

18 May 2012



Financial Assistance Consultation
Attorney-General's Department
By e-mail: finass@ag.gov.au

Dear Sir/Madam

Where are the gaps? Consultation paper – A new scheme for assistance with disbursements

The Public Interest Advocacy Centre (PIAC) welcomes the opportunity to provide comment on the establishment of a Commonwealth funded consolidated financial assistance scheme to cover the cost of disbursements in a wide variety of legal matters.

PIAC is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC conducts litigation on a broad range of public interest issues, particularly where the rights of a significant number of people are affected. These include cases on human rights, discrimination, consumer protection, administrative law and constitutional matters. Through its Homeless Persons' Legal Service project, PIAC also provides a specialist criminal law service for people experiencing homelessness.

In addition to its litigious work, PIAC also conducts minor casework in a wide variety of legal matters and runs an extensive community legal education program.

PIAC receives funding from Legal Aid NSW for its criminal law work and some of its public interest test cases. In these matters, PIAC is usually able to recover its disbursement costs through the grant of aid.

In litigious matters, PIAC often acts on a contingency fee basis, seeking to recover the costs of its professional fees and disbursements only if there is a favourable outcome for the client. In the event that a costs order is made in favour of our client, or a matter settles on the basis that the other side pay an amount to our client for costs, PIAC will recover costs and disbursements accordingly. In other cases, the cost of disbursements is borne either by the client or, as in most cases, by PIAC.

We will address some of the questions raised by the issues paper below.

Level 7, 173-175 Phillip St
Sydney NSW 2000
DX 643 Sydney
Phone: 61 2 8898 6500
Fax: 61 2 8898 6555
www.piac.asn.au
ABN: 77 002 773 524

What are the types of disbursements that generally arise in the course of a Commonwealth law matter?

The common disbursements that PIAC encounters in the provision of legal services (including in Commonwealth law matters) are barristers' fees, fees associated with accessing government information pursuant to freedom of information requests, fees for obtaining health records for clients, court fees, court transcript fees, travel and accommodation expenses for solicitors and barristers to appear in courts and tribunals outside Sydney and photocopying and printing charges.

PIAC supports the proposal that the scheme should specify the types of disbursements that are claimable to ensure administrative efficiency and transparency and to provide clarity for legal service providers. However, PIAC suggests that the scheme should allow for a broad range of disbursements to be claimed.

Should Counsel fees be considered a disbursement for the purposes of this scheme?

PIAC acknowledges that including barristers' fees, as a claimable amount under the scheme may be beyond the financial capacity of the scheme given the amounts that are likely to be involved. However, PIAC feels strongly that the scheme should allow for barristers' fees to be claimed for cases that are in the public interest, in order to increase the chances of attracting senior and experienced counsel to run such cases.

Allowing barristers' fees to be claimed under the scheme would remove some of the barriers to conducting public interest litigation. Further, such a measure would improve access to justice for disadvantaged and marginalised people seeking to bring cases that are in the public interest.

PIAC suggests that the definition of 'public interest litigation' for the purposes of the proposed scheme should include the following:

- the matter raises an issue of public importance;
- the matter will have an impact beyond the rights of the individual parties to affect a larger group of people. It heightens the public interest dimension of a matter if that larger group of people includes, in particular, disadvantaged and marginalised people; and
- important rights and obligations will be determined or enforced by pursuing the matter.

Where matters are successful in a costs jurisdiction, barrister's fees will be payable by the losing party and reimbursed to the scheme.

Of the Commonwealth law matters suggested for inclusion in the new scheme, should any additional matters be considered 'exceptional', and therefore appropriate to attract legal representation costs as well as assistance for disbursements?

Again, we consider that the scheme should cover legal representation costs where matters are in the public interest. Public interest cases have the potential to assist disadvantaged and marginalised people and to clarify legal issues for the benefit of the community. Funding for such matters is essential, particularly in jurisdictions where each party bears their own costs (in costs jurisdictions, conditional costs arrangements are common).

Where matters are successful in a costs jurisdiction, legal representation costs will be payable by the losing party and reimbursed to the scheme.

The definition of 'public interest' should be as mentioned above.

Are the proposed payment arrangements feasible for the payment of disbursements likely to be covered by the new scheme? Are there other payment arrangements you would like to see considered?

PIAC suggests that the proposed scheme should allow claimants to apply for, and if successful, receive, an up-front disbursement grant at the beginning of a matter, and prior to expenses being incurred.

Under such an approach, claimants could outline in an initial application to the scheme, the types of disbursement costs anticipated in the matter and claim an up-front payment to meet those costs. To ensure transparency and accountability, claimants would need to keep appropriate accounts of expenditure of the grant and provide these accounts to the scheme periodically or as requested.

At the conclusion of the matter any unexpended amount of the grant should be reimbursed to the scheme. Similarly, if the disbursement costs are later recovered from another source, for example, as part of a settlement or pursuant to a costs order, the amount advanced through the grant should be paid back to the scheme.

Legal cases, particularly complex litigious matters, often take a long time to conclude. Having to pay expenses up-front during the course of the matter can place a significant financial burden on some legal service providers. PIAC's suggested approach would assist legal service providers, in particular, community legal services, by providing financial assistance up-front rather than delaying payment until the conclusion of the matter.

Should you require any further information, please contact Alexis Goodstone on (02) 8898 6558.

Yours sincerely

A handwritten signature in black ink that reads "A. Goodstone". The signature is written in a cursive style with a large, looped initial "A".

Alexis Goodstone
Principal Solicitor
Public Interest Advocacy Centre

Direct phone: +61 2 8898 6558
E-mail: agoodstone@piac.asn.au