in the Family Law scale, translating to an extra $200 at the application stage. SOMLs paid by way of lump sums.

The suggestion of converting fees to lump sum amounts would be unlikely to have any beneficial effect as it appears that the current stage of matter limits are so inadequate that an itemized account rendered generally exceeds the limit and the practitioner is paid a (lesser) lump sum amount anyway. An increase in fees of 4.5%, or the promised $200 extra at the beginning of the case, would be unlikely to change that situation.

The inadequacy of the SOMLs is not addressed by simply passing on the recent increase in the Family Court scale. The hourly rate is not in issue so much as the amount of work deemed necessary to complete each stage of proceedings.

Increases in the number of hours allocated for conferences and in funding of cases requiring the services of an interstate agent, are welcomed. However as an overall package this option does little to address the concerns expressed by clients and practitioners alike.

Option 2

Revision of fee structure to enable greater expenditure at earlier stages of the litigation process by instructing only where necessary and using a clerk instead of a solicitor **or** by adopting a more liberal policy in relation to the exercise of the $2000 discretion to extend.

The proposal to review the stage of matter limits to ensure they more accurately reflect the amount of work required at each stage is a step in the right direction. In our view however, as stated above, any increase in the stage limits should result in a corresponding increase in the overall cap or at least be coupled with a **real** discretion to extend funding. Not only would this bring Victoria in line with other states but would ensure that after the investment in an outcome made at the preliminary stages, is not lost by withdrawing from the matter at the most crucial stage ie., the trial.

The suggestion of placing a limit on time spent instructing counsel is a reasonable one. However all indications are that practitioners are already taking such cost cutting measures (amongst many) in an attempt to complete the matter within the ceiling. Perhaps the matter could be taken further to only fund instruction by a clerk in a final trial.

In conclusion, we urge the board to take a broad view in implementing any amendments to the guidelines to ensure that any changes result in realistic funding amounts for family law clients.

2. STATE LAW MATTERS

2.1 Summary Criminal Guideline

The Federation welcomes the consideration to relax the Summary Criminal Guidelines. In relation to the specific changes to be considered, the Federation submits that Summary Criminal Guideline 1.1(i) should be amended by making eligible applicants who wish to plead not guilty if they have a *reasonable* prospect of acquittal on all substantive charges.

The Federation endorses the comments made in the letter in relation to the issue of the previous guidelines requiring a good defence to *all* charges. However, the Federation submits that the word "realistic" should be replaced with the word "reasonable". The word "reasonable" has parallels within the common law, and is much more objective. The word "realistic" implies a subjective view of the legal and factual characteristics of the individual case, and the likely realities of achieving acquittals in the Magistrates' Court jurisdiction, which has a conviction rate of in excess of 98% of cases coming before it. The word "reasonable" gives far more consideration to the legal merits of a defence.

In relation to Summary Criminal Guideline 1.1 (ii), the Federation submits that all references to the likely penalty if the applicant is convicted should be removed. It is submitted that VLA is obligated to provide all applicants with assistance if they have a reasonable prospect of success and of the charges being dismissed. Any frivolous applications would be weeded out by the "reasonable prospects" condition. Given the overwhelmingly high rate at which defendants in the Magistrates' Court plead guilty (approximately 95%), and the overwhelmingly high conviction rate in Magistrates' Courts (in excess of 98%), it is unlikely that this will have a significant financial impact. VLA will also recover costs from successful defendants who have obtained cost orders against the prosecution.

The Federation further submits that Summary Criminal Guideline 1.2, which currently reads:

> Assistance is available where conviction is likely to result in imprisonment, an Intensive Corrections Order or a suspended term of imprisonment.

Eligibility for assistance under this guideline should be extended to include the following:

- Community Based Orders
  - as many CBOs impose onerous conditions and may not be a suitable sentencing disposition for a defendant. In addition, when CBOs were introduced, they were defined as being an option to imprisonment, and should not be used a simply an additional sentencing option. Accordingly, CBOs should be viewed as being a serious sentencing disposition, aimed at diverting convicted defendants away from prison. As such, the prospect of receiving a CBO should entitle a defendant to receiving legal assistance.

- For defendants aged between 17 and 22 years, where finding of guilt on charges is likely to result in a conviction which would, in turn, be likely to have a detrimental effect on the future employment and livelihood prospects of the applicant -
  - Young people form one of the most vulnerable groups in the criminal justice system, and are more likely to be disproportionately affected by an adverse sentence given their age and future ahead. Extensive research supports the assertion that the deeper a young person enters into the criminal justice system, the more likely they will penetrate deeper into it in the future. By providing assistance in situations which will prevent convictions of young people, which will also assist them in not worsening their employment prospects, the chances of that young person reoffending are significantly reduced.

- For all charges heard in the Magistrates' Court which a breach of a suspended sentence ordered in a higher court -
  - The penalty imposed in the Magistrates' Court may significantly affect the success of defending an application to impose a suspended sentence in the higher court.

The Federation notes the comments made on page 6 of the letter dated 18 September, in relation to the issue of CBOs. The Federation is strongly of the view that the likelihood of receiving a CBO should be re-introduced as a basis of qualification of assistance. In addition to the comments mentioned above concerning CBOs, the Federation reminds the board that when CBOs were introduced as a sentencing option, they were stated to be a sentencing option at the serious end of the sentencing scale, to be used as an alternative to imprisonment, aimed at diverting people away from prison. In this context, CBOs should be viewed as a sentencing disposition of near equal severity as a suspended sentence. There is considerable opinion that suggests that CBOs are a more serious disposition than fines.

For people who are in receipt of social security, or have no income (approximately 96% of VLA applicants), the prospect of receiving a CBO as opposed to fines of the magnitude as proposed by the proposed guideline is much greater. Indeed, magistrates are more disposed to impose a penalty in the form of a CBO to a non-pecunious defendant, than a fine. Accordingly, a guideline which does not allow the likelihood of receiving a CBO as a basis of qualification of assistance would have a particularly prejudicial to applicants facing financial hardship.

ADDITIONAL ISSUES OF CONCERN

There are several areas of unmet legal need which will not be positively affected by the proposed changes, and appear not to have been considered as areas in need of urgent review.

Special Circumstances Guideline

Currently, Guideline 2.3.1 reads as follows:

> If the applicant qualifies on the means test, but the matter does not otherwise meet the VLA guidelines, a grant of assistance may be offered if the applicant is under 18 years of age, has a language or literacy problem, has an intellectual or psychiatric disability.

The Federation submits that this category of special circumstances should be extended to people who suffer from an addiction, where in criminal law matters, the addiction is clearly related to the offending. The addictions may include prescribed medications, illicit substances and gambling, and should be verified by a suitably qualified professional.

The psychiatric disability category should be extended to include persons suffering from personality disorders, depression, post traumatic stress disorder and other illnesses. In addition, the current practice of only granting an extension of aid to fund a psychiatric assessment and report if the applicant is facing a term of imprisonment should be extended to all applicants who fit within the special circumstances category. It is clear that many people suffering from a psychiatric illness facing criminal charges will be dealt with by a court in a completely different and more appropriate manner on presentation of a psychiatric assessment and diagnosis.

Further in relation to special circumstances we note that 2.3.1 provides:

> "...where there is the prospect of benefit being gained not only by the applicant, but also by the public or any section of the public."

The Federation is of the view that the pursuit of public interest cases in all jurisdictions are essential to the development of the law and to human rights. It is important that bodies assessing the "public interest" do so with some guidance. Furthermore it is important that decisions about funding of public interest matters be carried out in co-ordination with other initiatives in this area.

Accordingly the Federation recommends that Victoria Legal Aid convene an expert working group to work with VLA to develop guidelines for the assessment of public interest applications and to explore ways in which expenditure by VLA in this regard can be co-ordinated with other initiatives in this area including, for example, the Public Interest Law Clearing House and the Law Foundation's Voluntas project.

Civil Matters

The Federation is concerned that there are no proposals to amend the eligibility guidelines with respect to civil matters. The current operation of the guidelines in civil matters are causing particular hardship in several areas.

Equal Opportunity and Discrimination matters

As a result of funding constraints Victoria Legal Aid altered guidelines on 12 December 1996 to provide that legal aid would not be granted for discrimination cases, except where there was a strong prospect of benefit being gained not only by the applicant but also by the public or any section of the public. Following the changes to the guidelines, it was reported to the Federation from Disability Discrimination Law Advocacy Service, that Victoria Legal Aid refused all applications for assistance for discrimination complaints, even where the application involves issues of public interest, affecting a large number of people with disabilities.

The nature of equal opportunity/discrimination cases means that even where the particular case involves the circumstances of one person, it is rare that the pursuit of such a case will not have any wide public benefit, for example, by brining about a change in management practice or, through wider publicity, a change in community attitudes.

The inability of persons who face discrimination to remedy that discrimination because of economic disadvantage and lack of legal aid is of particular concern. The failure to provide legal aid compounds the disadvantage they already face and, on a human level, exacerbates the pain and suffering caused by the act of discrimination.

The Federation is further concerned that the proposals to transfer the hearing powers under the various commonwealth human rights legislation from the Human Rights and Equal Opportunity Commission to the Federal Court, with the resultant filing fees and need for legal representation, coupled with the inability to obtain legal aid will significantly curtail legal redress for persons who have suffered discrimination.

The Federation recommends that guidelines relating to Equal Opportunity matters be reviewed in consultation with relevant organisations (including but not limited to Victorian Aboriginal Legal Service, Women's Legal Resource Group, Mental Health Legal Centre and Disability Discrimination Law Advocacy Service) to arrive at more equitable guidelines.

Public Interest Environmental Matters

In relation to public interest environmental cases such as planning appeals and proceedings to enforce environmental standards legal aid is non existent. In fact, Victoria Legal Aid does not have any guidelines for the legal aid funding of public interest environmental matters. The lack of guidelines basically means that such matters will not attract a grant of legal aid. This is of particular concern given the constraints that have been placed on the Environment Defenders Office by the Commonwealth, namely, that funding cannot be used for the purposes of litigation. The Federation recommends that guidelines for the funding of public interest environmental matters should be developed in consultation with the Environment Defenders Office.

Employment Disputes

Currently there is no legal aid available for employment disputes. The Federation considers that security of employment is a fundamental human right and that legal representation is often essential particularly where special circumstances exist (such as language, disability, etc.). The Federation considers that this prohibition on aid for employment matters should be reviewed in consultation with relevant groups including but not limited to Job Watch and the Victorian

Trades Hall Council.

Immigration Matters, particularly Asylum seekers

The Federation echoes concerns expressed by the Refugee & Immigration Legal Centre (RILC), that there is an urgent need to reinstate funding for asylum seekers. The IAAA Scheme administered by the Department of Immigration as a "substitute" or alternative for VLA funding has been woefully inadequate to cope with the demand.

In the year prior to the funding cuts to legal aid, the Refugee Advice and Casework Service assisted 397 asylum seekers, and VLA assisted 360 asylum seekers. The great majority of these applications were successful. RILC is n0w funded to assist 34 stages and the IAAA Scheme in Victoria is funded for only approximately 100 stages (most likely less than 70 clients, and less than 10% of last year's case load of RACS and VLA). Prior to the cuts, RACS had three full time refugee caseworkers, and VLA had four full time solicitors specialising primarily in refugee cases. At present RILC has 1.5 full time caseworkers for refugee matters and VLA have none, apart from those solicitors finalising existing cases. Yet demand for services has not diminished at all.

The Senate Legal and Constitutional References Committee, in its Inquiry into the Australian Legal Aid System, stated that:

> The Committee regards as unacceptable the virtual removal of all legal aid for migration matters. It notes that the Commonwealth is abrogating responsibility for an area in which it has passed laws. It is therefore not an action which flows from the declared aim of the new legal aid agreements that the Commonwealth would only provide legal aid in relation to matters which arise under Commonwealth laws.

Amnesty International has also expressed concerns that denial of legal aid assistance to asylum seekers who are escaping human rights abuses is a breach of Australia's obligations under international law.

CONCLUSION

As community legal centres are a major provider of legal aid services in Victoria. the Federation welcomes the opportunity to have input into the board's considerations of the proposals to review VLA's eligibility guidelines. The Federation is willing to assist should the board require any further information or elaboration regarding the contents of this submission.