

# Conditions of Assistance

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## 4.1 Introduction

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Legal assistance may be granted on condition that the applicant pay a contribution towards VLA's costs, VLA's "out of pocket expenses", and/or consent to a charge over property in which he/she has an interest.

## 4.2 General Terms Of Legal Assistance

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The application for legal aid contains standard terms of assistance to which an applicant agrees when signing the application form. These conditions are:

- (i) The applicant must tell VLA immediately:
  - (a) of a change address while receiving legal aid, or
  - (b) of any change in the financial or other circumstances set out in the application, or
  - (c) of any other changes affecting his/her eligibility.
- (ii) The applicant authorises any lawyer who is acting for him/her, or who has done so in the past, to give VLA any information necessary for it to perform its functions under the *Legal Aid Act*.
- (iii) If the applicant's lawyers receive any money on his/her behalf during the period of aid they must immediately advise VLA of the amount received. They may be asked by VLA to hold from it the cost of the legal assistance provided.
- (iv) Any costs, awarded by the Court or payment by another party of costs in relation to a legally aided matter must be paid to VLA.
- (v)
  - (a) Aid may be stopped or changed if any of the above conditions are broken or the advice of the applicant's lawyer is not followed.
  - (b) If VLA stops legal aid, all legal costs up to that time are payable by the applicant.
  - (c) VLA may take a charge over the applicant's property and require interest in accordance with any policy at the time.

## 4.3 Contributions

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An assisted person may be required to pay a contribution towards the cost of assistance. The amount of this contribution depends on the applicant's financial circumstances. Payment may be required in a lump sum or by instalments at the beginning, during or end of the grant (s.27).

The Act authorises VLA to secure payment by charges or other security over property. In practice, payment is usually secured by equitable charges and irrevocable authorities, (see 4.4 for further information on charges).

VLA may charge interest on unpaid contributions.

Persons granted assistance in War Veterans matters and under the *Crimes (Mental Impairment and Unfitness to be Tried) Act* are not liable for a contribution.

### 4.3.1 Rights And Obligations Of Assisted Persons

VLA's practice in relation to contributions is

- To inform an applicant, or an assisted person, about her/his potential contribution to the cost of assistance at the time of granting assistance. The applicant may then accept or reject the offer of assistance.
- To advise the assisted person of:
  - the extent of her/his liability at any time on request;
  - the required manner of payment; and
  - the period in which VLA requires the payment to be made.
- To not allow payment of a contribution by instalments over more than five years unless the contribution is secured by a charge or irrevocable authority;
- To provide the assisted person on request with a copy of the assigned practitioner's account, although VLA will make the final decision about the amount paid to the practitioner.

### 4.3.2 Principles Of Assessment

VLA's assessment of contributions is guided by two principles:

- Where possible, an assisted person should be placed in a position which is equal to, but no better than, that of an unassisted person in relation to the payment of legal costs.
- An assisted person should contribute to the cost of legal assistance according to his/her ability to pay, without too much hardship.

### 4.3.3 Initial and Interim Contributions

VLA will decide at the time of granting assistance, or at the time of extending assistance, whether a contribution is required. For information about how VLA assesses contributions see Appendix 2I of this handbook.

### 4.3.4 Final Contributions

The amount that a person is required to pay may not be certain until the matter is finalised and VLA's costs are known.

VLA may require the payment of a final contribution at the end of a grant of assistance in the following circumstances.

#### ***Assisted Person Acquires Money From Legal Proceedings***

If an assisted person acquires money as a result of legal proceedings, she/he will usually be asked to pay the full cost of assistance as a final contribution.

When VLA assesses this amount it will disregard:

- a lump sum payment for child maintenance or child support in a family law case;
- amounts which must be repaid from an award or settlement to Centrelink or any other organisation; and
- legal costs incurred but not paid before the grant of assistance.

#### ***Assisted Person Acquires Property From Legal Proceedings***

If an assisted person acquires property as a result of the legal proceedings which were the subject of a grant of assistance, but does not have enough money to pay a final contribution, VLA will secure repayment of the final contribution either with an equitable charge or a statutory charge.

#### ***Other Circumstances***

VLA can request a final contribution where:

- the assisted person's financial position has improved after the grant of assistance or the last extension of the grant;
- at the time of the grant or an extension of the grant, the assisted person's future financial position was unclear;
- the actual cost of assistance has exceeded the estimated cost;
- the cost of assistance exceeds costs recovered by the assisted person; or
- the assisted person has not recovered costs.

In these circumstances VLA will:

- ask the assisted person to fill in a financial statement;
- apply the Means Test (including allowable deductions) to the applicant's financial circumstances to assess whether she/he should pay a contribution, and if so the amount to be paid;
- treat the actual cost of the legal assistance in the same way as the estimated cost in the Means Test;
- deduct any contributions which the applicant has paid to date from the final contribution;
- request payment of the contribution by the instalments specified in Appendix 4A if the applicant is required to pay a contribution on income, and
- request payment of the contribution in a lump sum if the applicant is required to pay a contribution on assets.

### ***Special Circumstances***

VLA recognises that there may be circumstances where recovery of the full cost of assistance would cause financial hardship or inequity to an assisted person. In these circumstances VLA may:

- waive the requirement for the assisted person to pay all or some of the final contribution;
- defer payment of some or all of the final contribution on condition that the assisted person sign an equitable charge to secure repayment of the final contribution; or
- defer payment of some or all of the final contribution without requiring a charge.

Special circumstances may include:

- an award for damages in a personal injuries case which is not sufficient to pay the assisted person's past, present or future medical expenses;
- the necessity to use an award to alter the assisted person's home to accommodate disability;
- Centrelink imposing a preclusion period which prevents the applicant from receiving a pension, benefit or allowance, and the applicant has insufficient other financial support during the preclusion period;
- the assisted person suffering a disadvantage as a result of legal assistance. For example, a court refuses to make an order for costs on the ground that the assisted person had received a grant of assistance.

VLA will usually not consider the following as special circumstances:

- the assisted person has spent, or is committed to spending, some or all of an award;
- the assigned practitioner has released an award without accounting to VLA, and the assisted person is unable or unwilling to pay the final contribution assessed;
- the assisted person wishes to use an award to pay debts rather than the final contribution - particularly if the assisted person incurred the debts after the grant of assistance;
- the assisted person wishes to use an award to buy a home or for home renovations;
- an award is less than the amount the assisted person believed she/he was entitled to receive; or
- Centrelink has made a decision, based on an award, to reduce the applicant's entitlement to Centrelink payments.

#### **4.3.5 Reviewing Financial Circumstances**

VLA will review an assisted person's financial circumstances from time to time. VLA may ask an assisted person to pay some or all of the final contribution and interest which is secured by the charge, either in a lump sum or by instalments, if:

- the grant of assistance was made on or after 1 July 1992; and
- VLA assesses that the assisted person can afford to pay some or all of the final contribution.

#### **4.3.6 Arrears of Contributions**

##### ***Arrears on an Existing Grant***

If the assisted person is more than sixty days overdue in paying all or part of her/his contribution, VLA may suspend the grant of assistance and direct the assigned practitioner to stop acting for the assisted person at VLA's cost until further notice.

The assisted person then has thirty days to either pay the arrears or ask VLA to change its decision about the amount or method of payment of the contribution. If neither action is taken VLA may terminate the grant of assistance.

##### ***Arrears on Finalised Grant***

If the assisted person is more than sixty days overdue in paying the final contribution or an instalment of the contribution, VLA will send the assisted person a notice of arrears.

The notice of arrears requires the assisted person either to pay the amount overdue, or to provide a satisfactory explanation for not paying and request VLA to change its decision about the amount or method of payment.

If the assisted person does not respond to the notice of arrears within thirty days, VLA may start court proceedings to recover the whole of the final contribution.

### ***Requests For New Grants Or Further Assistance***

VLA may refuse an application for assistance, or an application for a further grant of assistance, if the applicant is more than sixty days late in paying her/his contribution or contribution instalment.

If this occurs VLA will give written notice to the applicant of its intention to refuse the grant of assistance. If the applicant gives a satisfactory explanation for not paying the arrears and asks VLA to change its decision about the amount or method of payment of the contribution, VLA may grant assistance if the applicant qualifies.

### **4.3.7 Interest On Contributions**

If assistance was granted on or after 1 August 1993, VLA may charge interest for the late payment of a final contribution.

The rate of interest is 70% of the rate fixed under section 2 of the *Penalty Interest Rates Act 1983* (charged at a simple interest rate), that is, 70% of 12.3%, as at February 1998. This is 8.61%.

### **4.3.8 Reconsideration And Review**

If an assisted person is unhappy with VLA's decision to require a contribution, she/he can ask for a reconsideration of the decision. If still dissatisfied, the assisted person can ask an independent reviewer to review the decision. For further information about these processes see Chapter 7.

## **4.4 Charges On Property**

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A charge can be used by VLA to obtain security for the cost of legal assistance to be provided to an assisted person. The charge is placed on property owned by the assisted person. If the assisted person wants to sell, re-finance or borrow on the property, VLA may ask that some or all of the costs of assistance be repaid.

VLA can use an equitable charge or a statutory charge.

VLA will not take a charge on property where the person was granted assistance for a War Veterans matter or for proceedings under the *Crimes (Mental Impairment and Unfitness to be Tried) Act*.

#### 4.4.1 Equitable Charges

VLA may request an equitable charge as a condition of legal assistance. This request can be made in addition to, or instead of, a request that the assisted person pay money as an initial or final contribution. VLA may ask that an equitable charge be signed in three situations:

- (i) Before VLA grants assistance. This will secure payment of all or some of the cost of granting assistance.
- (ii) When VLA makes a further grant of assistance. This will secure payment of all or some of the current and future costs of assistance.
- (iii) At the end of a grant of assistance. This will secure payment of the amount assessed as a final contribution.

#### ***Debt Policy***

VLA has established a debt policy which will:

- treat VLA clients fairly and equitably;
- comply with VLA's obligations under the Legal Aid Act to obtain contributions from clients;
- avoid repeating the present situation where VLA's secured debt is overstated in its accounts.

The policy does not change VLA's existing approach to enforcement of equitable charges. VLA's policy is that payment is not required until the property is sold or refinanced. In addition, it is VLA policy that interest is not charged on outstanding contributions.

See Appendix 4C for a copy of the debt policy.

#### ***Lodging A Caveat***

If an assisted person signs an equitable charge, VLA will usually lodge a caveat at the Land Titles Office. This caveat restricts the assisted person's dealings with the property.

VLA may agree not to lodge a caveat if the costs of stamping, lodging and later withdrawing it would unreasonably add to the applicant's liability to VLA. See Appendix 4B for information about these costs.

#### ***Refusal To Provide A Charge***

##### ***Before A Grant***

If VLA asks an assisted person to sign an equitable charge before granting assistance, assistance will not be provided until the charge in registrable form is returned to VLA.

##### ***Existing Grant***

If VLA asks an assisted person to sign an equitable charge, VLA will suspend the grant of assistance and tell the assigned practitioner to stop work at VLA's expense until the charge is received.

If VLA suspends assistance as described in the last paragraph, it will notify the assisted person in writing. The assistance may then be terminated unless the assisted person takes the following action within thirty days of receiving the written notification:

- she/he signs the equitable charge;
- she/he provides a satisfactory explanation for not signing; or
- she/he asks VLA to review its initial decision.

### *Application for a new grant*

If an assisted person has not signed an equitable charge on a current or finalised grant and she/he applies for a new grant of assistance, VLA will refuse assistance unless:

- she/he signs the equitable charge; or
- she/he provides a satisfactory explanation for not signing.

Legal assistance does not commence until the assisted person also signs a charge for the new grant.

However, if an equitable charge was not given in fulfilment of a condition on which assistance was given, VLA would usually place a statutory charge on the property (see 4.4.2).

### **4.4.2 Statutory Charges**

A statutory charge has the same effect as an equitable charge. The main difference is that a statutory charge does not need to be signed by the owner of the land. VLA is empowered to take out a statutory charge under the Act (ss. 27 & 47A) where it has advised the applicant in writing that any grant would be subject to a charge over the property or where a person receiving assistance has not paid an amount as and when required by VLA or given a charge to secure payment of monies due to VLA.

### **4.4.3 Dealing With Property**

VLA does not usually allow dealings with property that is subject to a charge. VLA may require the assisted person, or the assisted person's estate, to pay VLA the amount secured by the charge if the assisted person:

- sells the property;
- sells the property and buys another one;
- obtains a new loan using the property as security;
- transfers the property to another party as part of a matrimonial property settlement; or
- dies.

The assisted person must inform VLA before signing any contracts, mortgage or transfer of land documents that will affect the property which is subject to the charge.

If VLA is satisfied that payment of the total amount secured by the charge would cause exceptional hardship, it may agree to accept a smaller amount.

If an assisted person needs VLA to provide a withdrawal of caveat, consent to registration of a dealing, or any other document relating to a charge, she/he should write to VLA at least twenty-one days prior to the date when the document is required and provide the following:

- The file number;
- the caveat or memorial number; and
- the document which the assisted person needs VLA to sign.

If the assisted person cannot give twenty-one day's notice, VLA will try to meet the assisted person's requirements, but will not accept any responsibility for any damage which the assisted person may suffer due to delay.

Requests for withdrawals of caveats, consent to dealings, or other documents should be sent to the VLA office which handled the grant of assistance. If sending a request to the Melbourne Office it should be addressed to:

Conveyancing and Securities Officer  
Finance and Administration Division  
Victoria Legal Aid  
350 Queen Street  
MELBOURNE VIC 3000  
Telephone: (03) 9606 5271  
Fax: (03) 9269 0444

## **4.5 Costs Payable By VLA**

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If a court or tribunal makes an order for costs against an assisted person in a proceeding or cross-proceeding, the Act (s. 48) allows VLA to pay some or all of those costs to the person in whose favour the costs order is made at the request of the assisted person or the other party.

VLA will only pay the amount of costs which it considers just and equitable and in cases other than appeals, only if the person requesting payment would suffer substantial hardship if the costs were not paid.

### **4.5.1 Requesting Costs Under Section 48**

VLA requires requests for payment of costs under section 48 to be in writing. In some cases VLA may require information in the form of a statutory declaration. The applicant should state the nature and extent of the hardship which she/he will suffer if the costs are not paid. If the applicant is a public company, a private company, an incorporated association or individual(s) of means, and for whom legal expenses may be an allowable deduction for taxation purposes, "substantial hardship" would not be able to be demonstrated.

In deciding what would be just and equitable for VLA to pay (if anything), VLA will consider the conduct of both the assisted person and the party awarded costs in the proceedings, whether the proceedings were prolonged by either party and whether the assisted person had made a full disclosure of everything going to the merits of his/her case.

If VLA pays costs under section 48, it may require the assisted person to reimburse VLA for some or all of this amount and secure the reimbursement in any manner it thinks fit. VLA may charge interest at 9.24% (as at November 1995) on the amount which the assisted person is required to reimburse.

### 4.5.2 Who Decides Section 48 Requests?

The Managing Director considers claims for costs under section 48 of the Legal Aid Act.

### 4.5.3 Reconsideration And Review

Any person affected by a decision of VLA in relation to a section 48 request may ask for a reconsideration of the decision. If dissatisfied with the result of the reconsideration the person may apply, in writing, for a review of the decision by an independent reviewer. For more information see Chapter 7.

### 4.5.4 Requests For Indemnity In Test Cases

Where the proceedings are in the nature of a test case, VLA may agree, in advance, to indemnify an assisted person against payment of costs if the case is unsuccessful. The indemnity will only apply if:

- the costs, which are the subject of the order, are attributable to proceedings covered by the grant; and
- the assisted person has not breached the terms and conditions of assistance.

## 4.6 Limits on Assistance

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VLA places a cost ceiling on the amount it will pay for many types of matters so that it can provide assistance to as many clients as possible. Once the ceiling is reached VLA will pay no further costs. VLA also limits the amount it will pay for stages of matters.

The cost ceilings are set out at 6.2.1, Chapter 6.

## Secured Debtors Contributions

| Applicant's Weekly Net Assessable Income Range | Monthly Payment   |
|--|---|
| \$   | \$  |
| 355 – 364                                      | 70  |
| 365 – 374                                      | 95  |
| 375 – 384                                      | 115   |
| 385 – 394                                      | 125   |
| 395 – 404                                      | 140   |
| 405 – 414                                      | 155   |
| 415 – 424                                      | 180   |
| 425 – 434                                      | 205   |
| 435 – 444                                      | 235   |
| 445 – 454                                      | 295   |
| 455 – 464                                      | 320   |
| 465 – 474                                      | 350   |
| 475 – 484                                      | 370   |
| 485 – 494                                      | 400   |
| 495 – 504                                      | 440   |
| 505 and over                                   | 490<br>plus \$50 for every \$10 of<br>net income in excess of<br>\$505 per week |

# **Disbursements for Lodging and Withdrawing Charges**

(Current Ut April 2009)

## **Lodging Caveats**

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|                      |         |
|----------------------|---------|
| Registration fee     | \$65.90 |
| Registration by post | \$70.90 |

## **Withdrawal Of Caveats**

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|                      |         |
|----------------------|---------|
| Registration fee     | \$65.90 |
| Registration by post | \$70.90 |

## **Statutory Charges:**

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|                      |          |
|----------------------|----------|
| Registration fee     | \$99.90  |
| Registration by post | \$104.90 |

## **Extinguishment of Charge:**

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|                      |          |
|----------------------|----------|
| Registration fee     | \$99.90  |
| Registration by post | \$104.90 |

## Appendix 4C

# Debt Policy

## 1. Secured Debts

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- 1.1 VLA shall require an equitable charge over a client's home if the cost of legal assistance will, or is likely to exceed, \$1,700:
- on one grant of assistance; or
  - on several grants of assistance for the same client which are current at the same time; or
  - in total on all grants of assistance (including the cost or likely cost of the current grant) made to that client by VLA over the preceding three years.
- 1.2 The amount shown as a secured debt in the books of VLA from time to time shall be (approximately) equal to the cost of legal assistance or 120% of the value of client's equity in the property (whichever is the lesser). The 120% allows for inflation in a property's value.
- 1.3 The balance of the costs of legal assistance owed to VLA by a secured client in excess of the value of VLA's security is to be recorded as an unsecured debt but in a separate category from the unsecured debts referred to in paragraph 2. The unsecured portion of a debt owed by a client who has given VLA an equitable charge over his or her property will be reviewed annually in accordance with paragraph 1.6.
- 1.4 The value of a client's property and the client's equity in it is to be determined as follows:
- from the current mortgage statement provided to VLA at the time a grant is made and with each subsequent financial statement;
  - from information contained in the client's financial statement;
  - by a search at the Land Titles Office to ascertain the existence of prior charges or securities in respect of grants where the costs are likely to exceed \$1,700;
  - by a kerbside valuation obtained from an appropriate estate agent in cases in which the legal costs are expected to exceed \$5,000.

- 1.5** The secured debt, any associated unsecured debt, the value of a client's equity and the client's financial position are to be reviewed annually after a final contribution has been assessed (from an updated financial statement and from further enquiries of the type referred to in paragraph 1.4 or otherwise as appropriate). If the client does not provide VLA with updated financial information, VLA can review and enforce the debt if VLA decides that is justified in all the circumstances.
- 1.6** Following that annual review, a decision will be made:
- to carry the debt forward; or
  - to seek to enforce the debt and the security and recover the amount due to VLA; or
  - to write off the debt.

## 2. Unsecured debts

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- 2.1** All unsecured debts (including instalments on account of the cost of legal assistance but excluding debts referred to in paragraph 1.3) are to be paid in full or an instalment repayment program commenced within three months of a final contribution being assessed or the instalment falling due unless payment is deferred by VLA on the basis of hardship or exceptional circumstances.
- 2.2** If unsecured debts are not paid in full or repayments commenced within three months, then VLA will:
- refer the debt to VLA's debt collectors; and/or
  - default the client with the Credit Reference Association of Australia; and/or
  - negotiate other acceptable payment arrangements with the client (which could include taking an equitable charge for a debt less than \$1,700 in which case the debt will thereafter be treated as a secured debt).
- 2.3** When a debt is referred to VLA's debt collectors or defaulted to the Credit Reference Association of Australia, it is to be written off.
- 2.4** All unsecured debts are to be reviewed annually and a decision made:
- to carry the debt forward; or
  - to seek to enforce the debt and recover the amount due to VLA; or
  - to write off the debt.
- 2.5** Any unsecured debt still listed on the subsidiary ledger shall be written off when the debt is six years old.

### **3. Initial Contributions and Other Property**

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This policy does not affect VLA's requirement for an initial contribution in appropriate cases or a requirement for a charge over real property which is not the applicant's home. VLA's current practice in respect of those applications should continue as now.

### **4. Hardship or Special or Exceptional Circumstances**

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The application of this policy can be modified in cases of hardship or special or exceptional circumstances justifying special consideration.

Examples of hardship or special or exceptional circumstances include a family law litigant bringing up children who should be entitled to keep his or her interest in the home until the children reach adulthood and a client in prison with his or her family living in the home who needs to maintain that home at least until the conclusion of the prison sentence for his or her family's welfare.