Review of the *Appeal Costs Act 1998*

Submission to the Dispute Resolution Branch, Department of Justice and Regulation

June 2016

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# About Victoria Legal Aid

Victoria Legal Aid (VLA) is an independent statutory authority with a mandate to promote social justice and protect legal rights in Victoria, particularly the rights of those who are marginalised or disadvantaged within the community. Our organisation works to improve access to justice and pursues innovative ways of providing assistance to reduce the prevalence of legal problems in the community. We assist people with their legal problems at courts, tribunals, prisons and designated mental health services, as well as in our 14 offices across Victoria. We also deliver non-legal advocacy services to people receiving mental health treatment, community legal education, and assist more than 100,000 people each year through Legal Help, our free telephone advice service.

VLA’s Assignments Unit is responsible for administering grants of legal assistance. Assignments is responsible for:

* providing legal assistance in accordance with the *Legal Aid Act 1978* and VLA’s funding guidelines
* providing legal and policy advice to the Executive Director, Legal Practice and the VLA Board
* setting up financial contributions, attending settlements where VLA has secured costs over property, and making applications to the Appeal Costs Board to recover costs
* overseeing the quality of legal services provided by private practitioners, by conducting file audits/reviews, and monitoring adherence to VLA’s Practice Standards
* appearing at the County and Supreme Courts on behalf of VLA.

Private lawyers, staff lawyers and CLC lawyers make up VLA’s mixed model of service provision. All Australian states and territories operate a similar model.

In 2014–15, VLA provided over 34,600 grants of legal assistance to over 26,800 unique clients. Private practitioners provided 68 per cent of all grants, with VLA making a total of $63.6 million in payments to private practitioners under grants of aid. VLA’s staff lawyers provided 32 per cent of grants.

In addition to services provided under grants of aid, in 2014–15 VLA provided 83,674 duty lawyer services. VLA’s staff practice provided 92 per cent of all duty lawyer services. In the 2014–15 period, VLA’s Legal Help service took over 114,000 calls and there were over 1,400,000 website sessions through VLA’s website.

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# Executive Summary

Victoria Legal Aid (VLA) welcomes the opportunity to contribute to the development of possible amendments to the *Appeal Costs Act 1998* (the Act) and supports the objectives of the review, namely to develop a range of reforms that would improve the efficiency of the Appeal Costs Board (the Board). We base our submission on our regular and extensive involvement in making appeal costs applications.

This submission relates to two of the four proposed amendments to the Act. We submit that the timeframe for submitting late applications should remain at the current period of 12 months. The current period enables sufficient time to obtain the necessary information and make an application, and a reduced timeframe would have financial and resource implications for VLA.

The inclusion of criteria for the Board to consider when assessing late applications will provide a useful mechanism for VLA when addressing the ‘interests of justice’ test. We recommend that the Board provide written reasons at the time of a refusal to provide guidance when making future applications.

We submit that the granting of indemnity certificates should remain as is currently legislated, which does not provide the courts with the power to limit the scope. While counsel’s conduct may impact on the quality and length of a trial, creating financial implications for agencies such as VLA (as well as private paying clients) when certificates are limited would not address this issue. VLA has a range of mechanisms in place to address the conduct of counsel, including our panels arrangements, quality audits and the preferred barrister list. We consider that these quality assurance mechanisms are more appropriate for addressing quality-related issues amongst VLA-funded practitioners.

# Recommendations

**Recommendation 1:** The timeframe for making an application should remain at the current prescribed period of 12 months.

**Recommendation 1a:** If the timeframe is reduced, a transitional arrangement should be put in place so that the new timeframe does not apply to any certificates issued in the past 12 months to provide a sufficient interval for agencies to implement an amended process.

**Recommendation 2:** The ‘interests of justice test’ should have criteria included in the legislation that the Board must take into consideration when assessing late applications.

**Recommendation 2a:** Written reasons should be provided in the first instance to the applicant where a late application is refused for not meeting the relevant criteria.

**Recommendation 3:** The ambit of indemnity certificates should remain as it is currently legislated.

# Background

Positioned with the Assignments Unit of VLA, the Legal Recoveries Officer (the LRO) lodges applications with the Board in relation to appeal costs. It is also the responsibility of the legal practitioner to ensure that certificates are granted when possible and then lodged with the Board.

In many instances, the role of the LRO is to liaise with both in-house VLA and private practitioners to seek further information where the granting of an Appeal Costs Certificate may have been indicated on a file but the lodgement status remains unclear. This is done by communicating with the practitioner and then in many cases, following up the application with the Board. The LRO also processes payments from the Board when they are received and liaises with the Board's registrar in regards to payments as well as previous and ongoing applications.

VLA has developed a series of practice standards that apply to practitioners who are representing clients who have been granted legal assistance. These standards inform how VLA monitors the effective, economic and efficient delivery of high quality legal aid services. Practice Standard 3.2(w) is the applicable standard, which instructs that ‘a practitioner providing legal assistance services must seek costs certificates or costs orders where appropriate and, where applicable make any application to the Appeal Costs Board to recover costs’.

In the past six months, VLA has been notified that there have been approximately 300 indemnity certificates issued on legally aided matters with approximately $280,257.03 being claimed, making VLA one of the largest relevant stakeholders in this area in terms of the number of applications made.

1. **Should section 35D be amended to provide that the timeframe for making an application on the basis of a certificate is reduced from 12 months to six months?**

Our experience is that the current 12-month timeframe provides a sufficient amount of time to conduct all necessary work required to process applications following the issuing of an indemnity certificate. Our experience indicates that it takes approximately eight to 11 months for applications to be made to the Board by VLA following the issuing of the certificate. In any given month, there is an average of eight applications made by VLA to the Board, however this does not include the applications being made directly by private practitioners to the Board on legally aided matters. There are approximately 30 applications made by private practitioners on legally aided files each month.

The timeframe commences when the proceedings conclude and not from when the certificate is issued. A certificate can be issued months prior to a matter concluding. We are reliant on practitioners providing us with the certificate before we can commence the necessary work to submit the application. Therefore, the timeline does not trigger for us until we are notified by the private practitioner. VLA’s practice standards require that practitioners finalise all billing and submit file outcomes within 30 days of a matter’s conclusion, however there are instances of non-compliance which impacts on VLA’s ability to submit an application. This is illustrated by the fact that there have been at least five out-of-time applications made to the Board in the first six months of 2016. We have compliance processes in place that enable us to deal with non-compliance of practice standards through regular checking of practitioner’s legally aided files.

In the past six months, 228 legally aided applications have been sent to the Board for consideration of payment. Fifteen of these applications were refused, four on the basis of being out of time when submitted and therefore not considered. Given that under the current 12-month timeframe there are a number of applications submitted out of time, it is likely that a reduced timeframe would increase the number of out-of-time applications and this would have flow-on implications for VLA. We submit that the timeframe should remain at 12 months.

If the time limit is amended, we consider it appropriate that a transitional arrangement be put in place so that the new timeframe does not apply to any certificates issued in the past 12 months. This will enable agencies like VLA to implement any necessary changes to assist with complying with the shortened timeline.

**Recommendation 1:** The timeframe for making an application should remain at 12 months.

**Recommendation 1a:** If the timeframe is reduced, a transitional arrangement is put in place so that the new timeframe does not apply to any certificates issued in the past 12 months to provide a sufficient interval for agencies to implement an amended process.

1. **In relation to the ‘in the interests of justice’ test, should section 35E(2) be amended to provide that the Board must have regard to:**
* **whether any negotiations with the other party regarding the payment of costs, and the taxation of those costs, were progressed with reasonable expedition;**
* **the actions of the applicant and its lawyers;**
* **the consequences of granting or not granting the extension, including financial implications; and**
* **whether it is fair and equitable in the circumstances to consider an out of time application?**

We support the Department’s proposal for a criteria setting out the ‘interests of justice’ test when the Board considers late applications. Our experience with this test has indicated that there has previously been no clear guideline as to how the test is defined. This has made it difficult to address the test when submitting out-of-time applications. The considerations as outlined in the suggested amendment are appropriate and provide sufficient scope for applications to address the relevant criteria.

With respect to the third limb of the test, which considers financial implications, VLA has a limited pool of funding and uses eligibility criteria to ensure financial stability. An increase in the refusals to consider late applications would be a factor that would impact on the availability of funding and how we set our guidelines in determining who may be eligible for legal assistance. Therefore, we would expect that the third limb of the test would consider the financial implications of not granting an extension to VLA as a body with finite and scarce funds that are required to meet widespread legal need. Given that VLA may require contributions from a client for the total cost of a matter, which includes costs paid to the Board, the financial circumstances of the client may also be relevant.

The refusal of a late application in accordance with the test should be accompanied with written reasons – without the requirement of an additional request. This would assist agencies like VLA when making future applications to provide a guide as to how the criteria is being applied by the Board. Reasons would also assist VLA with compliance checking private practitioners if they are the cause of an application being made out of time and can assist VLA to take remedial action for those non-compliant practitioners.

Finally, the legislation should make clear whether the Board will be *required* to consider the application, or if the Board only *may* consider the application, should the criteria be met. This will avoid ambiguity in the application of the test.

**Recommendation 2:** The inclusion of criteria defining ‘in the interests of justice’ test and outlining what factors the Board must take into consideration with late applications is appropriate.

**Recommendation 2a:** Written reasons should be provided in the first instance to the applicant where a late application is refused for not meeting the relevant criteria.

1. **Should the Act be amended to provide a court with the power to grant an indemnity certificate of a more limited ambit in appropriate circumstances to reflect conduct at trial?**

The conduct of counsel has a significant impact on the way in which a trial progresses, and we support efforts to address issues of quality in this respect. Over recent years, VLA has introduced a range of procedures and policies manage quality issues for counsel appointed on a grant of legal assistance. These include compliance checks, quality audits and the establishment of the preferred barrister list, as detailed below.

* **Preferred Barrister List:** In July 2015, VLA established the Criminal Trial Preferred Barrister List to provide more oversight regarding the quality of barristers appearing in criminal trials. Practitioners are only permitted to brief barristers on the list unless a VLA exception is granted. Barristers on the list are required to be competent to conduct legally aided trials in an effective, economic and efficient manner, comply with our criminal trial advocacy competencies and conduct practice professionally and appropriately. Barristers are required to make declarations about misconduct or complaints. If a barrister no longer meets these requirements, they are liable to suspension or removal proceedings.
* **Compliance:** VLA regularly checks the case files kept on legally assisted matters by in-house lawyers and private law firms who are members of VLA’s specialist panels. A compliance officer will check a representative sample of total case files held by the lawyers to ensure that the lawyers comply with VLA’s requirements for record-keeping and invoicing, and that the case files support VLA’s decisions to make a grant of legal assistance. Checks are conducted on a quarterly basis, however, compliance officers may check additional files at any time, particularly if concerns have been made about a specific matter.
* **Quality Audits:** Quality audits are conducted by VLA’s auditing team who assess the practitioner’s ability to meet or exceed requirements outlined in our practice standards. Practice Standard 3.2 (w) is the applicable standard for indemnity certificates, which instructs that ‘a practitioner providing legal assistance services must seek costs certificates or costs orders where appropriate and, where applicable make any application to the Appeal Costs Board to recover costs’. Our [performance outcomes](https://www.legalaid.vic.gov.au/information-for-lawyers/practitioner-panels/panels-conditions) set out possible outcomes where practitioners’ files do not meet the requisite standard. Outcomes range from identifying training, remedial action, greater supervision and in the most serious cases, removal from a panel and referral to the Legal Services Commissioner or Victoria Police.

For legally aided matters, we consider that these mechanisms are appropriate to address the issues of quality that this amendment seeks to address. The ability to limit the ambit of a certificate would have other unintended consequences and detriment both privately paying clients and VLA. The proposed amendment would unduly impact on those who have little to no control over counsel’s conduct and should not be burdened by additional costs in these circumstances. In *Piccolotto v The Queen* (No 2) [2015] VSCA 182, the Court determined that it would not be appropriate for the appellant to be subjected to the consequences of counsel’s conduct at trial. We concur with this determination.

In addition, enabling the court to limit the ambit of the certificate could be utilised in multiple scenarios ranging from improper conduct of counsel to instances where counsel’s actions may have contributed to the length of the trial. This could apply in a greater number of scenarios than envisioned by this proposal and go beyond the original intention of the amendment.

We consider that the example provided in the Department’s options paper is an outlier, the results of which should not impact on the majority of routinely run proceedings. For matters that are not legally aided, there are other procedures in place to deal with professional misconduct under the *Legal Profession Uniform Law Act* (2014). Concerns about conduct can also be escalated to the Legal Services Commissioner.

**Recommendation 3:** The ambit of indemnity certificates should remain as it is currently legislated.