



LEGAL AID
WESTERN AUSTRALIA

NATIONAL COMMONWEALTH LEGAL AID GUIDELINES

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PART 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.

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.

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.

4 - TEST CASES

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



PART 2 - FAMILY LAW GUIDELINES

Note For the family law priorities see Schedule A of the National Partnership Agreement, the Commonwealth Legal Aid Service Priorities, Family Law Priorities attached at Annexure “A”.

GUIDELINE 1 - PRIORITY FOR URGENT MATTERS

1.1 URGENT MATTERS

- (1) Although each of the family law priorities in the Commonwealth Legal Aid Service Priorities are generally of equal priority, in deciding whether to make a Grant of Legal Assistance for a family law matter for an interim order or injunction, the Commission will give the highest priority to urgent matters.
- (2) Urgent matters are matters in which the Commission determines that:
 - (a) a child’s safety or welfare is at risk
 - (b) the applicant’s safety is at risk
 - (c) there is an immediate risk of removal of a child from Australia or to a remote geographic region within Australia
 - (d) there is a need to preserve matrimonial property, or
 - (e) other exceptional circumstances exist that require urgent legal assistance.

1.2 NON-URGENT MATTERS

- (1) If the Commission determines a family law matter that falls within the family law priorities is not urgent, a Grant of Legal Assistance should not be granted until the relevant parties have been separated for a sufficient period of time to enable them to be sure that there are real issues in dispute.
- (2) Guideline 1.2(1) does not apply where the Commission considers that a non-urgent matter warrants a Grant of Legal Assistance for an application to the court for an interim order or injunction prior to the passing of the sufficient period of time referred to in guideline 1.2(1).
- (3) In prioritising funds available for non-urgent matters and deciding whether a Grant of Legal Assistance is to be made and if so, the nature and extent of that Grant, the Commission may take into consideration whether:
 - (a) there is, or is a likelihood of, domestic violence, especially if an allegation of domestic violence has been made
 - (b) concerns as to the safety, welfare and psychological wellbeing of a child have been identified and require further investigation
 - (c) the applicant has a language or literacy problem
 - (d) the applicant has an intellectual, psychiatric or physical disability
 - (e) it is difficult for the applicant to obtain legal assistance because the applicant lives in a remote location
 - (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
 - (d) one or more of the parties to the proceedings is unable to participate effectively in family dispute resolution (whether because of an incapacity of some kind, physical remoteness from dispute resolution services or for some other reason).

GUIDELINE 3 - INDEPENDENT REPRESENTATION OF CHILDREN

3.1 ASSISTANCE FOR INDEPENDENT REPRESENTATION OF CHILDREN'S INTERESTS

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

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

- (2) The Commission should make a Grant of Legal Assistance for the independent representation of a child 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
 - (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
 - (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 costs of the single expert.
- (4) Guideline 3.2(1) does not apply to proceedings for special medical procedures involving a child in which a Grant of Legal Assistance for independent representation of the child's interest has been made, regardless of whether or not any of the parties to the proceedings are receiving legal assistance under a Grant of Legal Assistance.
- (5) If a party refuses or fails to pay the amount required by the Commission under this guideline 3.2, legal assistance for the independent children's lawyer should continue to be provided on the condition that the independent children's lawyer in appropriate circumstances seek an order for costs against that party at an appropriate time in the court proceedings.

GUIDELINE 4 - PARENTING ORDERS

4.1 ASSISTANCE FOR PARENTING ORDERS

The Commission may make a Grant of Legal Assistance for a court application for a parenting order under the *Family Law Act 1975* if the Commission is satisfied that:

- (a) there is a dispute about a substantial issue, and
- (b) any of the following circumstances apply:
 - (i) the party has a certificate under section 601 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, and
 - (b) any of the following circumstances apply:
 - (i) the party has a certificate under section 601 of the *Family Law Act 1975* about 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 SUPPORT AND CHILD MAINTENANCE

5.1 ASSISTANCE FOR CHILD SUPPORT MATTERS

The Commission may make a Grant of Legal Assistance for a child support matter under 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 for proceedings:

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



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

5.3 ASSISTANCE FOR CHILD MAINTENANCE MATTERS

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

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

5.4 ASSISTANCE FOR APPLICANT CHILDREN

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

5.5 APPLICATION OF PART 2 TO THE MAINTENANCE OF EX NUPTIAL CHILDREN IN WESTERN AUSTRALIA

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

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

GUIDELINE 6 - SPOUSAL MAINTENANCE UNDER THE FAMILY LAW ACT 1975 OR THE FAMILY COURT ACT 1997 (WA)

6.1 ASSISTANCE FOR APPLICATIONS FOR SPOUSAL MAINTENANCE

The Commission may make a Grant of Legal Assistance for a spouse maintenance matter under the *Family Law Act 1975* or the *Family Court Act (WA) 1997*, 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 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 paternity 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 for special medical procedures (including sterilisation) involving the child.
- (2) An application for a Grant of Legal Assistance under this guideline 9 is not subject to the merits test.

GUIDELINE 10 - RECOVERY, LOCATION AND INFORMATION ORDERS

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 for the location and/or recovery of a child.
- (2) A Grant of Legal Assistance under this guideline 10:
 - (a) should usually be limited to \$2,000, and



- (b) should only be made on the condition that the applicant for assistance seek a costs order against the respondent to the court application, unless that party is also receiving legal assistance under a Grant of Legal Assistance.

GUIDELINE 11 - DIVORCE AND NULLITY OF MARRIAGE

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
 - (c) the dispute relates to:
 - (i) property and/or
 - (ii) funds from which the applicant for assistance may receive only a deferred benefit, such as superannuation benefits.
- (2) Ordinarily a Grant of Legal Assistance will only be granted for the resolution of the dispute through participation in a Commission FDR Service.
- (3) A Grant of Legal Assistance for litigation for a dispute about property may only be made if the applicant for assistance is also seeking the resolution of another related family law matter by the Court or the Commission decides that it is appropriate to make a Grant of Legal Assistance to the applicant for assistance because of his or her personal circumstances.
- (4) Where the dispute relates to the preservation of property and there is a risk that property will be disposed of then a limited Grant of Legal Assistance may be made for injunctive relief.



GUIDELINE 13 - ASSISTANCE AFTER FINAL COURT ORDERS

13.1 ASSISTANCE NOT AVAILABLE

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

- (a) applications to discharge or vary parenting orders or set aside registered parenting plans in accordance with guideline 4.2
- (b) applications for recovery, location and/or information orders in accordance with guideline 10
- (c) appeals in accordance with guideline 14, and
- (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 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 for a family law or child support matter.
- (2) A Grant of Legal Assistance under this guideline 15:
 - (a) should usually be limited to \$2,000, and
 - (b) should only be made on the condition that the applicant for assistance seek a costs order against the respondent to the court application, unless that party is also receiving legal assistance under a Grant of Legal Assistance.

GUIDELINE 16 - CONTEMPT OF COURT AND BREACH OF COURT ORDERS

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 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 for an applicant to intervene in proceedings for the return of a child under the Convention.

GUIDELINE 18 - FAMILY LAW COSTS MANAGEMENT

18.1 GENERAL

- (1) In this guideline 18:

a family law or child support matter includes any dispute that involves the same parties about the same or substantially the same issue, if there has not been a material change in circumstances or if any such change would not materially affect existing orders

costs cap means the costs limitations on a Grant of Legal Assistance as set out in guidelines 10, 15 and 18.2 of this Part 2, 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 \$13,800.
- (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) and (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 will be subject to strict limits on costs, and the nature and extent of the additional cost will be determined by the Commission or agreed between the Commission and the External Service Provider (as appropriate) having regard to the following factors:
 - (a) advice from the court and the parties about the estimated length of time required for the hearing of the matter
 - (b) the number and nature of witnesses who must be called or cross-examined, and
 - (c) whether the other parties to the matter have legal representation.



PART 3 - CRIMINAL LAW GUIDELINES

Note For the criminal law priorities see Schedule A of the National Partnership Agreement, the Commonwealth Legal Aid Service Priorities, Criminal Law Priorities attached at Annexure "A".

GUIDELINE 1 - GENERAL

1.1 ASSISTANCE IN COMMONWEALTH CRIMINAL LAW MATTERS

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



PART 4 - CIVIL LAW GUIDELINES

Note For the civil law priorities see Schedule A of the National Partnership Agreement, the Commonwealth Legal Aid Service Priorities, Civil Law Priorities attached at Annexure "A".

GUIDELINE 1 - GENERAL

1.1 CONSIDERATION OF RESOLUTION PROCESSES OTHER THAN LITIGATION

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

1.2 ASSISTANCE FOR CIVIL PROCEEDINGS OTHER THAN THOSE DEALT WITH IN THIS PART 4

- (1) The Commission may make a Grant of Legal Assistance for litigation where the applicant for aid falls within the category of disadvantaged client.
- (2) In determining if a client is disadvantaged the Commission may take into account:
 - (a) the practical or material benefits/detriments/loss at risk
 - (b) whether the matter is of such complexity that it could not be represented to the court without legal representation.
 - (c) whether the applicant's ability to communicate, and/or self-represent is affected by
 - (i) mental illness or impairment, or
 - (ii) physical disability, or
 - (iii) a first language other than English,
 - (iv) literacy levels
 - (d) existence of financial stress/material deprivation
 - (e) housing disability

Note This may be indicated by homelessness or low income earners with private rental housing costs exceeding 30% household income.

- (f) remoteness of location and access to service providers
- (g) issues of joblessness and/or long term unemployment.



1.3 ASSISTANCE FOR DAMAGES ACTIONS

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

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

GUIDELINE 2 - SOCIAL SECURITY AND OTHER COMMONWEALTH BENEFITS

2.1 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
- (c) requires significant medical evidence, or
- (d) it would be unreasonable to expect the applicant for assistance to adequately represent himself or herself due to special circumstances of a kind listed in the Commonwealth Legal Aid Service Priorities, Special Circumstances of the Applicant priorities, or
- (e) the Commission determines that the appeal involves an important or complex question of law.

GUIDELINE 3 - MIGRATION CASES

3.1 ASSISTANCE FOR MIGRATION MATTERS

- (1) The Commission may make a Grant of Legal Assistance for proceedings in the Federal Court, Federal Magistrates Court or High Court dealing with a migration matter, including a refugee matter, only if:
 - (a) there is a difference of judicial opinion that relates to a substantive issue in dispute that has not been settled by the Full Court of the Federal Court or the High Court, 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.

GUIDELINE 4 - EQUAL OPPORTUNITY AND DISCRIMINATION CASES

4.1 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 5 - WAR VETERANS' MATTERS

5.1 ASSISTANCE FOR WAR VETERANS' MATTERS

- (1) The Commission may make a Grant of Legal Assistance to an applicant for assistance who is a war veteran or a dependent of a war veteran in relation to:
 - (a) appeals from decisions of the Veterans' Review Board about war-caused disability pension entitlement or assessment claims under Part II of the *Veterans' Entitlements Act 1986*, and
 - (b) appeals from decisions of the Veterans' Review Board about claims under the *Military Rehabilitation and Compensation Act 2004* that relate to warlike or non-warlike service, in regard to:
 - (i) acceptance of liability (Chapter 2),
 - (ii) rehabilitation programs (Chapter 3, Part 2),
 - (iii) permanent impairment (Chapter 4, Part 2),
 - (iv) incapacity payments for former members (Chapter 4, Part 4),
 - (v) special rate disability pension (Chapter 4, Part 6), and/or
 - (vi) dependants' benefits (Chapter 5).
- (2) An application for a Grant of Legal Assistance under this guideline 5.1 is not subject to:
 - (a) the means test, or
 - (b) the applicant for assistance making any contribution to the cost of his or her legal assistance provided by the Commission in relation to the matter, other than to the extent of any costs recovered from the respondent in the matter.

GUIDELINE 6 - OTHER FEDERAL AND HIGH COURT PROCEEDINGS

6.1 ASSISTANCE FOR CERTAIN MATTERS IF SUBSTANTIAL BENEFIT

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

- (a) appeals from decisions of the Administrative Appeals Tribunal
- (b) initiating proceedings in the Federal Court, the Federal Magistrates Court or the High Court, and
- (c) appeals in the Full Court of the Federal Court or the High Court.



GUIDELINE 7 - PROCEEDS OF CRIME

7.1 PROCEEDINGS UNDER THE PROCEEDS OF CRIME ACT 2002

- (1) The Commission may make a Grant of Legal Assistance to an applicant for assistance in proceedings under the *Proceeds of Crime Act 2002* if the applicant has property that is covered by a restraining order under the Act, or is likely to be covered by such an order.
- (2) In assessing an applicant's eligibility under the means test for the purpose of determining an application for a Grant of Legal Assistance under this guideline the Commission must disregard any property of the applicant that is subject to a restraining order or confiscation order under the *Proceeds of Crime Act 2002*, or is likely to be covered by such an order.
- (3) In assessing an applicant's eligibility under the merits test for the purpose of determining an application for a Grant of Legal Assistance under this guideline the Commission should disregard the 'appropriateness of spending limited public legal aid funds' test.
- (4) The costs of providing legal assistance to an applicant for assistance under a Grant of Legal Assistance will be reimbursed to the Commission in accordance with sections 292 and 293 of the *Proceeds of Crime Act 2002*.
- (5) The Commission must ensure that the costs claimed by it in accordance with guideline 7.1 (4) are fair and reasonable, and in accordance with the Commission's usual fee scales for civil law matters.

GUIDELINE 8 - EXTRADITION PROCEEDINGS

8.1 ASSISTANCE FOR CERTAIN EXTRADITION PROCEEDINGS

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

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

GUIDELINE 9 - APPEALS

9.1 ASSISTANCE FOR APPEALS

Subject to the other guidelines in this Part 4, the Commission may make a Grant of Legal Assistance for an appeal of a court decision in a civil law matter.

GUIDELINE 10 - CONSUMER PROTECTION

10.1 ASSISTANCE FOR CERTAIN MATTERS

The Commission may make a grant of legal assistance for Commonwealth consumer protection matters involving:

- (a) credit (including mortgages and guarantees).
- (b) unconscionable contracts and unfair contract terms.
- (c) the purchase of goods and services.
- (d) insurance contracts and superannuation.
- (e) a claim or cause of action against a person retained to advise and/or represent a client for the purpose of consumer transaction.



10.2 OTHER CONSUMER MATTERS

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

10.3 CONSUMER PROTECTION MATTERS – EXTERNAL DISPUTE RESOLUTION

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

10.4 CONSUMER PROTECTION – LODGING A COMPLAINT

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

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

10.5 CONSUMER PROTECTION MATTERS – COURT PROCEEDINGS.

- (1) The Commission may make a grant of aid for court proceedings where:
 - (a) the applicant has already participated in IDR and EDR and the parties have not resolved the dispute, or
 - (b) participating in IDR and EDR is unavailable, impracticable or not appropriate in the circumstances, or
 - (c) providing legal representation to the applicant for court proceedings would advance the public interest e.g. there is a significant point of law to be determined.



- (2) Where the consumer matter is eligible for the small claims procedure set out at s199 *The National Consumer Protection Act 2009* aid is limited and in addition to guideline 10.5 (1) consideration of the:
- (a) complexity of the matter and
 - (b) the particular circumstances of disadvantage of the client including
 - (i) the extent of the impact on the client
 - (ii) practical difficulties in self representing

will be taken into account in determining the appropriateness of granting aid.



Schedule A

COMMONWEALTH LEGAL AID SERVICE PRIORITIES

General principles and priorities are outlined for Commonwealth law matter types and special circumstances of the applicant are intended to provide guidance to the States and Territories about the types of legal matters that should attract Commonwealth funded legal services. The priorities are not exhaustive and may be subject to amendment from time to time as set out in clause 28 (e) of the Agreement.

General Principles to be applied to each priority

- Consideration should be given in all cases to what other services (non-legal as well as legal) may be relevant to a client's needs and the appropriateness of referral.
- Services directed to a case should, where appropriate, focus on resolution of the matter through the use of preventative, early intervention or dispute resolution services rather than litigation.
- The provision of all preventative and early intervention legal education, information, advice, assistance and advocacy services are considered a Commonwealth legal aid service priority regardless of whether the matter type comes within Commonwealth or State/Territory law.
- The priorities for family law matters relate to complex issues and fundamental matters necessary for the wellbeing of children and/or people who have experienced, are experiencing or are at risk of experiencing, family violence. The priorities are not intended to include grants of legal aid for matters such as matrimonial divorce proceedings, applications for passport, change of name applications, unless special circumstances apply.
- The priorities for family law, criminal law, civil law and special circumstances of the applicant outlined below are not listed in any hierarchical order.

Family law priorities

- Family law matters that involve a grant of legal aid being provided to assist:
 - children, including the appointment of a court appointed independent children's lawyer
 - people who have experienced, are experiencing or are at risk of experiencing, family violence, and
 - family members resolve complex issues relating to the living arrangements, relationships and financial support of their children.
- State 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 legal assistance could be made.



- State law matters where the applicant's safety is at risk and there are other connected family law priorities for which a grant of legal assistance could be made.

Criminal law priorities

- 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
 - a person who, if convicted, is likely to receive a sentence involving a period of imprisonment.

Note: Legal aid commissions may apply for reimbursement of one-off costs associated with providing assistance for a particular criminal law matter from the Commonwealth Criminal Law – Expensive Cases Fund administered by the Commonwealth Attorney-General's Department.

Civil law priorities

- Commonwealth civil law matters that involve a grant of legal aid being provided for:
 - (a) assistance to war veterans under the War Veterans Legal Aid Scheme
 - (b) matters relating to social security and other Commonwealth benefits
 - (c) migration matters where assistance is not available from services funded by the Department of Immigration and Citizenship
 - (d) Commonwealth employment, equal opportunity and discrimination cases
 - (e) Commonwealth consumer law matters
 - (f) matters arising under the *Proceeds of Crime Act 2002*
 - (g) proceedings under section 19 or 21 of the *Extradition Act 1988*.

Special circumstances of the applicant priorities

- Cases requiring a grant of aid involving special circumstances such as a language or literacy problem, intellectual, psychiatric or physical disability; a person's remote locality making it difficult to obtain legal assistance or where the person would otherwise be at risk of social exclusion.
- Cases requiring a grant of aid where the applicant is a child or the applicant is appointed under the *Crimes Act, 1914* to question a child complainant or child witness, should be considered a priority.