National Legal Aid Secretariat
GPO Box 1422
Hobart TAS 7001

Executive Officer: Louise Smith

t: 03 6236 3813
f: 03 6236 3811
m: 0419 350 065

e: louise.smith@legalaid.tas.gov.au

National Legal Aid

19th August 2011

Dr Albin Smrdel
Assistant Secretary
Federal Courts Branch
Access to Justice Division
Attorney-General's Department
3-5 National Circuit
Barton ACT 2600

Dear Sir,

Re: Review of recent changes to court fees

Introduction

We refer to your letter dated the 21st June 2011 in relation to the review of recent changes to court fees.

You have asked for our feedback on any issues created by fee change arrangements. You have advised us that any package of changes arising out of the review would need to be revenue neutral.

You note that it may be difficult to provide comprehensive information given the short period of time the fee amendments have been in place. The information which follows is based on our experience, much of it is anecdotal. Statistics have been provided where possible.

As indicated at meetings of National Legal Aid and the Attorney-General's Department, Commissions around the country have adopted slightly varying practices as a response to the changed arrangements. These different practices inform this feedback.

Legal aid commission clients

People who use the services of legal aid commissions typically have difficulty in paying the new fees. Many are on Centrelink benefits and live from pay day to pay day without any spare funds.

People who are in receipt of a grant of legal aid from a legal aid commission have already passed a means test establishing that they are financially disadvantaged. They may also face other personal challenges.

Family law - issues created by fee change arrangements

Clients in need of legal aid commission family law services are often in family violence situations and/or living in refuge/crisis accommodation. They may be very recently separated from a partner and have little/no immediate income of their own. If they are very recently separated, they may not yet have a health care or pensioner concession card so as to readily be able to establish their eligibility for a reduction of fees.

Since 1 November 2010 applicants commencing family law proceedings in the Federal Magistrates Court (FMC) or the Family Court of Australia (FCA), who were previously eligible for a waiver of all court fees, have been required to pay a reduced fee of $60. The full fee is $243. A consent order filing fee of $80 was also introduced. The courts have discretion to defer payment of the fee.

Urgent matters

Many family law matters involve elements of urgency. Legal action is often required to help protect personal safety and well-being.

Where there are matters of urgency it is often necessary to apply for deferral of the fee so that the application can be lodged and orders obtained as soon as possible.

Confusion about the changed fee arrangements has contributed to delay in the filing/acceptance of applications and therefore the hearing of applications. Much of this confusion has been about the relationship between the reduced fee and deferral.

Delay is a particular concern in matters where time is a critical factor, eg because personal safety is in issue, there is an urgent need for airport watch list orders and/or applications for recovery of children are necessary.

Confusion about the changed fee arrangements has lessened over time since the introduction of the arrangements. However, where the applicant cannot immediately afford to pay the full or reduced filing fee, the capacity for an application to be heard quickly still hinges on a decision about whether or not to grant deferral. This contrasts with the previous arrangements whereby if an applicant was in receipt of legal aid, then they would automatically qualify for a waiver of fees, and the matter could proceed to be heard. This provided some certainty, and streamlined administrative requirements in what is a pressured environment.

Potential/issues in relation to the status of proceedings and unpaid deferred fees remain. Some examples of the concerns we have raised above are attached to this letter.

Consent orders

When family law matters are settled, consent orders filed with a court are considered by us to be the most desirable method of recording the terms of agreement between the parties.

Legal aid commission legally assisted family law dispute resolution programs encourage consent orders as the conclusion to successful dispute resolution.

Consent orders are preferred by us over parenting plans because consent orders are binding and enforceable, whereas parenting plans are not. The consent order therefore reduces any likelihood of an agreement breaking down. Consent orders are particularly useful in cases where a power imbalance exists between the parties.

In those jurisdictions where the Commissions are not paying the fee, feedback from family dispute resolution practitioners, lawyers, and grants officers is that there appears to be an increase in the number of parties opting for parenting plans rather than consent orders after dispute resolution. Where this is occurring, this is understood to be the result of a financial decision, i.e. that a parenting plan does not need to be filed with a court and therefore there is no associated filing fee. This is of concern to us because it has the capacity to reinforce power imbalance, particularly where domestic violence exists, and also because there is a potential for flow on to further proceedings.

Once consent orders are made, a further grant of legal assistance will only be considered if there has been a material change in circumstances since the orders were made. It appears that in some matters where a parenting plan has been signed, that the agreements have broken down following dispute resolution. There are concerns that family violence/power imbalance has been a significant factor in the breakdown of some of these agreements.

Child support proceedings

Filing fees for child support application/response are or are not required variously depending on the court in which the matter is filed. The FMC does not require filing fees, the FCA does, and practices across local courts vary.

The inconsistent approach to requiring filing fees in child support matters has caused confusion and delay.

Procedures for fee payment/deferral

Where Commissions are not paying the fees the introduction of the changed fee arrangements has resulted in substantial administrative impost, including on Commissions. It also appears that in some cases consent documents have not been filed.

Clients often do not have the money for the filing fee at the time of appointment and further arrangements usually need to be made for legal aid commissions to collect/receipt this or alternatively to enable payment direct to the court by the client. Further time is also consumed by completion of fee reduction and deferral forms.

In relation to consent orders, whilst the parties may agree at a legal aid conference about how the filing fee will be paid, payment is then often not made by one or both of the parties. There is much time invested in following up with clients to get the money. Files are sometimes closed without obtaining consent orders because one or both of the parties has not paid the filing fee.

On occasion a Commission has received a bank cheque/money order for the client's share of the consent order fee but the application is ultimately not filed because the other party has not paid their share. The bank cheque/money order is returned to the client but they are out of pocket because they have paid to have the bank cheque/ money order issued and then they have to pay to have it cashed in.

Personal attendance at court is necessary for people whose only option to make payment is by EFTPOS. This is particularly onerous for people in regional, rural, and remote areas who need to travel significant distances to get to the nearest court registry.

The prospect of attending a court in person to file papers and make payment of the associated filing fees can be very daunting for some clients. For some people, language, literacy, and/disability issues compound the situation.

For reasons referred to above sometimes it has been necessary for a legal aid practitioner/staff member to attend the court registry with the documents and the client to make the payment.

It is noted that there are additional costs for clients who obtain money orders and bank cheques, usually approximately $5 or $6.

For those clients who need to travel to the court to make payment, we note that there can also be costs associated with this travel.

Where consent documents are not filed this increases the risk of agreements breaking down and requiring re-negotiation and/litigation.

Some examples of the concerns we have raised above are attached to this letter.

Statistics

A total of 29,739 family law applications were approved for a grant of legal assistance in the 2010-2011 financial year. This figure provides some indication of the revenue which has/might be raised by the courts from legal aid clients as a result of the changed fee arrangements. It is suggested that the amount that would be raised

even if all fees were collected is not significant, and that it is possible that the courts could expend as much/more in pursuit of unpaid deferred fees.

We suggest that it is not possible to draw any conclusions about the changed fee arrangements from the numbers of applications received by legal aid commissions.

Recommendations

1.1 Full fee waivers should be reinstated for applicants who meet the criteria for fee reduction and are genuinely unable to pay the reduced fee at the time of filing or in the reasonably foreseeable future. This will remove the current onus on the courts to make a separate administrative decision about whether or not to recover the amount of the fee as a debt at a later stage.

1.2 The approach to filings and associated fees in a particular matter type should be consistent regardless of the court in which the matter is filed.

1.3 To the extent that this has not already occurred court websites and forms should be updated to reflect the fees not/payable in all matters, including child support matters.

1.4 Legal aid clients should not be required to provide any further evidence of their financial disadvantage beyond an application evidencing that they are represented by a Commission, or a certificate to this effect.

Civil law - issues created by fee change arrangements

In addition to the challenges mentioned at the outset of this feedback, clients in need of legal aid commission civil law services may be in immigration detention.

Federal courts

Since 1 November 2010 litigants who were previously eligible for a waiver of filing fees in the federal courts are now required to pay a fee.

Under the present regulations, the Federal Magistrates Court and the Federal Court may:

- exercise discretion to reduce the amount of the filing fee to a one-off $100 fee
- exercise discretion to defer payment of the filing fee for 30 days or another period specified in writing
- exercise discretion to accept an application for filing without the payment of a filing fee.

The availability of the last of those discretions was confirmed by the Federal Court decision in Rosson v Tesoriero [2011] FCA 449 (6 May 2011). If the discretion to accept an application for filing without the payment of a filing fee is exercised, the fee will become a debt to the Commonwealth and the Court will need to make a separate

decision about whether or not to recover the fee. In the period before the Federal Court decision in *Rosson v Tesoriero,* we understand that some lawyers were paying the filing fee personally on behalf of their clients so as to enable their applications to be validly filed. Had they not done so, it is very likely that those clients would have been prevented from making a valid application. In NSW practitioners have reported to the Legal Aid Commission that registry staff have refused to accept applications without payment of the fee.

The process of applying for the exercise of discretion in relation to fees can be extremely confusing, particularly for unrepresented applicants. Information on relevant websites needs to be user-friendly, noting that some users will not be represented and could have limited skills.

Recommendations

2.1 Full fee waivers should be reinstated for applicants who meet the criteria for fee reduction and are genuinely unable to pay the reduced fee at the time of filing or in the reasonably foreseeable future. This will remove the current onus on the courts to make a separate administrative decision about whether or not to recover the amount of the fee as a debt at a later stage.

2.2 If full fee waivers are not to be reinstated, then the courts should retain the discretion to accept an application for filing without payment of a filing fee. The ability to defer payment of a filing fee is not a satisfactory alternative for those clients who have no capacity to pay the filing fee at the time of filing or in the foreseeable future. There is continuing uncertainty about the courts' power to defer payment for this category of applicants, which has not been completely resolved by the additional explanatory material issued in March 2011 (SLI 2011 No. 37). Deciding upon an appropriate deferral period is likely to be difficult for this category of applicants, and may lead to the need to make repeated deferral applications. This is likely to create additional work for legal aid commissions and the courts while generating little or no additional revenue.

2.3 Information about the fact that applicants may ask the courts to exercise discretion to accept an application for filing without payment of the filing fee should be easy to understand and consistent across courts.

Administrative Appeals Tribunal

Under the present regulations, the Administrative Appeals Tribunal has no discretion to defer filing fees or to accept an application for filing without the payment of a filing fee. Exemptions apply for only some categories of applications to the AAT, such as social security matters. For other matters, applicants who cannot pay at least the reduced $100 filing fee will be unable to make a valid application.

Our primary concern has been about the effect of this change on people who are seeking review of a decision by the Department of Immigration and Citizenship

(DIAC) to cancel their visa on character grounds. Such applicants are all, by definition, in gaol or immigration detention. They have no income and many, in our experience, have no assets. They also have no practical means of paying a $100 filing fee (i.e. access to a credit card, cheque book, etc). Although some may be able to get assistance from family members to pay the filing fee, our experience has been that many do not. The difficulty for these clients is exacerbated by the strict nine day appeal time limit that applies in these cases.

Some Commissions have determined that there is no option but to pay filing fees on behalf of this group of clients. This is not an acceptable long-term solution because it is inconsistent with the Attorney-General's current policy position on payment of fees.

There is uncertainty about the validity of an application for review which is lodged within time, but with the fee paid late. There are inconsistent AAT decisions on this point (see for example *Gallagher and Minister for Immigration and Citizenship* [2011] AATA 10 (11 January 2011) and *Kennedy and Secretary, Department of Education, Employment and Workplace Relations* [2011] AATA 102 (16 February 2011).

Recommendations

2.4 No application fee should be payable for an application for review of a decision by the Department of Immigration and Citizenship to cancel a person's visa on character grounds, consistent with social security matters.

2.5 The *Administrative Appeal Tribunal Regulations* should be amended to confer the same discretions upon the Tribunal as the federal courts.

Migration Review Tribunal

The Migration Regulations 1994 were amended with effect from 1 July 2011. The effect of the amendments is to increase fees for applications to the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT) 10%, from $1400 to $1540, with indexing for biennial Consumer Price Index (CPI) increases. This is the first increase of the $1400 fee since 1999 for the MRT and since 2003 for the RRT.

In addition, modifications to fee refund and fee waiver arrangements for the MRT apply from 1 July. Under the new rules, 50% of the MRT application fee will be refunded if a favourable decision is made, in contrast to the previous 100% refund after a favourable decision. Also, the provision for the fee to be waived if the Tribunal is satisfied that payment of the fee has caused or is likely to cause severe financial hardship to the review applicant has been replaced by a 50% fee reduction in cases of hardship. It continues to be the case that applications for review of bridging visa decisions made by persons in immigration detention do not require a fee. The RRT refund process is not affected; the RRT fee will remain a post-decision fee required only if a person is found not to be a refugee and no fee will be paid if the RRT applicant is found to be a refugee.

The main concern which arises out of the recent changes is that from 1 July 2011, an applicant in an MRT appeal suffering financial hardship is only able to obtain a reduction in the application fee to $770. Previously the fee was waived in its entirety if hardship was established.

Under the present regulations, the MRT has no discretion to defer filing fees or to accept an application for filing without the payment of a filing fee. This will adversely affect disadvantaged people seeking review of negative DIAC decisions, especially as the MRT has tight appeal times and has no power to allow an extension of time for applications lodged outside the prescribed time. Most visa applicants in Australia have 21 days from the date of notification of an adverse DIAC decision to file an appeal to the MRT. The appeal time is longer if the visa applicant is overseas.

The fee changes present a serious access to justice issue for some of the most disadvantaged people in the community. The most obvious group who will be affected are women who are the victims of domestic violence and are seeking permanent partner visas on the basis of the family violence exemption in the Migration Regulations. Typically, a woman in this position has been subjected to violent treatment from her former partner, may be living in a refuge, other supported accommodation or with friends, and has limited access to funds. Imposing a $770 application fee for a woman in this position severely restricts her ability to exercise her right to have a negative departmental decision reviewed. The decision clearly has serious life implications for the visa applicant.

The change will also severely affect Australian citizens or permanent residents who are on Centrelink payments and who are sponsoring family members such as spouses, children and carers. The reduced fee of $770 is greater than the current maximum single rate of pension for a fortnight (currently $729.30 per fortnight, which includes maximum pension supplement).

In addition to the access to justice issue, the reduced fee structure is inconsistent with the court and tribunal fees introduced from 1 November 2010. The reduced fee payable due to financial hardship for the AAT, FMC and Federal Court is $100. The fee in the MRT, a merits review jurisdiction, is more than the fee in the Federal Court. The courts, though not the AAT, have the power to defer payment of the reduced fee or accept an application without the filing fee.

Recommendation

2.6 The fee structure in the MRT should be consistent with the structure in the federal courts, including discretion to defer payment of the filing fee or accept an application for filing without payment of the fee.

Statistics

A total of 892 "Commonwealth civil law" applications for legal aid were approved in the 2010-2011 financial year. This is a rise of about 7% on the 2009-2010 financial year. We suggest that this rise is not related to the changed fee arrangements but

due to the increased number of cases involving asylum seekers seeking assistance in relation to judicial review.

Summary

There has been considerable confusion at the point of filing as a result of the changed fee arrangements, with practices varying across the country. Inconsistencies between relevant regulations persist. This confusion has exacerbated access to justice issues.

At a minimum, it would be of assistance if arrangements across courts could be consistent, and information about the arrangements provided in simple terms.

We suggest however that the changed fee arrangements have increased costs to:

1. The courts, by giving them a greater administrative impost in collecting deferred fees and possibly adjourning court hearings because a fee is not paid.
2. The Commissions by increasing the administrative costs associated with taking monies and possibly further appearances by reason of adjourned hearings.
3. The clients, in paying for postal orders, credit card interest rates etc.
4. The system as a whole by reason of changed fee arrangements deterring some people from filing an application with the potential for future litigation as a result, and the stress associated with it.

Our recommendation is that clients in receipt of a grant of legal assistance be exempt from payment of filing fees as outlined above.

Conclusion

Thankyou for the opportunity to make this submission.

Please do not hesitate to contact us if you require further information.

Yours sincerely

Andrew Crockett
Chair

Examples:

1. A solicitor filed a recovery application in the Sydney registry and applied for a fee deferral. She was initially advised by registry staff that the client could be granted either a reduction or deferral, but not both. When she queried this she was advised by a different member of the court staff that a deferral will only be granted in limited circumstances; where the applicant would be significantly disadvantaged if the application or response is not filed, and so it is possible to be granted both a reduction and a deferral, but only in very limited circumstances. Another solicitor, who also filed a recovery application the same afternoon, was granted a fee deferral without difficulty, including not being asked to provide either a certificate to verify a grant of aid or a Health Care card.

2. A solicitor sought to file an application for a divorce in the Sydney registry. She sought a fee reduction, which was granted, and a deferral on the basis of hardship, which was refused. No reasons were given.

3. A solicitor sought to file a response in the Parramatta registry. The registry staff refused to defer the fee on the basis that the application 'was not so urgent that it overrides the requirement to pay the fee at the time of filing'.

4. A solicitor sought to file a recovery application in the Sydney registry on a Thursday, and applied for both a fee reduction and a deferral. On the fee deferral form she wrote that the client had not seen the children for four weeks and also that the client was legally aided and currently living in a women's shelter. Initially the court clerk seemed confused by the fact that she wanted both a reduction and a deferral. Eventually he said that the decision had to be made by the Registrar who would advise of the outcome on Friday. The reduction and deferral were granted, but the practitioner was not advised of this until the following Monday.

5. A solicitor obtained an urgent ex parte recovery order at Parramatta. The registry refused to issue the order until the application fee was paid.

6. Acted in-house for a client and had to wait about 8 weeks to file as she simply did not have the money. In the intervening time, the other party removed the children from her care. The matter subsequently settled but the fee caused additional and otherwise unnecessary stress.

7. Client with unwell baby had to travel by bus from a country town to a regional city court registry to EFTPOS the court fee as it was the only way she could pay. The client had the additional cost of the return bus fares.

8. The current system can have particular impacts on respondents who may well not be involved in the proceedings by choice but are required to file a response and court fee within 14 days of service. Some respondents are unable to meet this deadline because of the time they need to save up the money, and some judicial officers are not sympathetic to this issue.

End.