

Private Practitioners And Legal Aid

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5.1 Introduction

As well as providing the services described in Chapter 1, VLA allocates matters qualifying for assistance to private practitioners. This chapter describes how this process works and covers areas such as the terms of assignment, and stage of matter limits.

5.2 Allocation of Work Guidelines

The Act (s.8) requires VLA to determine guidelines in relation to the allocation of work between officers of VLA and private practitioners having regard to:

- (a) the need for legal services to be readily available and easily accessible to disadvantaged people;
- (b) the desirability of an assisted person being entitled to select a practitioner of his or her choice;
- (c) the need for appropriate use to be made of the services capable of being provided by officers of VLA;
- (d) the importance of maintaining the independence of the private legal profession;
- (e) the need for the Fund to be used effectively and efficiently.

Irrespective of the class of matter, where legal services are to be performed by a private practitioner, VLA may call for tenders from private practitioners to conduct the case. VLA would call for tenders for a case only if it involved high costs, a potentially very large award of damages or was otherwise extraordinary, perhaps involving the public interest.

5.2.1 Indictable Criminal Matters

VLA's guidelines for the allocation of indictable criminal matters have been determined in accordance with ss.8 and 29A of the Act.

S29A enables VLA to establish specialised panels (**panels**) for any class of matter. To this end, VLA has established an exclusive panel in the area of indictable crime. Membership of the panel is by firm, not individual and the panel operates in both the Melbourne metropolitan area and rural and regional Victoria.

The panel recognises and supports the:

- right of applicants to select their own representation;
- preservation and development of a strong in-house criminal law practise; and
- maintenance of an independent private profession.

In making an allocation decision, VLA must have regard to whether an application is lodged by:

- VLA's in-house practice (**in-house**);
- a practitioner employed by/partner of a firm that is a member of VLA's indictable crime panel under s.29A of the Act (**panel firm**); or
- a practitioner employed by/partner of a firm that is not a member of VLA's indictable crime panel (**non panel firm**) but is a member of VLA's general referral panel.

5.2.1A Applications lodged by in-house or panel firms

Where a matter is not projected to significantly exceed the fee ceiling and subject to:

- there being no conflict of interest; and
- consideration, where relevant, of the extent of funds paid by the assisted person on a private basis for his or her committal hearing

where an application is lodged by either in-house or a panel firm, that practitioner lodging first in time will automatically be allocated carriage of the matter.

(a) Conflict

Where in-house or a panel firm lodges an application and subsequently discovers that conflict prevents them from acting in the matter, VLA will re-allocate the matter pursuant to these guidelines.

(b) Committal funding

VLA does not consider that effective use is made of the Fund if:

- an accused person funds his or her own committal hearing significantly in excess of the amount that VLA could afford to provide; and
- having exhausted his or her own funds, subsequently seeks a grant of aid for his or her trial or plea through the same firm that had carriage of the committal.

Where a panel firm lodges an application for aid for a trial or plea and, in the opinion of VLA, the panel firm has unreasonably expended the applicants' own

funds at committal stage, VLA will re-allocate the matter pursuant to these guidelines. VLA may also take appropriate action against the panel firm, which may include removing them from the indictable crime panel.

(c) Any other reason preventing lodging practitioner from acting

Where an in-house practitioner or a panel firm lodges an application and, for any other reason, they are unable to act, VLA will re-allocate the matter pursuant to these guidelines.

Where, pursuant to paragraphs (a)-(c) above, VLA re-allocates a matter, preference will be given to VLA's in-house practice. If VLA's in-house practice is unable to act, VLA will allocate the matter in the following order of preference:

- a panel firm
- a non-panel firm

5.2.1B Applications lodged by non-panel firms or applicants directly

- (a) In the absence of compelling reasons, where an application is lodged by a non-panel firm, that firm will not be allocated carriage of the matter. Where VLA does allocate a matter to a non-panel firm, the principles set out at 5.2.2 below apply.
- (b) Where an application is lodged directly by an applicant without nominating a practitioner on his or her application form, VLA will allocate the matter pursuant to these guidelines. Preference in allocation of the matter will be given to VLA's in-house practice.

If VLA's in-house practice is unable to act, VLA will allocate the matter in the following order of preference:

- a panel firm
- a non-panel firm

5.2.2 Expensive indictable matters allocated to in-house or panel firms

General principle

If a matter is allocated to in-house or a panel firm and the cost of assistance sought is projected to exceed VLA's cost ceiling, the Managing Director or Divisional Manager, Grants will determine the amount that VLA will pay in excess of the cost ceiling. The fees will not exceed the scale established under section 32(2) of the Act.

Panel firms

If a matter is allocated to a panel firm, and the cost of assistance sought is projected to significantly exceed VLA's cost ceiling the Managing Director or the Divisional Manager, Grants may re-allocate the matter in-house.

If a matter is allocated to a panel practitioner and the cost of assistance sought is projected to significantly exceed VLA's cost ceiling, the panel practitioner may be required to brief VLA's selected counsel, including being required to brief VLA's in-house counsel.

5.2.3 Expensive Family Law Matters

- (i) If it appears likely that the costs will exceed the costs ceilings set out in Commonwealth Family Law Guideline 12 the case should be assigned to an officer of VLA wherever possible.
- (ii) In exceptional circumstances if it is not possible to limit costs within the amounts set out in Family Law Guideline 12 and the matter cannot be handled by an officer of VLA, VLA may extend the grant of assistance by further \$2,000 maximum.

5.2.4 Crimes (Mental Impairment and Unfitness to be Tried) Act Matters

- (i) Supreme and County Court matters under the Act will be handled by:
 - officers of VLA who will brief VLA's in-house advocates wherever possible, or
 - where the application for assistance is lodged through the Mental Health Legal Service, the Mental Health Legal Service.
- (ii) Forensic Leave Panel matters will be handled by:
 - officers of VLA, or
 - where the application for assistance is lodged through the Mental Health Legal Service, the Mental Health Legal Service.
- (iii) Counsel may only be briefed when:
 - the matter is in the Supreme or County Courts, and
 - the Managing Director or the General Manager, Grants consider the matter to be of particular difficulty or otherwise deserving of special consideration,or
 - if the matter is assigned to officers of VLA, the in-house advocates are not available.

5.2.5 Social security matters at the ARO and SSAT stages and State equal opportunity matters

In the absence of compelling reasons, social security matters at the ARO and SSTAT stages and state equal opportunity matters will be allocated to officers of VLA

5.3 Referral Panel

5.3.1 Solicitors

VLA can only allocate cases to legal practitioners who have advised that they are willing to act and have signed a notice of willingness to act and to comply with the *Legal Aid Act* and the conditions of assignment of legal aid. VLA keeps a register of these legal practitioners called the Legal Aid Referral Panel.

Practitioners who would like to be included on the Referral Panel should contact:

The Panel Manager
Grants Division
Victoria Legal Aid
GPO BOX 4380
MELBOURNE VIC 3001

5.3.2 Barristers

Any practitioner who has signed the Bar Roll is not required to apply to join the referral panel to be paid for briefs in legally aided matters.

However, a barrister wishing to apply for grants of aid to be made to him/her is required to apply for inclusion on the panel and to satisfy VLA as to how the work normally performed by a solicitor will be undertaken in any grants to him/her.

5.3.3 Removal from the Panel

The Act (s. 30) sets out a procedure for removing or excluding individual practitioners and/or firms of solicitors from the Legal Aid Referral Panel. The Act does not prescribe the grounds on which a removal or exclusion may be made. However, it specifically states that a sole practitioner or firm may be removed from the panel if one or more employees or partners (in the case of a firm) are excluded. VLA may exclude a practitioner's name from the panel in any of the following non-exhaustive circumstances:

1. Failure or refusal to provide VLA with information required by section 31 (3) of the *Legal Aid Act*.
2. Seeking payment from the assisted person in contravention of section 32 (1) - even if VLA does not prosecute the practitioner.
3. Seeking payment from VLA for legal services not performed for the assisted

person.

4. Being knowingly involved in the provision of false information to VLA - even if VLA does not prosecute the applicant, assisted person or legal practitioner under section 44 (1) (a) (b) of the *Legal Aid Act*.
5. Failing to disclose information which the practitioner knows to be relevant to the application or to the provision of legal assistance - even if VLA does not prosecute him/her under Section 44(1)(c).
6. Habitually taking an excessive time to defend persons charged with criminal offences or to progress the assisted person's case.
7. Seeking payment from the applicant for the preparation of an application contrary to section 26 (1) of the *Legal Aid Act*.
8. Failing to diligently pursue an award of costs or an Appeal Costs Certificate in favour of the assisted person.
9. Failing to retain sufficient funds from moneys received on behalf of an assisted person to pay VLA.
10. Giving false or misleading statements regarding the position with legal assistance to a court or to the media and thereby undermining confidence in the legal aid system.
11. Rendering accounts to VLA in matters not subject to a fixed fee which are manifestly excessive.
12. Failing to render accounts promptly for counsel's fees (and other disbursements) and to pay counsel/and other service providers promptly on receipt of payment from VLA.
13. Lodging applications for assistance for criminal trials within 14 days of the hearing without reasonable grounds for late lodgement.

VLA must give reasons for the removal or exclusion of a practitioner.

Stages of The Removal Process

VLA may write to the practitioner (including a firm of practitioners) concerned and ask for a written explanation of the conduct. In the absence of a response or satisfactory explanation, VLA will give notice that exclusion or removal is proposed and the reasons for same. The practitioner is invited to show cause why the exclusion or removal should not be made. Where VLA considers that the facts known to it are sufficiently serious to warrant exclusion or removal, it will give the written notice without seeking a prior written explanation.

Decision-Maker

The Board of VLA decides whether a notice is issued under section 30 (10) (a) of the *Legal Aid Act*.

Notice of Proposed Removal or Exclusion

The partner or partners and employer of a practitioner, even if it is not proposed to remove or exclude them from the panel, may be informed of the notice issued to the practitioner.

The notice usually specifies that if the practitioner wants to show cause, then a written notice of intention to show cause must be given to VLA within fourteen days.

If there is no response within this time, VLA sends a notice confirming the removal or exclusion to the practitioner (and any other persons who were sent the original notice).

The Independent Reviewer's Hearing

If a practitioner gives notice of intention to show cause, the Board refers the matter to the chairperson of the panel of independent reviewers who appoints an independent reviewer to hear and determine the matter.

This hearing is an administrative process, not a judicial one. The independent reviewer regulates proceedings subject to the provisions of the Act.

The independent reviewer must keep records of his/her determinations and proceedings (s.30(15)).

The independent reviewer must advise VLA of his or her determination (s. 30(14)), and once VLA is notified it must then give formal notice of the determination to the practitioner and others involved (s.30(15)).

Right of Review

A practitioner may under s.30 (18A) of the Act, take proceedings in the Supreme Court in respect of any decision of VLA or determination of an independent reviewer under s.30.

5.4 General Terms of Assignment

Legal assistance is provided only for the matter or matters specified in the grant letter. If assistance is required for other matters, written approval must be obtained from VLA. Approval is required for counsel's fees except in matters attracting a lump sum fee or family law proceedings apart from the final defended hearing. In these matters, the same fee is payable irrespective of whether counsel is engaged.

Where legal assistance is granted on or after 31 March 1997 in a matter to which a cost ceiling applies the practitioner is obliged to complete the matter within the cost ceiling unless the Managing Director or the General Manager, Grants releases the practitioner from that obligation.

The practitioner agrees:

- (i) to keep out of any money received on the assisted person's behalf sufficient to cover the costs of the assigned matter;

- (ii) to notify VLA immediately any money is received on the assisted person's behalf and disburse the money according to VLA's instructions;
- (iii) to inform VLA of any circumstances which may be relevant to the continuation of legal assistance, including any change in the assisted person's financial or domestic situation;
- (iv) (a) to provide VLA with any information it reasonably requests which is relevant to the grant of legal assistance, the services provided to the assisted person, and the costs charged or to be charged for them;

(b) if requested, to deliver to VLA the file or files relating to the matter for which legal assistance was provided; and

(c) if required:
 - to deem the whole or any part of the work already completed and paid for by the assisted person as having been performed pursuant to the grant of legal assistance; and
 - to give VLA credit for all moneys received in payment for work deemed to have been performed pursuant to the grant of legal assistance;
- (v) not to do anything, take any action, give any advice, or enter into any agreement that could prejudice VLA's right to recover its costs by way of contribution;
- (vi) (a) to refrain from entering into any agreement which could prejudice the assisted person's right to recover costs without VLA's written approval;
(b) to take all reasonable action to recover costs ordered in favour of the assisted person; and
(c) to notify VLA if the recovery of costs appears unlikely.
- (vii) to immediately inform VLA if the assisted person does not accept or act on either the practitioner's or counsel's advice;
- (viii) to advise VLA of the progress of the assigned matter, in particular any circumstances which might substantially increase costs above the normal costs for a matter of the type for which legal assistance has been granted;
- (ix) on completion of the assignment, to send to VLA within a reasonable time:
 - (a) a report on the outcome of the matter, including details of any order for costs;
 - (b) an account in the form provided (if any), using the appropriate scale of costs or VLA's fee schedules, and if requested, a bill of costs in taxable form for fees and disbursements; and
 - (c) an account for all moneys received and paid on behalf of the assisted person during the assignment;

- (x) to accept professional costs paid according to section 32 of the Act; and
- (xi) where appropriate, to request a certificate under the Appeal Costs Act 1984 and to complete an application to the Appeal Costs Board.

5.5 Stage of Matter Limits

Stage of matter limits apply to grants and extensions of legal assistance which are not remunerated by a lump sum. See 6.3, Chapter 6, for an explanation of stage of matter limits.

5.6 Extending a Grant of Assistance

Any practitioner who wants an extension of a grant of assistance should:

- report on the progress of the case to the end of the previous stage;
- tell VLA the amount of costs, disbursements and counsel's fees claimed for the previous stage;
- advise VLA about the merits of continued funding of the case;
- specify what further assistance is required; and
- estimate the costs, disbursements and counsel's fees for the next stage.

VLA will not increase a stage of matter limit or make a further grant retrospectively. Any further grants must not exceed the cost ceiling for the matter. See 3.2.4, Chapter 3, for further information.

5.7 Change of Practitioner

If an assisted person wants to change his or her practitioner, VLA may agree to a change of practitioner pursuant to these guidelines. VLA will not usually approve a change of practitioner where it will result in an increase in the amount of funds expended on a case except in the circumstances set out in these guidelines. An assisted person seeking a change of practitioner must address the requirements in these guidelines.

5.7.1 Summary or indictable criminal matters

1. A change of practitioner will not be approved in summary or indictable criminal matters unless:
 - (a) there is a conflict of interest or other compelling reason; or

- (b) the request is to transfer from a practitioner on VLA's general referral panel to an inhouse practitioner or a practitioner on VLA's section 29A indictable crime panel.
- 2. Compelling reasons may include:
 - (a) a pre-existing long term professional relationship between an assisted person and a practitioner and that practitioner has acted for the assisted person in relevant criminal proceedings; or
 - (b) objective and demonstrable breaches in practice by the original practitioner; or
 - (c) other special circumstances, such as a psychiatric disability.
- 3. Practitioners on VLA's panels must not solicit or poach the clients of VLA practitioners or other panel practitioners in legally assisted matters.
- 4. VLA will not agree to a change of counsel between the committal and trial in the absence of satisfactory reasons for the unavailability of counsel who appeared in the committal. Practitioners should ensure that they only brief counsel who are prepared to undertake legally aided committals and trials.
- 5. If an assisted person withdraws instructions from a practitioner, or otherwise makes it impossible for the practitioner to continue with the representation, and VLA does not agree to a change of practitioner, VLA requires that it be notified of any application under section 360A of the *Crimes Act*. VLA will appear to oppose the application.

5.7.2 All matters where a change of practitioner is sought

- 1. When considering whether to approve a change of practitioner, VLA will have regard to:
 - (a) the reasons put forward by the assisted person or the new practitioner as to why a transfer is being sought;
 - (b) the extent of work carried out by the original practitioner;
 - (c) the amount of costs and disbursements paid by VLA in the matter;
 - (d) the imminence of the next stage of proceedings;
 - (e) the original practitioner's willingness to continue to act for the assisted person.
- 2. Should VLA decide to approve a change of practitioner the original practitioner must immediately:
 - (a) report to VLA on the progress of the case;
 - (b) advise VLA on the merit of continued assistance; and

- (c) submit an account for work done before the withdrawal of instructions.
- 3. The original practitioner must retain the file until VLA authorises the transfer of both the file and the grant of assistance.
- 4. The new practitioner must then:
 - (a) accept the transfer of the grant on its current terms and conditions; and
 - (b) if necessary make the file available to VLA to cost the work of the original practitioner.
- 5. Transfer of the practitioner file must be arranged between the original and the new practitioner. VLA will not accept responsibility for delays in the transfer of the file. Wherever possible, the same counsel must be retained.
- 6. VLA will not pay for any costs of the change, including any cost of the new practitioner becoming familiar with the file. The assisted person is responsible for the consequences of any delay that may occur during the transfer of the grant and any steps which may need to be taken such as the adjournment of the proceeding to allow the grant of assistance to be transferred.

5.8 Abandonment of Legal Assistance

VLA has guidelines for cases where a grant of assistance begins, but the assisted person later decides to continue the case without legal assistance.

5.8.1 Ongoing Cases

If VLA has granted assistance but the assisted person wishes to abandon the grant of assistance, the practitioner must report on the progress of the case and submit an account to VLA. VLA will then certify the account and ask the client to refund interim costs, disbursements and counsel's fees paid between the date of assistance and the date of abandonment.

If the abandonment of legal assistance also involves a change of practitioner, VLA will not consent to the transfer of the clients' file until its costs to date are paid or secured in a manner acceptable to it.

5.8.2 Finished Cases

It is not possible to abandon a grant of legal assistance at conclusion of the case to obtain the payment of greater legal costs by the other side, or for any other reason.

If a case is finished, and the practitioner has rendered an account to the assisted person in excess of that paid or payable by VLA, VLA will take action under section 30 (10) as well as considering prosecution under section 32 (1) of the Act. VLA will require any payments made by the assisted person to be repaid to him/her.

5.8.3 Small Settlements

In some cases VLA pays interim costs, disbursements and/or counsel's fees, and the settlement offer or judgment is significantly lower than the amount which was anticipated when VLA granted assistance. In these cases VLA may agree to the practitioner refunding only the amount paid by VLA