

Dr Albin Smdrel
Assistant Secretary, Federal Courts Branch
Attorney-General's Department
Robert Garran Offices
National Circuit
Barton ACT 2600

8 July 2011

Dear Dr Smdrel

The National Association of Community Legal Centres (NACLC) is the peak body for Australia's community legal centres (CLCs). This paper summarises feedback received from community legal centres specialising in matters within federal jurisdiction. Further information can be provided on request.

Further information: Jacqui Bell, Policy Officer, Federation of Community Legal Centres (Victoria) Inc,
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Thank you for the opportunity to participate in the review of the recent Federal Court fee changes (Review). Our feedback is drawn from the experiences of our member centres, who assist some of the most disadvantaged members of the community through case work, advocacy, and litigation where necessary.

The Commonwealth Government's Review of the Commonwealth Community Legal Services Program noted that the community legal sector assists the most disadvantaged individuals in dealing with a significant variety of legal issues. The Commonwealth Review noted that collated data demonstrated that 58% of community legal sector clients received some form of income support, 82% of clients earned less than \$26,000 per annum, and almost 9% of clients had some form of disability.¹ The significant costs associated with litigation compound the lack of access to justice experienced by our heavily disadvantaged client base.

Summary

We do not support the low flat fee system for people facing significant disadvantage, because it operates as a barrier to access to justice for our client group. In our view, a single fee exemption and waiver application should apply for people facing disadvantage and financial hardship, as existed under the pre 1 November 2010 Federal Court regulations. We note that the current federal court flat fee is 21% of a fortnightly Centrelink allowance payment and 15% of the fortnightly Centrelink pension payment for a single recipient.

We provide particular examples of the impact of the one off flat fee system on our client base, below.

Divorce matters

When applying for a divorce, people have no choice but to use the court system; there is no other option available (such as mediation). In addition to the flat fee, many community legal sector clients struggle to pay other fees associated with divorce, including obtaining a copy of a

¹ Review of the Commonwealth Community Legal Services Program March 2008, 6.
<<http://www.ag.gov.au/www/agd/agd.nsf/Page/RWP6DE98B3437EEB6FDCA25742D007B0738>>

marriage certificate, translation of marriage certificate, affidavit of translator, or the cost of a newspaper advertisement for substituted service. Seeking a divorce can be an essential part of getting out of a violent relationship, or ensuring acceptance from a person's community. In some cases, access to finances can be problematic and a flat fee can impose an additional hurdle to obtaining a divorce (*reported by Women's Legal Services NSW*).

Consent Orders

Clients who would previously have formalised a parenting plan into consent orders for certainty, especially in circumstances of family violence, may now elect for a parenting plan alone, sacrificing safety due to the cost of seeking the consent orders. The absence of a court order can place women and children who have been victims of family violence or child abuse at even greater risk. An informal agreement or a parenting plan can leave a perpetrator of violence with significant control over parenting arrangements. In cases of hardship, there should be no fee for consent orders (*reported by Women's Legal Services NSW*).

Women experiencing family violence

We are also concerned that the flat fee structure may have a disproportionate impact on women experiencing violence. Some matters are not suitable for mediation due to issues of abuse and family violence, and some clients are forced to respond to vexatious or frivolous applications that form part of the violence perpetrated against them (*reported by Women's Legal Services NSW*).

People in prison

In our experience, clients in prisons face particular difficulty in paying the fees. For example, a client in prison seeking a divorce may receive as little as \$13 a week, which is used to pay for phone calls to family and friends, toiletries, additional food and (in some jurisdictions) a compulsory victims of crime compensation levy and potentially restitution payments (*reported by Women's Legal Services NSW*).

Urgent Applications

The low flat fee structure has caused significant difficulties in cases of extreme urgency, such as child recovery orders, applications for commonwealth airport watch-list orders or injunctions. Many people seeking these urgent court orders do not have the luxury of time to see a private lawyer and make an application for Legal Aid funding, and they are presenting at the Family Court and Federal Magistrates Court to see the duty lawyer to make the urgent application. Many of these individuals cannot afford the \$60.00 fee as it represents such a large proportion of their Centrelink income. These individuals are therefore prevented from issuing an urgent application due to financial barriers. In many of the cases that we see, this delay can have serious consequences such as a child being removed from the jurisdiction (*reported by the Women's Legal Service Victoria*).

The delay of Victoria Legal Aid funding

Related to the issue noted above, where a grant of legal aid is available, the \$60.00 fee will be paid by Victoria Legal Aid after the grant is approved and the invoice is submitted for processing. This means that private firms are having to pay the flat fee from their "office" account hoping that aid will later be approved. Many community legal centre budgets do not provide for an "office" account from which client disbursements can be paid in the hope they will be later recovered via a grant or a costs order. Women's Legal Service Victoria has had to ask the client to pay the \$60.00 personally so that they can later be reimbursed later by Victoria

Legal Aid. Recently, this caused significant delay as the client did not have the \$60.00 fee available. Therefore, the client had to wait until her next Centrelink payment was received before issuing an urgent application (*reported by the Women's Legal Service Victoria*).

Social Security

While the November 2010 fee changes apply to Administrative Appeal Tribunal applications, no fee is payable for appeals relating to social security under various Acts representing the gamut of legislation which governs social security payments.² This is entirely appropriate. Fees should not act as a barrier for access to justice for clients who seek to assess the validity of decisions affecting their social security entitlements.

At the Federal Court level, the experience of Social Security Rights Victoria is that the sorts of matters for which review is sought generally involve large debts (in excess of \$30,000) or eligibility for payments which would provide lifelong support (for example, Disability Support Pension applicants under 35 years old). Accordingly, the current one off fee in Federal Court proceedings is not as significant an issue for social security issues as it is for other issues (*reported by Social Security Rights Victoria*).

Employment law

A person who claims they have been dismissed from their employment in breach of the Fair Work Act's General Protections, which includes unlawful discrimination, temporary absence due to illness or injury and workplace rights, firstly has to file their claim with Fair Work Australia. Fair Work Australia can waive its filing fee in the case of financial hardship. If the matter cannot be resolved by way of a conference, which usually takes place approximately one month after the claim is filed, the aggrieved person must then file their claim in the Federal Court or the Federal Magistrates Court within 14 days of the date of the conference certificate. This is a very short time frame and, where a person may have already been out of work for approximately 6 weeks, they may not be able to afford or have access to money to pay the filing fee.

Under the post November 2010 regulations, for applications relating to general protections where the person has been dismissed; and for applications for unlawful termination, all fees are exempted except the initial filing fee specified under the Fair Work Regulations.³

It would be an injustice should a person suffering financial hardship be able to have the initial fee waived by Fair Work Australia but then not be able to afford to continue their case because the Court required a further filing fee to be paid without the option of waiving that fee in cases of financial hardship (*reported by JobWatch*).

Refugee and asylum seekers

For many asylum seekers, judicial review is a critical step in their application to gain permanent protection in Australia. The recent abolition of fee exemptions for people experiencing financial hardship has had a significant effect on both the asylum seekers applying for judicial review and the community legal centres and legal professionals that assist them. Asylum seekers in detention have no access to income and are often in remote locations. Many asylum seekers living in the community have no work rights, no access to income support and are totally reliant

² No fee is payable if the decision to be reviewed is made under the following legislation: *Social Security Act 1991*, *Social Security (Administration) Act 1999*, *Social Security (International Agreements) Act 1999*, *A New Tax System (Family Assistance) Act 1999*, *A New Tax System (Family Assistance) (Administration) Act 1999*, and Schedules 5 and 6 to the *A New Tax System (Family Assistance and Related Measures) Act 2000*.

³ *Federal Court of Australia Regulations 2004* (Cth) r 11(1).

on charity. Those asylum seekers in the community who are eligible for Red Cross income support receive only 89% of the Centrelink Special Benefit payment. As a result, many asylum seekers are unable to pay filing fees themselves and instead seek financial assistance from charities and CLCs. Those in detention and remote locations face difficulties in obtaining legal and financial support from charities or CLCs in time to seek review. Without such assistance many are essentially barred from accessing judicial review to remedy erroneous Refugee Review Tribunal and Independent Merits Review Tribunal decisions. The change in filing fees bring with it the very real possibility that asylum seekers who may not have their claims properly considered are returned to their home country and may face persecution upon their return. We are extremely troubled by the change in filing fees (reported by Asylum Seeker Resource Centre).

The Refugee and Immigration Legal Centre is in agreement that the reduced fees, in place of a court fee exemption, greatly impacts on the access to justice that people facing disadvantage would have. Specifically for RILC clients, the majority of clients do not earn any income whatsoever, because they are forbidden by law to do so or are held in detention.

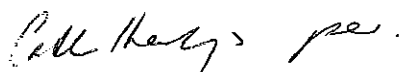
We think that the review should play particular attention to how the low flat fee system impacts people in these circumstances.

Revenue neutral

We note in your correspondence dated 24 June 2011 that any package of changes arising out of the Review would need to be revenue neutral. Ultimately, it is a matter for government how it resources measures to improve access to the justice system. Free legal assistance, and the ability to obtain a full waiver of court fees, are both vital to achieving access to justice for the disadvantaged clients we represent. Any proposed changes to court fees should not come at the expense of either.

Please let us know if you would like further information

Kind regards,



Julia Hall
Executive Director