

# 1 Social Security Practice (In-House VLA practitioners)

This section provides definitions and guidance for VLA In-House practitioners submitting applications for assistance from the Social Security Practice. Assistance extends to Social Security (ARO and SSAT) matters and Equal Opportunity matters. (This section should be read in conjunction with Guidelines 5 and 12, Appendix 2B of the Legal Aid Handbook. Any matter that is not the subject of commentary has been deemed sufficiently clear not to need such commentary.)

## 1.1 Allocation of Work Guideline

In the absence of compelling reasons, social security matters at the ARO and SSAT and state equal opportunity matters will be allocated to officers of VLA. It is the intention of VLA in providing assistance in these matters that it will be more effective, efficient and economic for these matters to be allocated to the in-house civil practice. Regard is had to the specialised nature of the law involved and the relatively small volume of matters. Compelling reasons for the assignment of a matter to an external practitioner would include where there is a conflict of interest in VLA acting for the applicant, where there is a relationship between the client and the solicitor, particularly if the client has any disability, the capacity of the Social Security Practice to take the work on.

## 1.2 SOCIAL SECURITY (ARO and SSAT) State Guideline

### 1.2.1 SOCIAL SECURITY MATTERS AT ARO LEVEL

Assistance may be provided for social security matters at the Authorised Review Officer (ARO) stage. These cases will (in the absence of compelling reasons) be allocated to VLA's Social Security Practice.

Practitioners can recommend a grant of assistance, having regard to the following matters:

The cost benefit test i.e. the benefit that may accrue to the applicant having regard to the legal costs to be incurred in obtaining this result

The merits test i.e. whether the proceeding will determine in a manner favourable to the applicant

#### Example 1

A client has a Centrelink overpayment of \$1 000. He wishes to appeal to the ARO to request that the debt be waived because of solely administrative error and because he believes that he received the payments in good faith.

In VLA's view, a recommendation for assistance should not be made because the potential benefit to the client is less than the legal costs to be incurred. It therefore does not meet the cost benefit test.

### **Example 2**

A client has applied for the Disability Support Pension. Centrelink has refused his claim because he has been assessed as having an impairment rating of 15 points instead of the legislative requirement of at least 20 points. Centrelink concede that he has a continuing inability to work. The client instructs that his GP is treating him for bipolar affective disorder and that Centrelink has not taken this into account in assessing his claim.

*In VLA's view, a recommendation for assistance should be made because it is arguable that after the client obtains a suitable medical report from his GP, he is likely to have his impairment rating increased to at least 20 points. He therefore meets the merits test. He also meets the cost benefit test because he is likely to receive an ongoing benefit.*

## **1.2.2 SOCIAL SECURITY MATTERS AT SSAT LEVEL**

Assistance may be provided for social security matters at the Social Security Appeals Tribunal (SSAT) stage. These cases will (in the absence of compelling reasons) be allocated to VLA's Social Security Practice.

Practitioners can recommend a grant of assistance, having regard to the following matters:

The cost benefit test i.e. the benefit that may accrue to the applicant having regard to the legal costs to be incurred in obtaining this result

The merits test i.e. whether the proceeding will determine in a manner favourable to the applicant

### **Example 1**

The client was in receipt of Parenting Payment Single. Centrelink has recently decided to cancel her payments and to raise an overpayment because they believe that she has been in a marriage like relationship with the father of the children. The client instructs that she does not believe that she was or is in a marriage like relationship. Firstly because they have always lived separately and apart under the same roof and secondly because the father of the children cannot financially contribute to the household because he is on a bridging visa and is not allowed to work.

*In VLA's view, a recommendation for assistance should be made because it is arguable that the client should not be treated as a member of couple under Section 4 of the Social Security Act "Definition of a Marriage like Relationship". Secondly it is arguable because of her particular circumstances she should not be considered to be a member of a couple under Section 24 of the Social Security Act.*

*If successful, it would mean that the client's Parenting Payment Single would be reinstated. In addition, it would mean that she does not have a Centrelink overpayment. She therefore meets the merits test. She also meets the cost benefit test because she is likely to receive an ongoing benefit and avoid a large Centrelink overpayment.*

### **Example 2**

Centrelink has recently advised the client that she has a Family Tax Benefit overpayment because the children were not in her care between 2001 and 2003. The client insists that the children were in her care during the relevant period and that the father of the children refused to have any contact with them. VLA assisted the client at the ARO stage, and the ARO decided to affirm the Family Tax Benefit overpayment. The ARO decision refers to an independent reliable source indicating that the children were in the father's care during the relevant period. The client is unable to produce evidence or witnesses to refute this information, but still wishes to appeal to the Social Security Appeals Tribunal.

*In VLA's view, a recommendation for assistance should not be made because the client does not meet the merits test.*

## **COMPLIANCE REQUIREMENTS**

A practitioner's file must include:

A reference to the relevant Guideline;  
Full details of the client's case and Centrelink's documentation.  
The practitioner's assessment of the likely outcome.

In assessing the likely outcome, practitioners should, wherever possible:

Cite legislation and/or case law that supports the recommendation;  
Cite or quote unreported examples (where applicable) where similar fact situations have resulted in favourable outcomes;

### **Costs**

The practitioner must also demonstrate on file that attention has been turned to, and advice given, in relation to the potential quantum of solicitor/client professional costs and disbursements that may be incurred when conducting the matter. A notation should also be made on file that the client has been made aware of VLA's Debt policy. In particular, if the client receives any lump sum Centrelink payment, a contribution towards the legal costs incurred may be sought.

## **USE OF EXTERNAL COUNSEL**

The vast majority of this work, including appearances, will be done in-house, save for the occasional matter where Counsel is briefed to appear or other disbursements are required.

## **MEDICAL REPORTS**

Where a practitioner recommends disbursements for the matter, the principles set out in Chapter 8 of the Notes on VLA Guidelines and Section 1.4 of these notes apply.

## **INDIVIDUAL WORK CAPACITY REPORTS**

Where a practitioner recommends disbursements for the matter, the principles set out in Chapter 8 of the Notes on VLA Guidelines and Section 1.4 of these notes apply.

## **FURTHER INFORMATION**

It is important to note that at the beginning of the ARO stage and/or SSAT stage, the practitioner should obtain an updated Application for VLA assistance, supporting financial documentation, complete a checklist and forward it to the **Simplified Grants Unit**.

At the end of the ARO stage and/or SSAT stage, the practitioner should cost and close their file and notify the Simplified Grants Unit of the outcome of the matter.

It is also important to note that at the beginning of the AAT stage, the practitioner should obtain an updated Application for VLA assistance, supporting financial documentation, prepare a memorandum of support and forward it to the **Grants Assessment Unit**. Such applications will need to comply with Guideline 2.1 and/or 2.2 of Part 4 of Appendix 2D of the VLA Guidelines in order for assistance to be granted.

## 1.3 EQUAL OPPORTUNITY & DISCRIMINATION

Assistance will be provided for cases in Equal Opportunity Commission and VCAT. These cases will (in the absence of compelling reasons) be allocated to VLA's Social Security Practice.

Practitioners can recommend a grant of assistance, having regard to the following matters:

- The cost benefit test i.e. the nature and extent of the relief sought and the benefit that may accrue to the applicant
- Whether the matter has **strong** prospects of benefit being gained by the applicant

When considering the merits of granting assistance, the cost benefit test should be considered at each stage of the proceeding.

In cases where applicants should avail themselves of a conditional fee agreement, the provisions of the VLA Guidelines, Chapter 2, Appendix 2B, Clause 1.4 will apply, and the matter should be referred to an appropriate private practitioner.

In considering whether the matter should be conducted under a conditional cost agreement, consideration should be given to the costs of funding the matter privately and the likely remedy that the applicant will receive.

### **Example 1**

*An applicant seeks monetary compensation, and an apology, arising out of the respondent's potential breach of the Equal Opportunity Act. The applicant has been off work for almost six months prior to seeking legal advice. After considering all matters, the practitioner is of the view that the recompense sought is not likely to be awarded. A more likely result is either:*

- *a pre-hearing settlement in the sum of \$3500, without an apology; or*
- *the 50-50 possibility of a win at hearing stage, with the possibility of an apology.*

In VLA's view, a recommendation for assistance should be made for all steps prior to the hearing of the matter. However, as the prospects of a benefit to the applicant at the hearing are not strong, assistance should not be recommended for the hearing.

### **Example 2**

*An applicant seeks an apology and a reference from a former employer after being dismissed on what are potentially discriminatory grounds. The practitioner is of the view there are strong prospects of obtaining this relief, but the respondent is notorious for declining to make any reasonable offers prior to hearing, and has –in the past- insisted on conducting negotiations "at the court's door".*

In VLA's view, a recommendation to aid this matter is justified, notwithstanding that grants of aid to conduct the matter at a hearing will likely exceed \$3600. When recommending this grant, the practitioner should carefully note the benefit that might accrue to the applicant, including the details of any non-monetary remedy. In addition, the practitioner should consider the nature of the respondent's wrong-doing, and whether it is provable, if run to a defended hearing.

### **Example 3**

*An applicant seeks a monetary award. The practitioner is of the view the matter satisfies the merits test, and a likely award is between \$9 000 and \$12 000.*

In VLA's view, a recommendation for assistance by VLA's Social Security Practice can be made. The matter is not a large damages award.

## **DEFINITIONS**

“**Benefit**” includes any of the following:

- reinstatement of employment or improved conditions of employment
- obtaining an apology and/or reference(s)
- provision of education and training in equal opportunity and discrimination
- award of monetary compensation
- declaration that the conduct was prohibited

## **COMPLIANCE REQUIREMENTS**

A practitioner's file must include:

- A reference to the relevant Guideline;
- Full details of the applicant's case, and (if available), the respondent's documentation.
- The practitioner's assessment of the likely outcome.

In assessing the likely outcome, practitioners should, wherever possible:

- Cite authority for the proposition that supports the recommendation;
- Cite or quote unreported examples (where applicable) where similar fact situations have resulted in awards/orders commensurate to the relief sought in the instant case;
- Advise why the matter enjoys strong prospects, as opposed to the usual civil standard of “more likely than not.”

## **Costs**

The practitioner must also demonstrate on file that attention has been turned to, and advice given, in relation to the potential quantum of solicitor/client professional costs and disbursements that may be incurred when conducting the matter. A notation should also be made on file that the client has been made aware of VLA's Debt policy, and in particular that a full contribution from any award may be sought.

## **USE OF EXTERNAL COUNSEL**

### **Use of External Counsel Generally**

The vast majority of this work, including appearances, will be done in-house, save for the occasional matter where Counsel is briefed to appear or other disbursements are required.

## **INTERLOCUTORY APPLICATIONS**

Applications for further and better particulars are included within the lump sum fee and no further fee is payable.

Where an appearance needs to be undertaken for an interlocutory application (eg. for strike out applications), application should be made to the Grants Division as to whether and what fee is payable. This will be referred to the Costs Adviser.

The Frequency of these applications will need to be monitored. If they become an ongoing issue, consideration will be given to a request to amend Table W to include preparation and appearance fees for such applications.

## **MEDICAL REPORTS**

Where a practitioner recommends disbursements for the matter, the principles set out in Chapter 8 of the Notes on VLA Guidelines and Section 1.4 of these notes apply.

## **EXPERT WITNESSES**

Where a practitioner recommends disbursements for expert witnesses, the principles set out in Clauses 8.4.2 & 8.4.3. of Chapter 8 of the Notes on VLA Guidelines and Section 1.4 of these notes applies.

## 1.4 DISBURSEMENTS – Social Security Practice

### State Social Security and Equal Opportunity matters

#### **Medical reports**

Before recommending that assistance be granted for such reports, practitioners must form the view that the medical report is necessary to establish the claim and/or the remedy sought.

Assistance may be recommended by practitioners for medical reports up to the sum of \$200.

#### **Individual psychiatric/psychological reports**

Before recommending that assistance be granted for such reports, practitioners must form the view that the medical report is necessary to establish the claim and/or the remedy sought.

#### **Individual Work Capacity Reports**

A practitioner is able to recommend assistance for an Individual Work Capacity Report. Before recommending that assistance be granted for such reports, practitioners must form the view that the individual work capacity report is necessary to establish the claim and/or the remedy sought.

Assistance may be recommended by practitioners for Individual Work Capacity Reports up to the sum of \$460.

#### **Statewide Civil Law Service**

The following fee table applies to the VLA in-house Social Security Practice for matters relating to Social Security (ARO & SSAT) and Equal Opportunity matters.

#### Table of Fees – Social Security Practice (In-house grants only)

<b>Available as of right. No recommendation required.</b>			
Interpreters	Available as of right. No recommendation required.		
Freedom of Information*	If under \$40 – available as of right. No recommendation required.		
Title Searches	Available as of right. No recommendation required.		
Police Reports*	\$50 maximum.		
<b>Available via recommendation</b>			
	Report	Treating	Supplementary
Psychologist/Psychiatrist*	\$510/\$582	\$318/\$396	\$288/\$360
For DSP –matters.	( As per Table P )		
General Practitioner (GP) Report*	\$200 maximum		

Hospital Report*	\$280 maximum
Work Capacity Report*	\$460 maximum
Witness Expenses* Psychologist/Psychiatrist – Court Attendance	\$510/\$582 for ½ day attendance \$726/\$870 for full day attendance (As per Table P)
* If costs exceed amount then recommendation seeking higher fee is required.	
Other disbursements not set out in the table require prior approval from the Grants Division.	