

Chapter 5

Northern Territory Law Guidelines

Part 1

Criminal Law

Guideline 1

Traffic Prosecutions

Assistance will not normally be provided in relation to traffic prosecutions unless:

- (a) a potentially substantial civil claim may be affected by the outcome of the proceedings;
- (b) conviction is likely, having regard to all the circumstances, including prior convictions, to result in:
 - (i) the imposition of a jail sentence; or
 - (ii) the loss of the applicant's livelihood; and
 - (iii) there exists a real prospect of avoiding conviction and retention of driver's licence.

Guideline 2

Summary Criminal Prosecutions

Assistance will not normally be provided for hearings in the Magistrates' Court unless:

- (a) the applicant has a reasonable prospect of acquittal; and
- (b) conviction would be likely to result in the imposition of a term of imprisonment (including a suspended term) ; or
- (c) conviction would be likely to have a significantly detrimental effect on the defendant's livelihood or employment, actual or prospective; or

- (d) the defendant suffers from a disability or a disadvantage which would prevent self-representation.

Assistance may be available for representation for a plea of guilty where for reasons of complexity or other aggravating circumstance the matter could not reasonably be expected to be dealt with through a duty lawyer service and the likely penalty is imprisonment or a disposition likely to result in loss of livelihood.

Assistance will not be provided for minor matters involving nothing more than a small monetary penalty. Notwithstanding the foregoing, where in the opinion of the Director there are compelling reasons based on the public interest or other general priorities of the Commission for providing representation, assistance may be granted.

Guideline 3 **Committal Proceedings**

Assistance will be provided, for committal proceedings, in those cases where the charges cannot be determined summarily, or where the Commission is satisfied that there are compelling reasons for the matter to proceed by way of jury trial, if the applicant satisfies the Commission that a substantial benefit will result from representation.

1. Such benefit may be that:
 - (a) there is reasonable likelihood that the applicant's case may in fact be dealt with summarily; or
 - (b) a committal hearing is likely to identify an early plea; or
 - (c) the defendant will be discharged at the committal; or
 - (d) the conduct of a committal will lead to a significant reduction in the length of trial; and
 - (e) the applicant's solicitor has identified the specific issues which he/she believes can be clarified or resolved at committal.

It should be noted that both the Northern Territory and Commonwealth Directors of Public prosecutions have adopted guidelines which require full pre-trial disclosure and accordingly a claim that the committal will provide an opportunity to discover the prosecution's case is not to be regarded as a substantial benefit.

2. Where a "hand up brief" has been served, assistance will not extend to requiring the attendance of any witness that is not relevant to the issues in dispute, accordingly aid will not ordinarily be granted for a "full oral committal".

Witnesses should ordinarily only be required to attend for the purposes of cross-examination.

3. In homicides and other serious matters, assistance may be extended to engaging the counsel it is proposed to brief for the trial, to represent the accused at committal. In determining whether to authorise briefing counsel for the committal the Commission will have regard to the following matters:
 - (a) the complexity and gravity of the charge;
 - (b) the likelihood of representation by counsel at committal resulting in a resolution of issues which would otherwise remain alive at trial; and
 - (c) the likelihood of counsel retaining the brief through to trial.

Guideline 4

Criminal Trials and Pleas

- (a) Assistance will not normally be provided for a plea of not guilty in an indictable criminal case unless the Commission is satisfied that there is a reasonable prospect of acquittal or reasonable prospects of being convicted of a less serious offence. If a court orders an adjournment or a stay of a person's trial pursuant to a successful Application based on the High Court's decision in *Dietrich's Case* the Director will favourably consider a grant of legal assistance.
- (b) Assistance will normally be provided for a plea of guilty in an indictable criminal case.

Guideline 5

Appeals

Assistance will be granted for an appeal against conviction and/or sentence if there are reasonable prospects of quashing or overturning the conviction or of a material reduction in the sentence provided that, after applying a costs benefits analysis in all the circumstances, the cost of conducting such appeal is in the opinion of the Director justified.

Guideline 6

Bail Applications

Assistance will normally be provided in respect of bail applications only where:

- (a) bail is opposed by the prosecution; and
- (b) there exists a strong likelihood of bail being granted.

Guideline 7 **Applications Pursuant to *Dietrich's Case***

Assistance will not normally be provided for the purpose of an accused person conducting an application before a Court seeking, pursuant to the decision of the High Court in *Dietrich's Case*, an adjournment or stay of their case until legal representation is available and where, in the opinion of the Director, there is absolutely no defence at all, assistance will not be provided.

Guideline 8 **Commissions of Inquiry**

Assistance will not normally be provided to appear before Royal Commissions or Boards of Inquiry, unless there are strong reasons, based on the public interest, for providing representation .

Guideline 9 **Costs Ceilings (Cap) Criminal Law**

In respect of trials in the Supreme Court, for any one trial aid will be limited to \$40,000.00 with an additional \$20,000.00 for each co-accused where the matter is referred to a private practitioner. Allocation of funding between defendants is determined by the Commission.

If it appears likely that the costs ceiling will be exceeded, the case should be handled in-house wherever possible.

The Director has a discretion to grant aid on terms which would exceed the ceiling cap provided only there are sufficient funds in the Territory Expensive Criminal Cases Fund (for Territory matters) or that an application to the Commonwealth Expensive Criminal Cases Fund (for Commonwealth matters) is successful, to meet the projected cost of the case.

Guideline 1

Legal Assistance will be Granted in the Following Matters

- (a) Disputed workers compensation and work health applications;
- (b) Crimes Victims Assistance matters, although aid will generally be limited to the cost of disbursements;
- (c) Motor accident compensation claims where there has been a determination by a Designated Person refusing benefits;
- (d) Inquests where it is considered that the applicant's claim for damages will be significantly advanced if representation is made available for coronial proceedings. Assistance may also be granted where, in the opinion of the Director, there are strong reasons based on the public interest for providing representation to ensure a full airing of the facts or where there is a reasonable likelihood that the applicant will be charged with a criminal offence as a result of the inquest;
- (e) Mental Health applications. Assistance is available but is generally confined to the provision of duty lawyer services;
- (f) Consumer credit disputes including matters under the Trade Practices Act where the applicant's case has real prospects of success and raises issues of genuine public interest;
- (g) Subject to Guideline 3 Common Law Personal Injuries claims in limited circumstances.
- (h) Subject to Guideline 3 and provided there are reasonable prospects of recovering the full cost of assistance at the successful conclusion of the claim wage and wrongful dismissal claims
- (i) Subject to Guideline 4 proceedings under the Criminal Property Forfeiture Act 2002 (NT).
- (j) Applications under the Family Provisions Act (NT) 1980.
- (k) Equal Opportunity and Discrimination Cases where there are strong prospects of substantial benefit being gained not only by the applicant but also by the public or a section of the public.

- (l) In respect of decisions or actions by Government authorities which have a real prospect of affecting a person's capacity to continue in his or her usual occupation.
- (m) Respondents in Care and Protection (FACS) proceedings in the Magistrates Court.

Guideline 2

Legal Assistance is not Usually Granted in the Following Matters

- (a) Matters where it is not essential that the applicant have the assistance of a lawyer such as claims which may be dealt with in the Small Claims Court or by the Office of Consumer Affairs or in some other forum outside the Court system or where assistance is available to the applicant through his or her trade union or some other body;
- (b) Conveyancing and deceased estates unless:
 - (i) conveyancing proceedings are necessary or ancillary part of the proceedings for which assistance has been provided, e.g., where assistance was granted for family law proceedings which resulted in an Order for transfer of the family home to the assisted person.
 - (ii) it appears for compassionate or social reasons that there is an immediate need for the finalisation of the deceased's affairs and there are insufficient assets in the estate out of which legal costs can be paid.
- (c) Disputes within organisations e.g. unions, associations, clubs, religious organisations etc., unless the applicant would suffer extreme hardship in the nature of loss of livelihood or property if assistance was refused;
- (d) Proceedings under the *Aboriginal Land Rights (NT) Act 1976* and *Native Title Act (NT) 1993*;
- (e) Commercial or business disputes;
- (f) Motor vehicle property damage and minor civil and contractual disputes;
- (g) Bankruptcy proceedings;
- (h) Defamation proceedings;
- (i) Adult guardianship applications.

Guideline 3

Civil Matters Generally

Assistance will be limited initially to an investigation of merits of the applicant's case.

Normally, further assistance will only be provided where:

- (a) the applicant has reasonable prospects of success; and
- (b) there are reasonable prospects of recovering from the other party the amount of any judgment or costs order; and
- (c) the applicant can establish that assistance is not available from the Northern Territory Contingency Legal Aid Fund.

In all applications for assistance in civil matters the Commission will weigh the benefit that the applicant is likely to derive against the estimated cost to the Commission of providing that assistance.

Where assistance is granted to an applicant to enable him or her to bring or defend a proceeding, the applicant should assume that if they derive any financial benefit from the proceeding they will most likely be required to repay to the Commission the ordinary professional costs of the legal services provided.

Guideline 4

Matters under the *Criminal Property Forfeiture Act 2002 (NT)*

Subject to the NT Guidelines for Civil Law Matters and the following, legal aid may be available for proceedings under the *Criminal Property Forfeiture Act*:

- (a) Where the value of the property which is the subject of the proceedings exceeds the likely cost of providing assistance;
- (b) Where disclosure of an accused person's defence to criminal proceedings is likely to be required provided that assistance in these circumstances will normally be limited to an application for a stay of proceedings under the *Criminal Property Forfeiture Act* until the related criminal proceedings are resolved;
- (c) Normally, the application will be reassessed after disposition of the criminal proceedings;

- (d) Where assistance is granted in proceedings under the *Criminal Property Forfeiture Act*, the assisted person will:
 - (i) execute an equitable charge (and in the case of real estate a charge in registrable form) in favour of the Commission to secure repayment of the cost of assistance;
 - (ii) instruct his/her solicitor to seek an order that funds to be paid or released to the assisted person be paid into the solicitors trust account from which the amount of the cost of the assistance is to be disbursed to reimburse the Commission prior to any release of the balance of the assisted person.
- (e) A solicitor will not be approved to represent an assisted person in proceedings under the *Criminal Property Forfeiture Act* unless he/she has first obtained instructions from the assisted person (his/her client) to seek an order that any amount awarded the assisted person be made out and deposited into the solicitor's trust account.

Introduction

The Contingency Legal Aid Fund is available to provide financial assistance to eligible persons to enable them to bring or defend civil proceedings. It was set up with a seeding grant from the Law Society Public Purpose Trust and is administered by the Northern Territory Legal Aid Commission in accordance with Section 44 of the *Legal Aid Act*.

Where assistance is granted to an applicant to enable him or her to bring or defend a proceeding, the applicant should assume that if they derive any financial benefit from the proceeding they will most likely be required to repay to the Commission the ordinary professional costs of the legal services provided.

Pursuant to section 12(e) of the *Legal Aid Act* the following guidelines govern applications for the provision of legal assistance from the Contingency Legal Aid Fund (the “fund”).

Guideline 1

Financial Assistance

Financial assistance is available from the Fund to cover the reasonable cost of disbursements and out of pocket expenses that are necessarily incurred during the course of litigation including such items as stamp duty, service fees, expert witness reports, travelling expenses and expert witness Court attendance fees. The Fund does not pay Solicitor’s professional fees and would not usually cover Counsel’s fees or reimburse general office expenses such as photocopying, telephone charges or facsimile charge unless specific authorisation had previously been obtained.

Where financial assistance is granted to enable a person to bring or defend a civil proceeding a Loan Contract will be offered to the assisted person. The Loan Contract will specify the terms and conditions of assistance, the type of expenses that will be covered as well as the maximum amount of the Fund’s liability for those expenses.

Guideline 2

Applications for Assistance

- (a) All applications shall be in the prescribed form and delivered to:
- | | |
|--------------------------------|--------------------|
| The Fund Manager | Mailing address: |
| Contingency Legal Aid Fund | Locked Bag 11 |
| C/- NT Legal Aid Commission | DARWIN NT 0801 |
| 6th Floor 9-11 Cavenagh Street | |
| DARWIN NT 0800 | |
| Ph: (08) 89993000 | Fax: (08) 89993005 |
- (b) (i) All applications shall be accompanied by a letter from the applicant's solicitor, (which solicitor must be on the list of private legal practitioners maintained under Section 30 of the *Legal Aid Act*) detailing the merits and prospects of success of the proposed proceeding and the expected quantum.
- (ii) The solicitor will also be required to provide an undertaking to accept instructions from an assisted person on the basis that the solicitor's professional fees and Counsel's fees not covered by the grant of assistance, are not sought or paid until the matter is concluded.
- (iii) If it is proposed that Counsel will be briefed during the course of litigation then the solicitor should also indicate whether Counsel has been engaged generally in the matter and whether Counsel is prepared to await finalisation of the matter for payment of his or her fees.
- (iv) The letter should also set out the nature and anticipated cost of the disbursements that are likely to be incurred during that stage of the proposed litigation.
- (c) An administration fee of \$200.00 (plus GST) shall be payable on the lodgment of the application. However, the Fund Manager has the discretion to waive all or part of the fee in circumstances where payment would involve undue hardship to the applicant.
- (d) If the Fund Manager is of the opinion that the applicant is clearly outside the Fund's guidelines the applicant will be given the option of withdrawing the application and if this occurs the fee will be refunded in full.
- (e) All applicants' shall disclose their full financial circumstances and if assistance is granted the applicant shall promptly disclose to the Fund Manager any significant variations in his or her financial circumstances. The applicant shall if

required by the Fund Manager provide additional information or authorise any other person to disclose financial information.

Guideline 3

Means Test

Assistance will only be granted to an applicant who is unable to reasonably meet the expected cost of the disbursements that would be occasioned in the proposed or actual litigation from the income and assets available to the applicant.

Guideline 4

Assessment of Applications

- (a) Once an applicant has provided all relevant information the Fund Manager will arrange for the application to be assessed by a Legal Aid Committee established in accordance with Part III of the *Legal Aid Act*. The Committee shall consider each case in the light of the following assessment criteria which are listed in order of priority, commencing with the highest priority:
 - (i) To grant assistance only when the applicant meets the financial criteria for a grant of assistance.
 - (ii) To ensure the solvency of the Fund.
 - (iii) To give preference to cases with good prospects of success.
 - (iv) To give preference to those cases where the applicant has not previously been required to pay interim accounts for legal fees.
 - (v) To support litigation of general importance.
- (b) The Committee shall be careful to ensure that no more cases are assisted in any one year than is consistent with the budget for the Fund.
- (c) If it appears to the Committee that the Applicant may be eligible for Legal Aid in accordance with Section 26 of the *Legal Aid Act*, the Committee may determine to reject or postpone consideration of the application until the applicant has lodged an application for legal aid.
- (d) In the absence of exceptional circumstances any assistance will not be granted retrospectively.
- (e) Any grant of assistance will extend from the date of receipt of the application to a set stage in the litigation process. At the conclusion of each of the stages of

litigation the assisted person may apply to the Committee through his/her solicitor, to extend the assistance to cover the next stage of the proceedings.

- (f) The Committee shall not approve assistance for any litigation outside the Northern Territory unless the cause of action shall have arisen in the Northern Territory.
- (g) The Committee may require, as a condition of assistance, the applicant to contribute to the expected cost of the disbursements that will be incurred in the litigation having regard to the applicant's financial circumstances. Further the Committee may subsequently vary the terms of the contribution requirement on the grounds of the applicant's changed financial circumstances or a change in the merits or expected cost of the case.
- (h) Any contribution fixed in accordance with these guidelines shall be paid at such time and in such manner, as the Committee shall direct.
- (i) The Committee may impose a condition of assistance that the assisted person provides an equitable charge for the benefit of the Northern Territory Legal Aid Commission, as administrator of the Contingency Legal Aid Fund, over any land in which that person has an interest.
- (j) If the application is rejected then the assisted person has the right of requesting a reconsideration or review in accordance with Part VI of the *Legal Aid Act*.
- (k) An application for reconsideration or review must be in writing and made within 3 months of the date the applicant has received or can reasonably be expected to have received the earlier decision refusing financial assistance.

Guideline 5

Variation of Assistance

A committee, whether in fact it was the Committee that determined the application, may at any time after the approval of the application for assistance vary, suspend, cancel or terminate such assistance on any of the following grounds:

- (a) The information provided by the assisted person or their solicitor to the Committee was materially inaccurate.
- (b) The assisted person's case appears to lack merit.
- (c) The ultimate return to the Fund is likely to be significantly less than the earlier anticipated return.
- (d) The assisted person has unreasonably refused to follow advice from their solicitor.

- (e) Failure by the assisted person or their solicitor to report adequately to the Fund Manager.
- (f) Failure by the assisted person or their solicitor to comply with any rules or any requests or direction of the Fund Manager.
- (g) Any other good cause.

If the committee terminates the grant of assistance then all monies paid by the Fund on behalf of the assisted person prior to termination shall be immediately recoverable by the Northern Territory Legal Aid Commission on behalf of the Fund.

On termination the matter will be deemed to be concluded and the assisted person's solicitor will be entitled to render an account to the client for professional services up to that time.

Guideline 6

Reporting

The Fund Manager may require a report from the assisted person or their solicitor (including an opinion from Counsel) at any time regarding any matter connected with the assisted litigation or the financial circumstances of the assisted person. Such report should be provided to the Fund Manager upon request within a reasonable time.

The applicant's solicitor shall immediately inform the Fund Manager upon becoming aware of any changes in the assisted persons financial situation or of any other matters which may tend to result in the Committee varying the terms and conditions of assistance.

Guideline 7

Contingency Fee

- (a) In determining to grant assistance to an applicant the Committee will specify a fee that the applicant will be required to pay to the Fund (over and above the reimbursement of monies actually expended by the Fund) upon successful completion of the applicant's litigation. This is referred to as the "contingency fee".
- (b) The contingency fee shall be a pre-determined percentage of the monies actually advanced by the Fund during the course of litigation.
- (c) The contingency fee together with the entitlement of the Fund to recover all monies expended during the course of litigation shall be a first charge, enforceable by the Northern Territory Legal Aid Commission, on any amount or

value of property recovered by the assisted person as a result of the assisted litigation and these sums shall be paid to the Fund as soon as practicable.

- (d) Where the assisted person derives no benefit from the proceedings then the contingency fee will not be payable. However, the assisted person will be liable to repay to the Fund all monies advanced on his or her behalf and the assisted person will also be liable to pay or her solicitor's and Counsel's fees.

Guideline 8 **Payments from the Fund**

- (a) The Fund shall reimburse the assisted person's solicitor for those disbursements specified in the certificate of assistance, as they arise. It is envisaged that solicitors would pay the expense at first instance and then submit an account to the fund for reimbursement however where significant items of expenditure are involved the Fund Manager can authorise pre-payment.
- (b) In cases where the certificate authorises the payment of a fee for an advice from Counsel the brief should be marked with that relevant fee.
- (c) Upon completion of the proceedings the assisted person's solicitor and Counsel will be entitled to render a charge to their client for their full professional fees in accordance with the applicable costs scale or pre-existing fee agreement.
- (d) A legal practitioner shall not render any charge to an assisted person for professional fees except in accordance with these guidelines and the Fund has no liability to meet the practitioner's professional fees or Counsel's fees unless these have been specifically authorised by the certificate.

Guideline 9 **Termination of Assistance**

An assisted person may terminate the assistance at any time by notifying the Committee in writing. However, the contingency fee and all monies paid from the Fund on behalf of the assisted person shall continue to be recoverable pursuant to these guidelines and the Northern Territory Legal Aid Fund may in its discretion recover all or part of the amount payable to the Fund.

Guideline 10 **Transfer of Assistance**

An assisted person may with the permission of the Committee transfer the grant of assistance from one solicitor to another. In determining whether to approve the transfer

the Committee will also decide whether the assisted person's original solicitor should be entitled to render an account for professional services at the time of transfer, rather than upon conclusion of the matter.

Guideline 11 **Litigation Support Loan Contract**

Before any financial assistance is provided to a person in accordance with this section, the applicant(s) must first have executed a Litigation Support Loan Contract.