



Australian Government

Attorney-General's Department

Social Inclusion Division

**GUIDELINES FOR THE PROVISION OF ASSISTANCE BY
THE COMMONWEALTH FOR LEGAL AND RELATED
EXPENSES UNDER THE COMMONWEALTH PUBLIC
INTEREST AND TEST CASES SCHEME**

(August 1996)

COMMONWEALTH PUBLIC INTEREST AND TEST CASES SCHEME

GUIDELINES

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COMMONWEALTH PUBLIC INTEREST AND TEST CASES SCHEME

GUIDELINES

1. COMMENCEMENT

1.1 These guidelines come into effect on 1 August 1996. They replace the guidelines for the Cases of National Importance Scheme which ceased to have effect as from that date.

1.2 As a result of the introduction of the Commonwealth Public Interest and Test Cases Scheme, the Overseas (Special Circumstances) Scheme, which ceased to have effect as a separate scheme in January 1996 following the introduction of the Cases of National Importance Scheme is restored in operation. Separate guidelines for the Special Circumstances Scheme (which incorporates the Overseas (Special Circumstances) Scheme) are available on request.

1.3 The Commonwealth Public Interest and Test Cases Scheme does not apply to work performed and disbursements incurred prior to commencement of the Scheme on 1 August 1996.

2. ADMINISTRATION OF SCHEME

The decision maker

2.1 Delegates in the Legal Assistance Branch of the Attorney-General's Department have been appointed by the Attorney-General to deal with applications for assistance under the Scheme.

3. HOW TO APPLY

Information required

3.1 An application form must be completed by the solicitor handling the matter and/or the applicant personally. A copy of this form is attached to these guidelines. Solicitors who access the scheme regularly are encouraged to make multiple copies of the form, for their own use.

3.2 The application must be accompanied by the following:

- verification of means as required;
- copies of relevant opinion, and/or reports where required;
- where appropriate, copies of any court documents filed.

Where the application relates to an appeal, or a proceeding in the nature of an appeal, the following should also be provided:

- copy of the decision appealed against;
- copy of counsel's advice.

3.3 All sections of the application form must be completed. Where a section is not relevant to a particular application, it should be marked "n/a". It is important that an applicant completes all the questions on the form otherwise a decision on an application will be delayed or a decision will be made on the information that is provided which may lead to an application being refused.

Authority to seek information

3.4 Applicants seeking assistance, or legally assisted persons seeking an extension of assistance, are required to give permission to the Attorney-General's Department to seek information regarding their application from government departments or agencies, including legal aid commissions.

Confidentiality of information provided

3.5 Subject to paragraph 3.4, all information provided by an applicant for assistance, or on an applicant's behalf, will be treated in confidence and will not be disclosed to any other person or agency other than in accordance with an express authority by the applicant or, where required, by law.

Lodgment of applications for assistance

3.6 All applications for assistance must be in the prescribed form and should be lodged with:

Assistant Secretary
Legal Assistance Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600
Fax: (02) 6141 4926

Telephone inquiries

3.7 Telephone inquiries should be directed to (02) 6141 4770.

4. SCOPE OF SCHEME

Who is eligible for assistance

4.1 Individuals, partnerships, companies, small business and other organisations may be eligible for assistance. Common purpose groups such as consumer groups or environmental groups may also be eligible for assistance. Assistance is available to plaintiffs and respondents to proceedings.

Types of matters for which assistance is available

4.2 Assistance is available, subject to certain eligibility criteria, in cases involving questions arising under a law of the Commonwealth which, in the opinion of the Attorney-General, are of public importance either because they raise matters in the public interest or the questions are in the nature of a test case.

4.3 'Public interest' cases are those involving questions arising under a law of the Commonwealth the resolution of which by the courts is, in the opinion of the Attorney-General, of public importance. 'Test cases' are those brought for the purpose of resolving an important question arising under a law of the Commonwealth that, in the opinion of the Attorney-General, affects the rights of a section of the public which is, or a group of persons who are, for the most part, socially or economically disadvantaged.

Type of assistance available

4.4 The Scheme covers some or all of the following:

- professional legal costs;
- counsel' s fees;
- court fees;
- medico-legal reports from relevant specialists;
- reasonable traveling expenses;
- reports and records required for the preparation of the case;
- transcripts;
- interpreters' fee; and
- other disbursements.

Types of matters for which assistance is not available

4.5 Cases involving the interpretation of State law or common law principles are not covered.

4.6 If the question has been determined previously and the law is settled assistance is not available as such a case is not considered a 'test case'.

4.7 The Scheme is subject to a merit test (paragraphs 5.18-5.21) and does not cover cases which are vexatious and have no prospect of success. Consistent with the Government's general policy of encouraging dispute resolution and case management guidelines parties are encouraged to avail themselves of alternative methods of dispute resolution, mediation, conferencing and arbitration prior to having the matter determined in a court.

4.8 Applications which will duplicate argument where the Commonwealth or a State or Territory Government is a party and is to present public policy arguments on behalf of the Australian community will not be funded, unless there are other cogent reasons, such as interests peculiar to the applicant, for approving assistance under the Scheme.

4.9 Cases where there is likely to be a benefit to one person only and where no legal questions are likely to be resolved will not be funded. Cases where the law has already been amended so that the provisions being tested are no longer current and few people were affected by the previous law will also not be funded.

4.10 If a similar case that covers the same questions of law or fact is currently before a court and a decision that will address the issues in that case is likely, then another case involving the same issues will not be funded.

4.11 The fact that a case is funded at first instance does not necessarily mean that any appeal from the decision, or proceeding in the nature of an appeal, will automatically be funded as different considerations may then be relevant.

What proceedings are included

4.12 All civil proceedings in Australian courts and tribunals are covered provided they deal with matters of public importance.

Availability of funds

4.13 As there are only limited funds available in any given year it is important that those cases that will assist the community to the greatest extent are funded. This means that not all cases can be funded.

4.14 Accordingly, in assessing an application for assistance regard is had to the availability of funds, in any given year, under the Scheme. Consideration is also given to the number and relative merits of other applications for assistance, whether made or reasonably expected to be made.

5. RELEVANT CONSIDERATIONS

5.1 In determining whether assistance should be authorised regard is had to a number of factors. These will include:

- hardship;
- prospects of success;
- the nature and extent of the benefit or detriment that may accrue to the applicant;
- the benefit to the public or any section of the public;
- the availability of funds; and
- the availability of legal aid from a legal aid commission.

5.2 The decision to grant or refuse assistance is a global assessment giving appropriate weight to the various considerations according to the circumstances of the case. Discretion can be exercised in these circumstances to ensure that the following factors, amongst others, are taken into account:

- the likely cost of proceedings;
- the overall financial position of the applicant and of associated persons;
- whether the applicant would suffer hardship if financial assistance was refused; and
- the public interest of the proceedings.

Hardship

5.3 Hardship is interpreted to mean financial hardship and consideration is given to all relevant matters such as income, expenditure, assets and liabilities of the applicant and any financially associated person. The estimated cost of the proceedings is also relevant. The broad test of hardship is whether the applicant has the means to meet the cost of the proceedings without incurring serious financial difficulty. In making this judgment, reference is made to the conditions of eligibility for a grant of legal aid from the relevant legal aid commission.

5.4 Regard is had to the ability of the applicant, and of any financially associated person, to meet the ordinary professional cost of the legal services which are the subject of the application.

5.5 For the purpose of considering eligibility for assistance, the applicant is regarded as the person on whose behalf assistance is sought. A financially associated person may include a relative, partner, spouse, trust, corporation or group. A financially associated person includes any person:

- from whom the applicant usually receives financial support;
- to whom the applicant usually provides financial support; and

- who could reasonably be expected to financially assist the applicant in obtaining legal services.

5.6 There is a discretion to disregard the income and assets of a financially associated person in certain circumstances, for example, where it is considered that the income and/or assets are not available for the use or benefit of the applicant or that the applicant does not have access to that income or those assets, or where the financially associated person has a contrary interest in the matter for which assistance is sought.

5.7 Where the applicant is a corporation or a member of an unincorporated association, the hardship guidelines are applied to the income and assets of the corporation or of the association and also the income and assets of any person(s) whose interest it is considered will be directly and beneficially affected if assistance is granted to the applicant.

5.8 The applicant's eligibility for assistance is determined by:

- applicant's weekly disposable income;
- applicant's net liquid assets; and
- assessment of applicant's ability to pay legal costs.

5.9 Income from all sources is included in the assessment, including, but not limited to, the following:

- pensions/benefits;
- wages/salaries;
- business income;
- workers compensation benefits;
- superannuation payments;
- maintenance payments;
- board or rent received; or
- interest earned and dividends paid on investments.

5.10 Liquid assets are readily realisable assets. Unless the value is unusually high, liquid assets do not include:

- clothes;
- tools of trade;
- household furniture;
- equity in applicant's principal home; or
- motor vehicle which is reasonably necessary for domestic or employment purposes.

5.11 A further factor is an assessment of the applicant's ability to pay legal costs and assistance may be refused to applicants who prima facie do not have a high weekly disposable income or net liquid assets. This discretion may be exercised in the following situations:

- where the applicant should reasonably be able to afford the cost of legal proceedings having regard to his/her general assets, or assets of a person financially associated with the applicant;
- where the applicant has substantial fixed assets or an interest in business assets that could be realisable, or against which the applicant could secure a loan to cover the cost of legal proceedings; or
- where an applicant's lifestyle activities or interests are such that, in the opinion of the Attorney-General or a delegate, the applicant should have sufficient means to be able to afford the cost of legal proceedings. 'Lifestyle' in this context means a style or standard of living with features which are significantly above general community standards.

Initial contributions

5.12 If an applicant is granted assistance because he/she cannot meet the full cost of legal proceedings but has a reasonably high income or savings or some assets he/she may be asked to make a contribution towards the costs of a matter. If the applicant is a club or association or common interest group each member may be asked to contribute towards the cost of the proceedings. An applicant will be told at the time a decision is made of the amount he/she will have to pay (see also paragraphs 6.16-6.18 dealing with final contributions).

Verification of means

5.13 Applicants for assistance are required to verify their means (both income and assets) as disclosed on the application for assistance. The means of financially associated persons must also be verified, except where discretion has been exercised to disregard their means.

5.14 The following documents (or copies) must be forwarded to verify the applicant's income as disclosed on the application form:

- for salaried applicants – a recent pay slip. In the event of the applicant not having a pay slip, then some other evidence of income or employment must be provided, such as a letter from an employer or the most recent group certificate;
- for pensioners – a pension or other benefit card;
- for self-employed applicants – a copy of the most recent full tax return, together, where appropriate, with current verified financial particulars.

5.15 Verification of liquid assets must be provided in the form of recent statements (i.e. within the past six months) showing two months' operation on all accounts with financial institutions maintained by the applicant, as disclosed on the application form.

5.16 Verification of non-liquid assets may be requested when the officer determining the application considers it appropriate, for example, where there appears to be some inconsistency in the application.

5.17 There is discretion to waive the requirement for verification of means. Some circumstances where this discretion may be exercised by the Attorney-General or a delegate are:

- where it is apparent from the material contained in the application that the application will be refused; and
- where the application is urgent.

Prospects of success

5.18 Consideration is also given to whether it is reasonable in all the circumstances to grant assistance. Circumstances to be taken into account include, but are not limited to whether the applicant has reasonable prospects of success in the proceedings.

5.19 The weight to be given to good prospects of success will depend to some extent on the importance of the case and the questions of law that will be resolved.

5.20 As these cases are ‘public interest’ or ‘test cases’, it is often difficult to determine what the prospects are likely to be. However it is necessary that a person have a reasonable case to argue; the case cannot be fanciful or raise only speculative arguments. Counsel’s opinion as to the prospects of success of the proposed proceedings may be required.

5.21 In order for the application to be assessed as to its probability of success, it is essential that the application include the following information:

- details of the matter;
- the action the applicant proposes to take; and
- any information that will substantiate the claim, such as medical reports.

Benefit/detriment to the applicant

5.22 In assessing an application for assistance regard is had to the nature and extent of any benefit that may accrue to the applicant by providing assistance or of any detriment that the applicant may suffer if assistance is refused.

Benefit to the public

5.23 In deciding whether to authorise assistance regard is had to the public importance of the proceedings. In determining public importance consideration is given to whether the outcome of the proceedings will be of benefit to the public in that it will resolve an important question of law that has been an area of uncertainty affecting a large section of the public.

5.24 Many test cases can be expensive to run because they have complex facts or need complex legal arguments to be developed. Because of this, before funding a particular case, an assessment will be made as to the benefit that the community will gain by the case being decided in court.

5.25 In deciding whether a particular case raises important issues an opinion from counsel may be sought, and the views of a relevant government organisation with responsibility for administering the relevant legislation or program may be taken into account; for example in environmental cases, the national interest is assessed by having regard to sources such as:

- the Australian Heritage Commission;
- the National Trust;
- the Report of the Committee of Inquiry into the National Estate;
- reports of Parliamentary Committees dealing with environmental and conservation matters;
- reports of commissions of inquiry made pursuant to the Environmental Protection (Impact of Proposals) Act 1974; or
- the Commonwealth Department concerned with the conservation management and protection of the environment.

Availability of funds

5.26 In assessing an application for assistance regard is had to the availability of funds, in any given year, under the Scheme for the provision of assistance. Consideration is also given to the number and relative merits of other applications for assistance, whether made or reasonably expected to be made.

Availability of legal aid from legal aid commissions

5.27 Assistance is not available to applicants who have access to other funds or legal aid in order to pursue their claim.

5.28 In the first instance, and where an applicant may be eligible for legal aid from a state or territory legal aid commission, application should be made to that commission. Where legal aid has not been approved the certificate of legal aid refusal should be provided.

6. CONDITIONS OF GRANTS OF ASSISTANCE

6.1 Conditions upon which a grant of assistance may be made have been determined. When the applicant's legal representative or the applicant are advised of the offer of a grant of assistance, a document containing the conditions of the grant will be forwarded. This must be signed by the solicitor and the applicant and returned to the Attorney-General's Department. No monies will be disbursed until this document is duly signed and received by the Attorney-General's Department. Where appropriate, and with agreement, the Department and/or the legal representative may delete, alter or add to the conditions of a grant.

Retrospective grants and dating of grants

6.2 Legal or financial assistance cannot be authorised retrospectively. Generally grants of assistance date from the date of receipt of the fully completed application for assistance.

6.3 Retrospective grants of assistance are defined as grants of assistance relating to applications received:

- (i) after the proceedings are concluded;
- (ii) after legal services have been provided and assistance is then requested for those services.

6.4 Generally all legal and associated costs will be covered. If a legal representative is not engaged only cash outlays will be paid. An applicant will not be provided with a money equivalent of lost earning or time spent in preparing a case.

6.5 Assistance does not extend to costs incurred in completing an application for assistance or interviews and consultations between an applicant and his/her legal representatives for the purpose of making an application for assistance or concerning the grant or refusal of assistance. Neither does assistance extend to attendances on, and correspondence with, the Attorney-General's Department in relation to the making of an application or the terms of assistance. Assistance will not extend to preparation for and work done in connection with any itemised bill of costs.

Assistance in stages

6.6 Usually funding will be provided in stages. At the end of each stage the Minister or a delegate will make a decision as to whether it is reasonable to continue funding. It should not be assumed that funding will continue beyond the stage for which approval has been given.

6.7 All applications for extensions must include an assessment of prospects of success, public interest, a statement of the costs to date and an assessment of the amount of costs required to conclude the matter.

Limits on grants of assistance

6.8 Applicants will be advised of the upper limit that may be spent at any stage. It is essential that this amount not be exceeded. If it is considered that there will be a need for an additional amount to complete the work needed at any stage then the Attorney-General's Department must be contacted to seek an extension to the original amount.

6.9 Any work that is done above the original amount before any additional amount is approved will **not** be paid.

Solicitors' costs

6.10 The policy in respect of solicitors' costs is as follows:

- (a) solicitors' professional costs may be claimed in accordance with the relevant scale in the jurisdiction where proceedings are instituted. Where there is no applicable scale, costs will be authorised, where relevant, in accordance with the scale applied by the local legal aid commission, or if there is no relevant scale, by agreement. Generally, solicitors' fees are paid at a maximum of 80% of the applicable scale;
- (b) no uplift for care skill and responsibility will be allowed unless there are exceptional circumstances and the prior approval of the Department has been obtained;
- (c) solicitors' professional costs incurred subsequent to the grant of legal aid will ordinarily be paid at the conclusion of the proceedings;
- (d) where an applicant changes solicitors in the course of proceedings, the newly instructed solicitors should ensure that costs previously incurred are claimed at the conclusion of the matter. Assistance will be paid to the first solicitor at the conclusion of the matter as necessary.

6.11 The policy in relation to solicitors' accounts is as follows:

- (a) solicitors should submit a resume of their work sufficient to enable a determination as to the reasonableness of their costs;
- (b) where the information supplied is insufficient to enable a determination to be made as to the reasonableness of their costs, the Attorney-General's Department may request the solicitor to supply further information and/or an itemised account;
- (c) where the Attorney-General's Department and the solicitor are unable to reach agreement in relation to the assessment of costs, the Department may request the solicitor to get the bill of costs taxed;
- (d) generally a solicitor is expected not to render his/her account until the conclusion of the matter. Interim payments, however, may be authorised where a solicitor has incurred disbursements exceeding \$500 in total or where proceedings have reached a stage where there will be a substantial delay before further work needs to be undertaken on behalf of an assisted person;
- (e) the Attorney-General's Department reserves the right to call for a solicitor's file in an assisted matter in relation to any account rendered for payment.

Counsel's fees

6.12 The policy in respect of counsel's fees is as follows:

- (a) if a matter is complex and counsel is needed full details should be provided. Counsel will only be funded in matters where the case is judged by the Attorney-General's Department to be complex;

- (b) counsel's fees will be allowed in accordance with the relevant scale applied by the local legal aid commission in the jurisdiction where the proceedings are instituted, or where there is no relevant scale by agreement;
- (c) solicitors should forward counsel's memoranda of fees to the Attorney-General's Department together with the bill of costs.

Disbursements

6.13 The Scheme's policy is that in respect of disbursements the Attorney-General's Department:

- (a) requires the solicitor to furnish a copy of an account for any one disbursement which exceeds \$100;
- (b) will not advance payments for anticipated disbursements unless there are special circumstances requiring payment in advance. In such cases comprehensive details of the disbursements should be supplied;
- (c) will require approval to be obtained prior to incurring any one disbursement for an expert report which exceeds \$500;
- (d) disallows, except in exceptional circumstances, the fees claimed by a professional when a legally assisted person fails to attend an appointment.

Solicitors prohibited from demanding payments from assisted persons

6.14 A private legal practitioner is prohibited from demanding or receiving payment, other than an initial or final contribution determined in accordance with these guidelines, from a legally assisted person or any other person on his behalf in respect of work under a grant of assistance except with the approval of the Attorney-General's Department.

Recovery of costs

6.15 Applicants are expected to apply for a costs order from the other party or parties if they win the action. Any costs recovered from another party must be repaid to the Commonwealth to the extent that the Commonwealth has contributed towards the costs of the action. The Commonwealth has the first right to be paid from any recovered costs.

Final contributions

6.16 Where the applicant obtains an award of the court for costs in his/her favour all monies advanced under a grant of assistance must be reimbursed within 60 days of the date of receipt of judgment/settlement monies or taxed/agreed costs, whichever is the relevant date.

6.17 Where the applicant negotiates a settlement of his/her claim, without recourse to the court, all monies advanced under a grant of assistance must be reimbursed within 60 days of receipt of settlement monies or taxed/agreed costs, whichever is the relevant date.

6.18 In cases of a favourable costs award, failure to reimburse the Commonwealth fully for monies paid out under a grant of assistance will result in recovery action being taken.

Indemnity for costs

6.19 A grant of assistance does not extend to an indemnity for costs that may be awarded against a legally assisted person.

Reporting

6.20 An assisted person or his/her solicitor shall provide any information that may reasonably be requested from time to time in relation to the subject matter of their claim.

6.21 On completion of a matter the legal representative shall forward a report which shall provide the following information:

- the result of the action, including details of orders made;
- particulars of any orders for costs;
- an itemised bill of costs.

6.22 In those cases where a matter is settled on the basis of undertakings as to confidentiality, such terms of settlement will not be relied upon as a basis for the non-disclosure of information to the Attorney-General's Department in relation to the subject matter of the grant of assistance.

Withdrawal, discontinuance of proceedings

6.23 The Attorney-General's Department must be advised of the reasons for the withdrawal and/or discontinuance within seven days of the notice being filed.

6.24 Where the withdrawal and/or discontinuance is due to:

- (a) failure of a legal representative to comply with the requirements of the Court rules;
- (b) the disclosure of false information in the application;
- (c) failure of the applicant and/or his/her legal representatives to pursue the claim;

the Attorney-General's Department may terminate the grant of assistance and require reimbursement of any monies advanced.

Misrepresentation

6.25 All information provided in support of the application must be true and correct at the time it is provided. Where it is shown that the applicant and/or his/her legal representative misrepresented the application in any particular, the Minister or delegate reserves the right to terminate the grant and require immediate reimbursement of monies advanced.

6.26 Legally assisted persons and/or their legal representatives are required to give an undertaking to notify the Attorney-General's Department of any changes to their financial circumstances which may have a bearing on their continuing eligibility for financial assistance.

7. PROCEDURAL FAIRNESS

Review of decisions

7.1 Where an application for financial assistance is refused the reasons for refusal must be provided. The applicant will also be advised of the mechanism to seek a review of the decision and any request for review must be lodged within 28 days after reasons for refusal have been given to the applicant. The review shall be carried out by a nominated officer other than the original decision maker.

7.2 Similarly, where an application for assistance is approved subject to conditions and the applicant is dissatisfied with any part of the decision, the applicant may seek a review of the decision by lodging a request in writing. Applications for review must be made within 28 days after reasons for imposing the conditions have been given to the applicant. The review shall be carried out by a nominated officer other than the original decision maker.

Ombudsman & complaints

7.3 Where a person is dissatisfied with any aspect of the administration of his/her application, a complaint may be made to the Commonwealth Ombudsman.

Freedom of Information Act 1982

7.4 Any person has the right to apply for access to documents under the Freedom of Information (FOI) Act 1982. Section 15 of the FOI Act sets out what is required for an application under the Act. The application has to:

- be in writing;
- refer specifically to the FOI Act;
- be accompanied by payment of the fee required;
- provide sufficient information to permit identification of the document;
- be lodged at an office of the agency; and
- request the particular form of access.

Privacy Act 1989

7.5 The Privacy Act 1989 requires Commonwealth Government departments and agencies to comply with certain Information Privacy Principles (IPP). Where a person believes that his/her privacy has been infringed because of a breach of an IPP, that person may complain to the Privacy Commissioner.