



Federation of
Community Legal Centres
VICTORIA

Judy Small

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Comments on Family Law Eligibility Guidelines Review Discussion Paper

Dear Judy

Thank you for the opportunity to comment on the proposed new Victoria Legal Aid Family Law Eligibility Guidelines.

We know from our experience in 2008 that changes to VLA family law guidelines are likely to impact on demand for CLC and pro bono services. We have consulted with a range of CLC family lawyers on the proposed changes. This letter draws on their input.

Summary

We broadly support the intended shift in focus in the proposed guidelines towards:

- early intervention and dispute resolution services, where appropriate; and
- using VLA's finite resources to assist the most vulnerable clients in the areas of greatest impact.

However, we are concerned about some of the impacts of the proposed guidelines as outlined below.

Data and modelling

To better analyse the potential impact of the proposed guidelines, it would have been helpful if the Discussion Paper contained:

- data on relevant VLA Family Law Program services over recent years; and
- modelling or informed comment on how VLA expects the proposed guidelines to impact on those services.

Without access to this information at this time, we are commenting on the basis of what we expect the impact of the changes to be.

Resource allocations by VLA

We also understand that, despite VLA's improved financial position, VLA has decided not to increase the resources available to its Family Law Program, and instead will allocate new resources to its civil and/or criminal areas. Without knowing the detail of possible changes to civil and/or criminal services, we cannot comment on the merit or otherwise of not increasing resources to family law

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services.

Parenting orders - RDM

The current guidelines favour RDM over other family dispute resolution processes.

We support RDM as an effective and appropriate lawyer assisted forum for the resolution of family law disputes. However, requiring an RDM certificate before a litigation grant can be made will unfairly prejudice families who have participated in good faith in other family dispute resolution processes such as family relationship centres.

The proposed guideline should be expanded to recognise certificates from other family dispute resolution practitioners, not just RDM certificates.

Parenting orders – Litigation grants

Impact

The proposed changes will mean that adults who cannot afford to pay for a lawyer, will be denied access to legally aided representation, unless the identified special circumstances exist.

This will result in more people either:

- self-representing; or
- agreeing to settlements through family dispute resolution processes which are less favourable than what they could obtain through an adjudicated court outcome (because they know they will not be able to access legal representation for litigation).

The increase in self-representation is likely to result in poorer outcomes for those clients denied legal aid for litigation. It is not clear whether this will be offset by improved outcomes for those clients afforded greater assistance under the proposed guidelines.

The increase in self-representation is likely to result in more clients seeking assistance from CLCs, duty lawyer services and pro bono, without any increases in capacity to assist those clients. It will place additional pressure on court administration. It is not clear to what extent the positive changes to the proposed guidelines may offset this demand.

The proposed changes to the litigation grants may also result in more private lawyers withdrawing from this area of work, as the only cases that will be aided will be the more complex or difficult cases, and we understand that there is no proposal to increase fees accordingly. VLA's in-house practice, which has expertise in working with complex and difficult matters, may pick up some of this work, however in rural and regional areas not covered by VLA offices, the proposed changes may result in difficulties accessing legal representation for some clients.

We are concerned that the availability of a grant of litigation aid may become a factor that can be manipulated to pressure a party into accepting a settlement

through family dispute resolution processes that is less favourable than what they could obtain through an adjudicated court outcome. We recommend greater consideration be given to structuring the guidelines in a way that minimises this risk.

If the litigation guidelines are changed as proposed, prior to the changes becoming effective, we recommend convening a meeting between VLA, CLCs and PILCH to discuss measures to best manage increases in self-representation, including referral mechanisms. Consistent with our joint commitment to improved referrals, we need to ensure that VLA does not refer clients who are ineligible for aid to CLCs and pro bono unless there is capacity to assist those clients.

Evidence of special circumstances

Evidence of special circumstances (family violence, mental illness etc) will be required under the proposed changes to access a grant of aid.

If these changes are implemented, it is critical that VLA does not adopt a restrictive approach to proving the special circumstances. An intervention order, or a lawyer attesting to their client's instructions that they have a mental illness or are a victim of family violence, should on their face, be sufficient evidence of the special circumstances.

Proper administration of justice

This category needs to more focused on the impact of the denial of aid to the person. We suggest drawing on international jurisprudence on the right to a fair hearing (incorporated into section 24 of the Victorian Human Rights Charter) to broaden the criteria to include particularly complex or serious cases or where the denial of legal assistance would put one party at a considerable disadvantage or render them effectively incapable of bringing the proceeding.

Property

We welcome the extension to funding RDM for some property matters. However, there is a risk that funding RDM, and not litigation or contravention and enforcement applications, will place undue pressure on parties to agree to a settlement through RDM which is less favourable than what they could obtain through an adjudicated court outcome.

If this proposed guideline is implemented, we recommend reviewing its impact in this regard after an appropriate period of time (12 or 24 months).

Divorce

It would have been good to have data on the number of divorce grants made by VLA each year, so we can assess the likely impact on CLC and pro bono services.

In general, CLCs prioritise assistance for clients with divorce matters where there are special circumstances, such as the presence of family violence, where clients are from culturally diverse backgrounds or where substituted service is required. These more complex divorce matters are more labour intensive.

We are concerned about an increase in demand for CLC services in this area as a result of the removal of aid for divorces, without any increase in CLC capacity to meet this demand.

If the divorce guideline is changed as proposed, prior to the changes becoming effective, we need to meet with VLA to discuss their impact and measures to best manage likely increases in CLC demand, including referral mechanisms.

Independent children's lawyers

We welcome the changes to granting aid for independent children's lawyers. In our experience, ICLs help to resolve cases more efficiently and with greater satisfaction from both parents and children. However, we are concerned that the proposed restrictions to litigation grants will result in more self-represented litigants which in turn will make the job of ICLs more difficult and time consuming.

We would be happy to discuss these comments with you in more detail.

Sincerely

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