



25 May 2012

Financial Assistance Consultation  
Attorney-General's Department  
3-5 National Circuit  
Barton ACT 2600  
By email: [finass@ag.gov.au](mailto:finass@ag.gov.au)

Dear Sir/Madam,

**Financial Assistance Scheme of the Commonwealth Attorney-General's Department**

1. Women's Legal Services NSW (WLS NSW) thanks you for the opportunity to comment on the consultation paper: *A new scheme for assistance with disbursements*.
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims compensation, care and protection, human rights and access to justice.
3. In summary, we make the following recommendations:
  - i. That the issue of adverse costs orders should also be considered.
  - ii. That if an applicant's primary source of income is a Commonwealth income support payment, such as Centrelink, the applicant will be considered to have met the means test and that this be verified directly with Centrelink.
  - iii. That the means and merits tests for disbursements should be less stringent than the means and merits test for legal representation.
  - iv. That 'likelihood of successful Court or negotiated outcome in the matter' is a consideration but should not be a mandatory criterion for eligibility to the new financial assistance scheme.
  - v. That when a public interest test applies it should be 'impact on a section of the public' with a broad interpretation of 'section'.
  - vi. That a public interest test should not apply to all matters.



- vii. That 'whether instituting Court Proceedings is the best way to resolve the issues' is not part of a merits test for the new scheme.
- viii. That filing fees and other court fees should be included as 'reasonable disbursements'.
- ix. That interpreters and translation services should be considered as 'reasonable disbursements'.
- x. That counsel fees should be included as a 'reasonable disbursement.'
- xi. That 'reasonable disbursements' should also include, but not be limited to, expert reports and witness attendance fees, transcriptions fees and appeal book preparation costs.

### **Introductory comments**

- 4. We wish to express our concern that the new financial assistance scheme of the Commonwealth Attorney-General's Department will be limited to financial assistance for disbursements only, 'with some limited exceptions where assistance for legal representation costs will also be provided'. We are not aware of any other consultation process in which people had the opportunity to comment on the need for financial assistance with legal representation.
- 5. We also wish to raise a related issue that is not directly addressed in the new scheme, but is a significant barrier to access to justice, namely, the risk of an adverse costs order. WLS NSW is a member of the National Association of Community Legal Centres (NACLC). We refer to the NACLC Submission in response to the Consolidation of Commonwealth Anti-Discrimination Law Discussion Paper in which NACLC recommended the Federal Court and Federal Magistrates Court should become no costs jurisdictions in discrimination matters, except for vexatious or frivolous proceedings.<sup>1</sup> We recommend that the issue of adverse costs orders should also be considered.
- 6. While we do not provide comment on additional matters that should be included in the new financial assistance scheme, at a minimum we recommend the scheme include the matters that have been included to date.

### **Means and Merits Tests**

- 7. Financial assistance in the form of both disbursements and legal representation costs is essential in achieving access for justice. WLS NSW supports the proposal that people whose primary source of income is a Commonwealth income support payment, such as Centrelink, will be considered to have met the means test. We understand that Legal Aid NSW will soon be verifying that an applicant receives a Centrelink benefit by checking directly with Centrelink, through Centrelink's Customer Confirmation eServices (CCeS) database, rather than requiring Centrelink statements from applicants. We understand this information will be used for the means test for determining eligibility for legal aid only and that access is not provided for other use or purpose.<sup>2</sup> We welcome such an initiative

---

<sup>1</sup> NACLC, *Submission in response to the Consolidation of Commonwealth Anti-Discrimination Law Discussion Paper*, 1 February 2012 at 57-59.

<sup>2</sup> See: Legal Aid NSW, *Verbals*, Issue 65, March 12 2012 at 21 accessed on 25 May 2012 at: [http://www.legalaid.nsw.gov.au/data/assets/pdf\\_file/0004/11992/Verbals-65.pdf](http://www.legalaid.nsw.gov.au/data/assets/pdf_file/0004/11992/Verbals-65.pdf)



as a means of simplifying the process both for applicants and assessors. We recommend that if the applicant's primary source of income is a Commonwealth income support payment, such as Centrelink, the applicant will be considered to have met the means test and that this should be verified directly with Centrelink.

8. WLS NSW recommends that the means and merits tests for disbursements should be less stringent than the means and merits test for legal representation. This is because while pro bono assistance may be available with respect to legal representation, such assistance is unlikely to include disbursements. Disbursements can be costly, the Commonwealth Attorney General's Department noting the range of costs for disbursements in Federal Court matters in 2007-2008 to be between \$27 - \$625,135, with a mean of \$27,525.<sup>3</sup> Without financial assistance, such costs act as a barrier to access justice.
9. With respect to a merits test, WLS NSW submits that while 'likelihood of successful Court or negotiated outcome in the matter' is a relevant criterion it should not be a mandatory criterion. This is because, as indicated in the current *Commonwealth Public Interest and Test Cases Scheme Guideline and Conditions*, 'it is often difficult to determine what the prospects of success are likely to be.'<sup>4</sup> Moreover, these matters are often important to test in Court due to the public interest. We recommend that 'likelihood of successful Court or negotiated outcome in the matter' is a consideration but should not be a mandatory criterion for eligibility to the new financial assistance scheme.
10. We understand that some merits assessments currently include consideration of 'whether the matter impacts on a *large* section of the public' (emphasis added). We do not consider this a suitable test for the new scheme due to its broadness of scope. Significantly, some matters may disproportionately affect members of a small, marginalised community. WLS NSW submits it is contrary to access to justice principles to deny financial assistance based on the size of a particular group that may be impacted upon or affected. We recommend that when the public interest test applies it should be 'impact on a section of the public' with a broad interpretation of 'section'.
11. WLS NSW further submits there are some matters to which a public interest test should not apply. For example, assistance in cases for individuals, such as for parents in matters that currently fall within the Overseas Custody (Child Removal) Scheme. WLS NSW therefore recommends that a public interest test should not apply to all matters.
12. We further note the proposal for a merits test to include 'whether instituting Court Proceedings is the best way to resolve the issues.' WLS NSW submits that given the recent trend for legislation to be reframed to incorporate an alternative dispute resolution requirement, this is unnecessary to include as part of a merits test. It is also unclear, if such a test was included, who would decide the 'best way' to resolve a matter. We also refer to the National Association of Community Legal Centre's (NACLC's) submission in response to the Consolidation of Commonwealth Anti-Discrimination Law Discussion Paper in which NACLC recommended that a complainant should be able to make an application directly to a court, rather than first going through investigation and conciliation by the AHRC.<sup>5</sup> This is particularly important in situations of significant

<sup>3</sup> Based on an extrapolation of 1997-98 data. See: *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Commonwealth of Australia, Canberra, 2009 at 41 accessed on 23 May 2012 at: <http://www.ag.gov.au/Documents/A%20Strategic%20Framework%20for%20Access%20to%20Justice%20in%20the%20Federal%20Civil%20Justice%20System%20-%20Report%20of%20the%20Access%20to%20Justice%20Taskforce.pdf>

<sup>4</sup> Commonwealth Public Interest and Test Cases Scheme Guideline and Conditions, October 2011 at para 5.19



power imbalance and/or where sexual harassment and violence may be involved, in addition to the reasons outlined in section 46PH of the *Australian Human Rights Commission Act 1986 (Cth)*. We recommend that 'whether instituting Court Proceedings is the best way to resolve the issues' is not part of a merits test for the new scheme.

### Disbursements

13. If the new financial assistance scheme is largely limited to disbursements, it is important that these include filing fees and other court fees. Such fees can act as a deterrent for a potential applicant/complainant, despite the meritorious nature of their matter. WLS NSW has previously raised filing fees as a barrier to access to justice in the National Association of Community Legal Centres' (NACLC') submission to the Review of Federal Court Fees.<sup>6</sup> We recommend filing fees and other court fees should be included as reasonable disbursements.
14. Based on our experience of working with culturally and linguistically diverse (CALD) women, lack of access to culturally appropriate services and interpreters is a barrier to accessing justice. We therefore recommend that interpreters and translation services be considered another 'reasonable disbursement'.
15. Given the very limited circumstances in which legal representation costs will be covered by the new financial assistance scheme, WLS NSW submits that counsel fees must be included in the new scheme as a disbursement. Counsel can provide important advice, including about prospects of success and framing arguments or grounds of appeal as well as appearing in matters, all of which promote access to justice. While a community legal centre or pro bono law firm has the capacity to provide legal representation at no charge, assistance from counsel is also often required. We recommend that counsel fees be included as a 'reasonable disbursement.'
16. Given the cost, which can act as a barrier to accessing justice, we recommend that additional 'reasonable disbursements' should also include, but not be limited to expert reports and witness attendance fees, transcriptions fees and appeal book preparation costs.
17. If you would like to discuss any aspect of this submission, please contact Carolyn Jones, Senior Solicitor or Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours sincerely,

**Women's Legal Services NSW**



Janet Loughman  
Principal Solicitor

---

<sup>5</sup> NACLC, *Submission in response to the Consolidation of Commonwealth Anti-Discrimination Law Discussion Paper*, 1 February 2012 at 55 accessed on 23 May 2012 at: [http://www.womenslegalnsw.asn.au/downloads/law-reform-2012/NACLC\\_AGD\\_DiscriminationConsolidation.pdf](http://www.womenslegalnsw.asn.au/downloads/law-reform-2012/NACLC_AGD_DiscriminationConsolidation.pdf)

<sup>6</sup> NACLC submission to the Australian Attorney-General's Department on Federal Court Fees, 8 July 2011 accessed on 23 May 2012 at: [http://www.womenslegalnsw.asn.au/downloads/law-reform-2011/NACLC\\_AGD\\_FederalCourtFees.pdf](http://www.womenslegalnsw.asn.au/downloads/law-reform-2011/NACLC_AGD_FederalCourtFees.pdf)