



17 May 2012

Ms Marjorie Todd
Assistant Secretary
Legal Assistance Branch
Financial Assistance Consultation
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Via email finass@ag.gov.au

Dear Ms Todd,

ATTORNEY-GENERAL'S DEPARTMENT FINANCIAL ASSISTANCE CONSULTATION

The Law Council of Australia is pleased to provide the following brief comments in response to the Attorney-General Department's ('the AGD') request for views on what additional Commonwealth law matters may attract financial assistance for disbursements under the new scheme of financial assistance, which commences 1 July 2012. The Law Council acknowledges the particular assistance of its Access to Justice Committee and the Law Institute of Victoria in the preparation of these comments.

The Law Council understands that from 1 July 2012, the existing 26 schemes of financial assistance will be consolidated into a single scheme, which will provide financial assistance for disbursements only, with some limited exceptions where assistance for legal representation costs will also be provided.

This move is said to significantly enhance access to justice through the provision of financial assistance to a broader range of applicants and to enhance support for pro bono work by assisting with the potentially prohibitive cost of disbursements. It is also said to demonstrate greater alignment with the Access to Justice Strategic Framework, by increasing accessibility in situations where the potentially high costs of disbursements can create a barrier to pursuing a claim.

The consultation paper prepared by the AGD also explains that the provision of assistance under the scheme will be similar in nature to the provision of legal aid, in that full commercial rates will not be paid and both a means and a merits test will apply, and that the existing 26 schemes of financial assistance will all form part of the new scheme.

The Law Council generally supports efforts to improve and broaden access to financial assistance for costs associated with Commonwealth law matters, and welcomes mechanisms to support and promote pro bono legal work, although noting that pro bono work should never be regarded as a substitute for an adequately-funded legal assistance sector.

To this end, the Law Council generally supports the consolidation of the existing 26 schemes of financial assistance, provided that the consolidation process does not restrict or limit the scope of financial assistance currently available in respect of Commonwealth law matters. At this stage, with very limited details publicly available, it is difficult to assess how the move to provide financial assistance primarily for disbursements only (with some limited exceptions for legal representation costs) will impact on the accessibility of the scheme to those most in need.

This gives rise to some concern, particularly given the relatively short period for public consultation on the significant changes proposed by the consolidation process, and the lack of detail provided in the consultation paper regarding how the new scheme will operate in practice.. The Law Council notes for example, that comments have been sought on the consultation paper by 18 May 2012, six weeks prior to the proposed commencement date of the new scheme on 1 July 2012.

Rather than responding to each of the questions posed in the consultation paper, the Law Council wishes to make some brief general comments and some more detailed comments in relation to the existing special assistance scheme with which it has had some recent direct interaction – the Special Circumstances (Overseas) Scheme.

General Comments

In regards to eligibility under the proposed consolidated scheme, the Law Council wishes to emphasise the importance of ensuring that all persons currently eligible for assistance under the existing 26 schemes, should continue to be eligible under the new scheme.

The Law Council also emphasises the importance of thorough consultation with the legal aid commissions on each of the questions raised in the consultation paper, particularly those questions relating to the scope of the term ‘disbursements’, eligibility for assistance, merits tests and prescribed amounts of assistance and capping. In relation to these issues, the Law Council suggests that where ever possible a flexible and broad approach should be adopted. For example, the type of disbursements covered by the consolidated scheme should generally include filing fees, expert report fees, setting down fees, sitting fees, transcript fees and counsel fees. The Law Council also urges caution in respect of imposing caps in respect of certain disbursements which may cause difficulties in many instances, such as in respect of fixed filing fees, and may undermine the purpose of the scheme if, for example, they prevent the provision of necessary expert reports.

The Law Council also notes that the proposed consolidated scheme would continue to prohibit the granting of legal assistance on a retrospective basis, meaning that an application must be approved prior to the accrual of expenses relating to the legal matter. While the Law Council recognises the need to ensure that applicants do not accrue a large legal bill in anticipation of Government assistance, the Council is of the view that there will be circumstances in which a party with a potential claim against the proposed new scheme must necessarily make an outlay before the issue of their eligibility may be determined. In such circumstances, the Law Council does not suggest the applicant should have a *right* to assistance under the scheme, however the Council recommends that the applicant should have the *opportunity to apply* for reimbursement, where the exigencies of the matter required payment before an application could be determined. In order to clearly manage expectations of potential applicants for assistance in such circumstances, the Commonwealth Government could set guidelines as to the circumstances which it would entertain such an application.

Special Circumstances (Overseas) Scheme

Under the current Special Circumstances (Overseas) Scheme (the SCOS), Australians involved in proceedings overseas may be eligible, in limited and exceptional circumstances, to receive financial assistance from the Australian Government to help meet their overseas legal and related costs. The SCOS is generally limited to cases where the Australian Government has a direct involvement in the matter, or in overseas criminal cases where the applicant is facing a lengthy period of imprisonment or the death penalty. The SCOS generally does not cover legal costs incurred by the applicant in Australia. The SCOS is accessed via application to the AGD, and grants of assistance are made according to eligibility criteria set out in the Guidelines which provide that:

The Attorney-General may authorise financial assistance for overseas legal costs and related expenses in the following cases:

(a) where there are special circumstances which lead to the conclusion that there is a moral obligation on the Commonwealth to make a payment; or

(b) where the merits of the applicant's case for which the assistance is sought, the applicant's lack of means to pay the costs, the lack of legal aid for the applicant in the country where the costs have been or are to be incurred and the applicant's connection with Australia constitute, in the Attorney-General's opinion, compassionate grounds for the Commonwealth's meeting some or all of the costs.¹

As you would be aware, the Law Council is frequently engaged in advocacy in relation to individual human rights cases, and international incidents giving rise to human rights concerns. Through this work, the Law Council has some limited experience with interacting with the SCOS in the context of its advocacy in relation to its policy opposing the use of the death penalty and in relation to the operation of its *Guidelines for Intervention on International Human Rights Matters*.

The Law Council's long standing policy opposing the imposition or execution of the death penalty² or any other form of torture, or cruel, inhuman or degrading treatment or punishment includes a commitment to providing assistance and support to Australian legal practitioners who provide pro bono and legal assistance to Australian residents facing the death penalty abroad. The Law Council's *Guidelines for Intervention on International Human Rights Matters*³ set out the factors the Law Council takes into account when deciding whether to intervene in an international human rights matter, such as an individual case of serious human rights infringement involving an Australian overseas.

Both of these policies have seen the Law Council supporting individuals or other organisations making applications to the Attorney General's Department for financial assistance under the SCOS.

It is in this context that the Law Council provides the following comments.

¹ Further details of the scheme, including the Guidelines and Application forms are available at [http://www.ag.gov.au/Legalaid/Pages/SpecialCircumstances\(Overseas\)Scheme.aspx](http://www.ag.gov.au/Legalaid/Pages/SpecialCircumstances(Overseas)Scheme.aspx)

² A copy of this policy, approved by Law Council of Australia Directors in 2007, is available at http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/death-penalty/death-penalty_home.cfm

³ These Guidelines were most recently authorised by the Law Council Executive on 29 July 2011 and are available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=91B2A72E-1E4F-17FA-D2F2-21F461059990&siteName=lca

The Law Council strongly supports the continued existence of a scheme such as the SCOS that provides financial assistance to Australians overseas who are at risk of receiving the death penalty or lengthy imprisonment. The Law Council is of the view that this assistance should be as generous and as flexible as possible, so as to enable the individuals facing such serious abrogation of their individual human rights (or at the very least the prospect of prolonged periods of imprisonment) the best opportunity to access quality and effective legal advice and representation. This is a critical component of Australia's broad obligations to protect and promote respect for human rights and human dignity at home and abroad, and a strong demonstration of the Government's commitment to access to justice particularly for those most vulnerable and in need. The establishment and operation of such a scheme also complements Australia's adherence to its particular obligations under key international human rights conventions to which it is a party, including the *International Covenant on Civil and Political Rights* (the ICCPR) and its Second Optional Protocol relating to the abolition of the death penalty, and the *Convention Against Torture*.

The Law Council is pleased that the consultation paper appears to provide that those eligible for assistance under the SCOS will continue to be eligible for assistance under the consolidated scheme, and that such assistance will not necessarily be limited to disbursements but could cover legal representation costs in exceptional circumstances, such as Australians overseas who are at risk of receiving the death penalty or lengthy imprisonment, and overseas child custody removal matters.

This approach is strongly supported. Any financial assistance scheme is unlikely to provide the type of assistance necessary to ensure adequate access to legal advice and representation for Australians facing the death penalty or prolonged imprisonment overseas if it is limited to disbursements only. This is particularly the case as there appears to be no other Commonwealth or State or Territory legal assistance scheme that would fill the gap left by a removal or restriction of the assistance currently available under the SCOS.

The Law Council also strongly supports the retention of a flexible approach to applications and eligibility for legal assistance in these circumstances. The Council is pleased that under the consolidated scheme applications would continue to be received from self represented individuals as well as people with legal representation. It also suggests that consideration be given to accepting applications made on behalf of these individuals by family members or organisations. This may assist in ensuring the assistance scheme is accessible to those most in need, for example those incarcerated in circumstances where it is difficult to prepare the appropriate application or to communicate with the Attorney General's Department without significant external assistance. This may arise, for example, when an Australia is imprisoned in a remote detention facility without appropriate internet or phone access and with only limited access to Australian consular support.

As noted above, the Law Council supports the retention of eligibility criteria relating to Australians facing the death penalty overseas or lengthy imprisonment, and the consideration of these circumstances as exceptional and warranting financial assistance that covers legal representation as well as disbursements. The Law Council further suggests that consideration be given to also including other breaches of fundamental human rights as giving rise to exceptional circumstances for the purposes of the consolidated scheme. For example, Australians who are being held in conditions that would amount to cruel, inhuman or degrading treatment, as understood under the *Convention Against Torture*, or those who have been imprisoned following a criminal law process that falls far short of the standards of a fair trial contained in Article 14 of the

ICCPR. The Law Council is of the view that Australians subject to these breaches of fundamental human rights should also be eligible to apply for financial assistance to cover disbursements and legal assistance.

The Law Council's *Guidelines for Intervention in International Human Rights Matters* may provide some guidance in this area. These Guidelines provide, for example, that before intervening in a particular matter, the Law Council should consider whether the alleged human rights violation and/or potential violation relates specifically to those fundamental individual rights which affect a person's liberty, dignity and equality in the context of the legal system (see in particular those rights which are protected by Articles 9, 10 and 14 of the ICCPR). A similar approach could be taken to determining what might constitute 'exceptional circumstances' in the consolidated scheme.

The Law Council also supports the adoption of a flexible approach when determining what falls within the meaning of 'disbursements', particularly in relation to applicants facing the death penalty or long periods of imprisonment overseas. In the Law Council's limited experience, Australians in these circumstances may be detained in remote locations with limited access to consular or other assistance, which can make it difficult and expensive to provide instructions to legal representatives or to receive legal advice. In such scenarios, 'disbursements' should cover those matters necessary to facilitate meaningful contact between the individual and his or her legal representative, such as interpreter or translation services, travel costs, accommodation, incidental expenses such as meals, and potential travel insurance or other costs associated with ensuring the safety of the legal representative when travelling in remote areas.

This is particularly important if the legal representative acting in the matter is doing so on a pro bono basis, or for a reduced fee, or in circumstances that may present risks to his or her safety. The Law Council has had limited but positive experience with the Attorney-General's Department in relation to claims under the SCOS, which appears to be responsive to the particular needs of the applicant and the challenges posed by the location in which he or she is detained. The Council urges the Government to retain this level of flexibility, particularly in respect to exceptional cases, under the consolidated scheme.

The Law Council appreciates the need for financial assistance schemes to incorporate a means test so as to ensure that limited resources are applied effectively and fairly and reach those most in need. However, in cases where Australians face the death penalty overseas or are subject to very lengthy terms of imprisonment in harsh conditions, the Law Council suggests that it may be inappropriate to impose a strict means test due to the potentially high costs associated with legal representation in such circumstances. The financial circumstances of the claimant or his or her family, while relevant, should not be conclusive in terms of determining whether the applicant has the support of the Australian Government and access to appropriate financial assistance. In such circumstances, it may be more appropriate for other factors such as the conditions of detention, the likelihood of success of the legal action, or the impact of the Australian Government's support for the action, to carry more weight when determining a claim.

The Law Council also suggests that in such circumstances there should also be flexibility around any cap on payments. It may be difficult to estimate the potential costs associated with pursuing a legal action, such as a clemency plea or pardon application in a death penalty case. As noted above, while the Law Council recognises the need for the consolidated scheme to ensure that potential applicants do not incur considerable expenses before being assessed as eligible for assistance under the scheme, the Council suggests that there may be circumstances in which an applicant seeking assistance in

relation to legal matters involving prolonged detention overseas or exposure to the death penalty may be required to outlay expenses before his or her claim under the scheme is determined. In such circumstances, the applicant should not be prohibited from applying for assistance in relation to previous expenses under the consolidated scheme, although the Council recognises that guidelines may need to be developed to limit the circumstances in which assistance can be granted for expenses incurred prior to a determination of a claim.

It is also important to ensure that once an applicant has been approved for assistance under the scheme that he or she has timely access to approved funds. The need for the scheme to be responsive and efficiently administered is of critical importance for individuals facing the death penalty or long terms of imprisonment overseas who may be relying upon the resources of relatives or other associates in Australia to meet the costs associated with their legal advice and representation overseas. In such cases, it is important to ensure that approved funds are paid quickly and that procedures for accessing approved funds are clear and easy to follow. Again, it is important that there be some degree of flexibility when dealing with overseas legal representatives who may have different practices in relation to billing from those of Australian practitioners.

The Law Council thanks the AGD for the opportunity to comment at this early stage of the development of the consolidated scheme, and looks forward to providing further comments and recommendations once further details have been released.

Yours sincerely,

A handwritten signature in black ink that reads "Margery Nicoll." The signature is written in a cursive, slightly slanted style.

Margery Nicoll
Acting Secretary General