



VALS SUBMISSION ON CONDITIONAL COST AGREEMENTS

DATE: 16-08-2022



Background to the Victorian Aboriginal Legal Service

The Victorian Aboriginal Legal Service (VALS) is an Aboriginal Community Controlled Organisation (ACCO). VALS was established in 1973 to provide culturally safe legal and community justice services to Aboriginal and/or Torres Strait Islander people across Victoria. VALS' vision is to ensure that Aboriginal people in Victoria are treated equally before the law; our human rights are respected; and we have the choice to live a life of the quality we wish. Legal Services Our legal practice serves Aboriginal people of all ages and genders in the areas of criminal, family and civil law.

We have also relaunched a dedicated youth justice service, Balit Ngulu. Our 24-hour criminal law service is backed up by the strong community-based role of our Client Service Officers (CSOs). CSOs are the first point of contact when an Aboriginal person is taken into custody, through to the finalisation of legal proceedings. Our Criminal Law Practice provides legal assistance and representation for Aboriginal people involved in court proceedings. This includes bail applications; representation for legal defence; and assisting clients with pleading to charges and sentencing. We represent clients in matters in the generalist and Koori courts.

Our Civil and Human Rights Practice provides advice and casework to Aboriginal people in areas including infringements; tenancy; victims of crime; discrimination and human rights; Personal Safety Intervention Orders (PSIO) matters; coronial inquests; consumer law issues; and Working With Children Check suspension or cancellation.

Our Aboriginal Families Practice provides legal advice and representation to clients in family law and child protection matters. We aim to ensure that families can remain together and children are kept safe. We are consistent advocates for compliance with the Aboriginal Child Placement Principle in situations where children are removed from their parents' care.

Our Specialist Legal and Litigation Practice (Wirraway) provides legal advice and representation in civil litigation matters against government authorities. This includes for claims involving excessive force or unlawful detention; police complaints; prisoners' rights issues; and coronial inquests (including deaths in custody).

Acknowledgment

VALS pays our deepest respect to traditional owners across Victoria, in particular, to all Elders past, present and future. We also acknowledge all Aboriginal and Torres Strait Islander people in Victoria and pay respect to the knowledge, cultures and continued history of all Aboriginal and Torres Strait Islander Nations.

SUBMISSION

VALS welcomes the opportunity to make submissions to the Consultation Paper Regarding Conditional Cost Agreements.

Currently, the Legal Profession Uniform Law specifically prohibits conditional cost agreements in criminal and Commonwealth family law matters¹. The proposed amendment seeks to extend that prohibition² to include proceedings in Victoria under the following Acts:

- *Guardianship & Administration Act 2019*
- *Adoption Act 1984*
- *Children Youth & Families Act 2005*
- *Child Support (Assessment) Act 1999*

The current use of conditional costs agreements under these Acts is tabled below, based on VALS practitioner experience. As VALS operates primarily (of the jurisdictions tabled below) in the child protection jurisdiction; the impact of conditional cost agreements is non-existent.

Act	Moderate use	Rare use	Never used
<i>Guardianship & Admin Act</i>		X	
<i>Adoption Act</i>		X	
<i>Children Youth & Families Act</i>			X
<i>Child Support Assessment Act</i>	X		

Nevertheless, VALS supports the proposed amendment to s181(7)(c) based on the following considerations.

(i) Objectives of the Legislative framework

Relevantly, the Uniform Law seeks to promote:

- The protection of clients and the public, and
- The ability of clients to make informed choices about their legal options.

Child related proceedings are, by their very nature, highly volatile. Clients are often dealing with a completely foreign legal process at a time when they are at their lowest or most vulnerable emotional point.

¹ S181(7)

² S181(7)(c) operates as a catch all provision for specified matters



These proceedings are not (or should not be) adversarial, and a client ought not be pressured into win-lose decision making with one eye on possible costs. The objectives are not served by clients entering into cost agreements, the purpose of which is financial; not the best outcome for the family.

(ii) Low incentive for private practitioners

There is often no financial outcome in child related proceedings. That being so, there is little to no incentive for private practitioners to offer a conditional cost agreement. Further, even if such an agreement were offered, the definition of a 'successful outcome' might well not meet the same standard as litigation involving a financial gain.

(iii) Best Interests of the Child

Both State and Commonwealth child related proceedings are based on the fundamental principle of the best interests of the child; who is the subject of, but not a party to, the proceedings.

Again, the outcome that is best for the child may not align with the cost agreement definition of a 'successful outcome'.

(iv) Disincentive to litigate

Child related proceedings are often protracted, and a 'successful outcome' may not be achieved within the terms or life of the agreement. If litigation is required, the interests of the practitioner are not served by continuing on, and the client may be pressured into settling.

(v) Public practitioner legal options

The majority of Aboriginal parties in child related proceedings are represented by government funded legal services such as VALS. Much of this has to do with financial capacity, culturally appropriate service delivery and an ethos of placing the child first in the proceedings. Pressure to settle in order to meet the cost agreement would simply further fuel distrust in the profession, the legal system and may adversely impact the subject child and their community.



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