

REVIEW OF THE CIVIL LAW LEGAL AID SCHEME

CONSULTATION REGARDING RECOMMENDATIONS



Overview

Legal Aid Queensland has reviewed the Civil Law Legal Aid Scheme (CLLAS).

This paper lists the review recommendations to be implemented by Legal Aid Queensland, proposes some new actions to address specific issues facing the scheme, and seeks comment about future direction.

An outline of the recommendations and issues for further consideration are provided below with supporting information. Legal Aid Queensland can provide further detail on request.

This paper is being distributed to the Public Trust Office, Queensland Public Interest Law Clearing House (QPILCH), Queensland Law Society, the Bar Association, the Department of Justice and Attorney-General, Community Legal Centres and private practitioners who do Legal Aid work.

The consultation is for a twelve week period. Submissions close on 25 February 2006, and should be sent by e-mail to Murray Brown (mbrown@legalaid.qld.gov.au). All telephone enquiries should be directed to Murray Brown on (07) 3238 3486.

A summary of responses will be made available to all contributors, and it will be assumed that responses can be made public unless confidentiality is specifically requested.

Background

The Civil Law legal Aid Scheme has been operating successfully for more than eleven years.

Recent tort reforms have significantly changed the personal injuries compensation environment from that which existed when the scheme was created. This has resulted in a reduction in the number of applications processed under the scheme.

It is therefore timely that there should be a review of the scheme's performance and operations, and its place in the wider civil law market place, to ensure that it continues to provide a relevant and appropriate service to the community.

Scope of the Review

The review covered the following aspects of the scheme:

1. The current processes of the Civil Law Legal Aid Scheme, including operational performance, intake processes for CLLAS applications, approval processes for granting aid on CLLAS matters, the scheme's funding model and cost recovery process, the file review process, and the panel of approved firms.
2. The impact of the changing legislative environment.
3. The future direction of CLLAS.

Background to the Scheme

Legal Aid Queensland ceased funding civil litigation matters where there is a power in a court or tribunal to award costs from July 1992. In May 1993 the Civil Law Legal Aid Scheme was introduced.

The scheme was a funding initiative of the Minister for Justice and Attorney-General intended to bridge the gap caused as a result of the changes in legal aid policy. The Chief Executive Officer of Legal Aid Queensland has been authorised by the Minister to approve legal aid in civil proceedings pursuant to Section 19 of the Public Trustee Regulations.

In order to give effect to the scheme, Guidelines were developed and agreed upon by the Public Trustee of Queensland, Legal Aid Queensland, the Queensland Law Society and the Bar Association.

The scheme considers assistance for any civil litigation matter that is to be dealt with in the state jurisdiction, where there is no grant of aid available from Legal Aid Queensland and where costs can be awarded. The original intention of the scheme was to give priority to funding cases involving children, personal injury claims and cases where, if not litigated, the applicant would lose their home or livelihood. In recent years the scheme has expanded its guidelines to include aid for public interest and test cases.

The scheme operates on an outlays only basis except for a one off payment to solicitors for professional costs just prior to trial. If the action is successful the legally aided person is required to refund, through their solicitors, any funding provided by the scheme. Solicitors are also required to refund any fees received from the scheme associated with their professional costs.

Solicitors are entitled to claim professional costs on a solicitor/client basis from the assisted person if a claim settles successfully. Counsel involved in matters funded by the scheme are briefed on a speculative basis.

Summary of Review Recommendations to be Implemented by Legal Aid Queensland

1. The scheme frequently receives referrals from Legal Aid Queensland where applicants have applied for aid for a civil law problem, but the matter is not one that Legal Aid Queensland will fund. These applications are referred to CLLAS if it is apparent that the claim is one that would fit within the scheme's guidelines. Currently there is no documented process to follow when transferring an application to CLLAS. A referral protocol will be developed.
2. An electronic copy of the Legal Aid application form was developed in response to firms' requests, but feedback indicates it is not user-friendly. Legal Aid Queensland will investigate developing a more user-friendly and efficient electronic form.
3. All applicants are required to sign a Client's Acknowledgement when aid is first approved for their claim. The Acknowledgement stipulates that if a matter settles

successfully the applicant must repay the scheme any funding provided by the scheme before the representing firm disburses the funds to the applicant. Although firms currently sign the Acknowledgement, the form is worded in such a manner that it can be interpreted that it is only the client who is agreeing to the terms of the Acknowledgement. The Client's Acknowledgement will be updated to include an acknowledgement from solicitors confirming that they agree to represent the client in accordance with the scheme's guidelines.

4. The Scheme has specific approval and refusal clauses that are utilised. These clauses enable all information that is specific to CLLAS to be readily identifiable and accessible when required for the accurate management of the scheme. The wording for the refusal clause that is utilised is somewhat confusing. The refusal clause utilised by CLLAS for matters suitable for referral to the scheme will be updated.
5. Currently the scheme does not have a formal guide for a cost benefit test. A cost benefit matrix will be developed and utilised by the scheme to ensure that there is uniformity of decision making and that the benefit applicants receive is not absorbed when refunding the scheme and paying solicitors' fees.
6. Legal Aid Queensland will carry out promotional activities to raise awareness of the scheme with referral agencies, the legal profession and the community.

Issues and Proposed Solutions – for Comment

The scheme's guidelines allow aid to be considered for any civil litigation matter that is to be dealt with in the state jurisdiction where there is no grant of aid available from Legal Aid Queensland and where costs can be awarded.

In recent times, the scheme has been providing assistance for personal injuries claims where costs are no longer awarded due to legislative changes. Firms are willing to continue to speculate their professional fees for these smaller claims, however they are reluctant to fund outlays.

If the scheme were to cease assisting with these claims, people with limited means would be less likely to gain compensation for their injuries.

Issue 1 for Comment

Should CLLAS guidelines be updated to allow funding for personal injury claims where estimated quantum falls below the threshold where costs can be awarded under related legislation?

When considering applications, the Advisory Committee takes into account the legal merit of the claim, the nature and extent of potential benefit to the applicant if aid is approved, and any detriment to the applicant, if aid is not approved. In formulating its recommendation, the Advisory Committee has regard to the financial viability of the scheme and may give priority to:

- (a) cases involving children;
- (b) personal injury cases;

(c) cases where, if not litigated, the applicant may lose their home or livelihood.

The scheme's guidelines allow aid to be provided for public interest matters, test case matters and business or commercial disputes.

In recent times, the scheme has considered assisting with any civil action where a firm is willing to act on a speculative basis, the applicant cannot obtain assistance from any other source and there are reasonable prospects of success for the action. This degree of flexibility allows the scheme to provide relevant and appropriate assistance where it would not otherwise be available.

Issue 2 for Comment

Should CLLAS guidelines be amended to allow aid to be considered for any civil action where a firm is willing to act on a speculative basis, the applicant cannot obtain assistance from any other source, and there are reasonable prospects of success for the action?

The basic principle that priority may be given to actions involving children, personal injuries cases, and cases where the applicant may lose their home or livelihood would remain.

The scheme's Advisory Committee can approve aid either for specified outlays or for stages of preparation, eg. on a medical negligence claim, the committee may approve aid for a medico-legal report to investigate liability (negligence and/or breach of duty). In this case no further aid will be provided until that report is obtained and the committee has reviewed the report. For claims where liability has been admitted and quantum is significant, the Advisory Committee may approve aid for reasonable outlays required to prepare the matter for settlement (a staged grant of aid).

Currently the scheme's guidelines only allow for an opinion from Counsel after close of pleadings and a matter is ready for trial. In a number of circumstances it is beneficial for a firm, and the scheme, to obtain an opinion from Counsel on prospects of success and/or liability at an earlier stage in proceedings. It would be desirable if the scheme's guidelines could allow aid to be considered for an opinion from Counsel at any time in settlement proceedings where it is deemed appropriate for an opinion to be obtained.

Issue 3 for Comment

Should CLLAS guidelines be amended to allow aid to be considered for an opinion from Counsel at any time in settlement proceedings where it is deemed appropriate?

Queensland Public Interest Law Clearing House (QPILCH) draws on the resources of the legal profession to provide pro bono legal services, advice and assistance in targeted areas of law and assessment, research and referral services.

CLLAS guidelines allow funding for public interest and test case matters, but the scheme does not fund a large number of these cases.

Currently CLLAS guidelines require firms to speculate their fees and for the firm to be on the scheme's list of approved firms. It is proposed that CLLAS expand its guidelines to allow consideration for reasonable outlays associated with public interest and test case matters where a member firm of QPILCH has agreed to act on a pro bono basis.

Issue 4 for Comment

Should CLLAS expand its guidelines to allow consideration for reasonable outlays associated with public interest and test case matters where a member firm of QPILCH has agreed to act on a pro bono basis?

Changing Environment and Future Direction

In response to increasing community concerns, the Queensland Government has introduced several legislative changes that have affected the way that compensation claims are dealt with prior to them entering the court system.

Recent tort law reforms have the combined effect of restricting the circumstances where costs can be awarded in personal injury claims. The flow-on affect is that solicitors are no longer as willing to speculate their fees on smaller personal injury claims where costs are either not awarded or are capped. As the scheme relies upon solicitors taking matters on a speculative basis, a negative impact on the scheme is inevitable.

It is now timely that Legal Aid Queensland and the Public Trust Office review where the scheme sits within the current environment, and develop a plan for future direction and development.

Issue 5 for Comment

Given the current civil law market place and legislative environment, where should the Civil Law Legal Aid Scheme position itself and what should its key priorities be?

ISSUES FOR COMMENT – CIVIL LAW LEGAL AID SCHEME

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