



Submission to the Victorian Legal Aid Means Test Review

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Murray Mallee Community Legal Service

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Murray Mallee Community Legal Service (MMCLS)

The Murray Mallee Community Legal Service is a program within Mallee Family Care which is delivered to the Northern and Southern Mallee of Victoria and South West NSW. It covers more than 100,000 square km with seven Victorian and 3 NSW Local Government Areas within its catchment.

The service offers free, confidential legal advice, information, referral and case work. It also provides legal education and engages in law reform activities.

The service aims to assist people from low socio-economic backgrounds and in particular young people, people from culturally and linguistically diverse backgrounds, Aboriginal and Torres Strait Islander people, people with disabilities and people living in isolated rural communities.

Regular Outreach Services are delivered in Dareton and Wentworth in NSW and Robinvale, Swan Hill, Birchip and Kerang in Victoria.

MMCLS welcomes the invitation to make a submission on the proposed possible changes to the means test and contributions policy. We also acknowledge the contribution to this submission by the Mildura Family Relationship Centre which is another Mallee Family Care program.

Our Own Experience of the Legal Aid Means Test

MMCLS has only been appointed as a panel solicitor in the Family Law and Family Violence areas since early 2017. We have however had considerable ongoing experience of clients, particularly in the family law area, that cannot afford to pay a private solicitor for their legal work but do not satisfy the means test and cannot therefore obtain a grant of legal aid.

We have since March 2015 provided a duty lawyer service at each of the three annual family law sittings of the Federal Circuit Court in Mildura. Our role has been, subject to conflict check, to provide advice and basic interlocutory representation on the day to unrepresented parties before the Court. We do not get involved with ongoing casework and do not represent parties at final hearings. In providing this service we have encountered a significant number of clients from one sittings to the next who

have not qualified for legal aid and have clearly not been able to afford to engage a private solicitor to do the necessary casework to have their matter prepared for a final hearing. Luckily for some of those clients we have assisted them to negotiate a final resolution of their cases. There have however been many that have had to proceed to a hearing with little or no relevant evidence before the Court.

A number of the clients that we have appeared for may have been eligible for legal aid and we have in the past referred them to appropriate local practitioners to make an appropriate application. Most of those that we have appeared for however were not eligible. They were either within the remaining 6 per cent of those below the Henderson Poverty Line (HPL) who do not qualify for aid or they were effectively “working poor” who may not have been below the HPL but on a practical basis did not have the funds available to engage a private legal practitioner, particularly at market rates. In some instances after referral to private practitioners at the conclusion of one sittings these clients were seen again at subsequent sittings without private representation as their available funds had been exhausted. This has a flow on of delay, disruption and additional costs to all parties and to the Court.

Case Study

The following case study comes from a Women’s Safety Package client but is similar to the duty lawyer clients referred to above.

The client had separated from her abusive partner in 2015 while living in Queensland and was the main care giver for their children. Throughout 2015 the client struggled financially to afford the legal fees associated with her family law and intervention order applications.

The client’s ex-partner delayed the court process through multiple contests and changes to family law applications. This process also impacted financially on the client.

The client’s legal aid application was denied due to assets (family home). The client had spent up to \$10,000 (Est) in legal costs and had been requested to provide a further \$20,000 (Est) to ensure ongoing legal representation.

The client moved to Victoria and again was advised a legal aid grant would not be made due to her asset pool and recently gaining employment. At this time the client

had no savings, was unable to afford a rental property and was living with family members. A family member was also providing funds to cover the legal costs.

Following a further \$10,000 spent on legal fees and the client's employment having ceased, the client was concerned in not being able to complete the family law process and what this would mean to her entitlements to property held by her ex-partner and the orders to ensure the stability of the children in their best interests.

Summary of Options

All of the options are useful and deserve some consideration. We offer a few comments about particular options that are relevant to our clients and our experience

2. Introduce a better approach for people with irregular incomes.

This option has much to recommend it particularly for many of the people that our Service regularly deals with. The income of many vulnerable people in rural and remote areas is very much seasonal depending upon the timing of fruit or crop harvesting and other such short term activities. In such instances their income over the preceding 6 to 12 months is often the best indicator of their means.

5. Allow the dependants of financially associated persons to be included in the means test calculations.

It is difficult to determine why the dependant allowance provided to the applicant for legal aid is not currently applied to the incomes of financially associated persons. That information is just as relevant to the position of a financially associated person as it is to the applicant. The current approach is inequitable and should be changed.

6. Allow a repayment schedule for asset contributions.

Such an approach would be expected to substantially decrease the current average 14 year wait for such contributions to be repaid. It would also be expected to provide a regular ongoing cash flow and thus reduce the drain on resources of the current system.

13. Increase the range of deductions.

It is difficult to understand how deductions such as the level of existing debt repayments and utilities are not currently considered in determining what an

applicant's allowable income is. It may well be that historically the cost of utilities had a substantially less significant effect on the overall cost of living. These days keeping track with current utilities liabilities to say nothing of outstanding utilities bills is one of the most significant issues that our Service advises clients on. At the same time the level of overall household debt appears to be fairly significant and certainly affects an applicant's ability to afford private legal representation.

18. Develop guidelines for scenarios where support and assistance is being provided by a family member.

One off or very limited provision of emergency assistance by a family member or friend should not be taken to mean that such generous person is in a position to provide ongoing assistance to an applicant. Suitable guidelines should be developed so that it is clear that such generous and for a limited time necessary acts are not going to affect the eligibility of the applicant over the longer term.

21. Fix the rate of contribution repayments based on income as opposed to contribution amount.

Recovery of a contribution should be assessed based upon a person's ability to repay it. Such an approach is more likely to lead to the overall contribution being repaid as it becomes affordable and less of a burden. While this may well extend the period of some repayments it is much more likely to encourage full repayment. As discussed in 33 below appropriate discounts for early repayment, concessional interest rates for on-time repayments and appropriate loan documentation may well address anticipated delinquency.

22. Introduce a clearer financial hardship process regarding contributions.

In this time of financial disclosure the comments on this option almost go without saying. The whole Debt Policy should be clarified and made available to all applicants seeking legal aid who are given the option of receiving a grant of aid subject to a contribution. It should be easy to understand and the process for seeking variation or waiver should be straightforward with the criteria spelled out clearly so that they can be addressed by the applicant.

29. Introduce separate asset allowances for home owners and non-homeowners.

It is difficult to rationalise the allowance of up to \$500,000 equity in an applicant's principal place of residence with the situation for non-home owners. There should be a more equitable approach to the application of the assets test to non-home owners.

31. Include additional cost categories to better align with costs of legal services.

32. Update existing costs categories.

As stated in the comments VLA should be in a position to look at the amounts that it currently pays for legally aided matters for the various categories of matters that are funded. Such information should provide a reasonably accurate initial estimate of the costs associated and therefore the level of funding needed for a grant to an applicant in each category. This information could be cross checked on an ongoing basis.

33. Extend the availability of legal assistance with a contribution to increase access to justice.

34. Provide discounts to people who pay their contributions back sooner than required.

Many people that are caught between no eligibility for legal aid and genuine ability to pay for private legal assistance would be assisted by an increase in the contribution scheme to allow them to make regular payments over time to repay contributions associated with grants of legal aid. Such a scheme would provide them with a grant of aid, would lock in lower overall litigation costs at legal aid rates and would allow them to repay the contributions over a reasonable period of time. If aid is not granted then private practitioners generally require that their fees be paid as an upfront lump sum which most people do not have available to them.

It may be argued that the current contribution scheme does not recover a significant portion of the money advanced and that much has to be written off. The proposed scheme could be tied to appropriate loan documents, provide for regular affordable payments and for automatic deduction from an employer, benefit or pension.

Discounts could be applied if the loans were paid back earlier than expected as discussed in item 34 of the options. There could be a concessional rate of interest applicable if the payments were made strictly as agreed. Where the repayments exceeded the original terms then a nominal rate of interest could apply. This scheme would have the effect of making it attractive to repay the contributions either on time

or earlier than anticipated which would offset the initial increased costs with an ongoing cash flow.

The average costs of the anticipated litigation should be able to be determined by reference to the amounts currently spent on eligible matters of a similar nature. Unforeseen costs would need to be approved in advance once the practitioner became aware of the need in line with their existing obligation to advise the client of any increase in the likely costs of any matter.

38. Online means test indicator tool.

Such a tool may assist applicants to a significant extent to assess the likelihood of obtaining a grant of aid and as to whether they may be required to make a contribution.

41. Stop collecting unsecured contributions.

It may be more rewarding to develop more effective means of encouraging the repayment of unsecured contributions as discussed above. If only 10 to 15 % are currently collected it is understandable why VLA might consider it uneconomical to continue as is. However if applicants were given appropriate encouragement to make regular affordable repayments a significant improvement in the percentage collected would have a correspondingly significant effect on ongoing cash flow.

MMCLS appreciates the opportunity to make this submission to the Means Test Review and we look forward to the outcome.

Dated: 26 June 2017

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