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PUBLIC SOLICITOR'S OFFICE

GUIDELINES FOR THE PROVISION OF LEGAL SERVICE

Preliminary

The Public Solicitor's Office is established by virtue of section 92 of the Constitution. Section 92(4) of the Constitution provides that the functions of the Public Solicitor are to provide legal aid, advice and assistance to persons in need in such circumstances and subject to such conditions as may be prescribed by Parliament and in particular.

- (a) to provide legal aid, advice and assistance to any person in need who has been charged with a criminal offence; and
- (b) to provide legal aid, advice and assistance to any person when directed to do so by the High Court.

The Public Solicitor Act (Cap.30) governs the granting of legal aid by the Public Solicitor and other matters that are incidental thereto. It formally implements conditions for the granting and refusal of legal aid. Legal aid is defined in section 3 of the Public Solicitor Act as consisting of representation, including all steps preliminary or incidental to proceedings and also providing legal advice and assistance.

Objective of Guidelines

The purpose of these guidelines is to focus the delivery of the most critical services to the most financially disadvantaged members of the community. These guidelines are derived from the requirements contained in the Constitution and the Public Solicitor Act.

Application of Guidelines

These guidelines apply to matters where representation is required on an ongoing basis. They do not apply to the duty lawyer scheme or legal advice clinic. The duty lawyer scheme is subject to the duty lawyer guidelines and legal advice clinic is subject to the direction of the Public Solicitor.

In accordance with the provisions of the Constitution, together with international legal obligations, these guidelines apply to Solomon Island and non-Solomon Island citizens equally.

These guidelines will not be applied to criminal matters categorised by the High Court as “tension matters”.

Eligibility for Legal Aid

Section 4 of the Public Solicitor Act provides the criteria for the granting of legal aid. It acknowledges that criminal cases together with matters directed by the High Court are priorities. These matters are not subject to a means test. Domestic violence and child protection matters are also not subject to a means test. The section then provides that legal aid is available to such other persons whose income does not exceed an amount prescribed by the Minister. Section 2 of The Legal Aid (Income Limit) Order provides that legal aid shall only be available to persons whose net income does not exceed \$12,000.00.¹ In circumstances where there is more than one applicant (eg.tribal land owners) the aggregate income of all applicants will be considered when assessing the means test.

Assets are not included in the means test as the Public Solicitor Act does not prescribe an asset cut off in respect of the granting of legal aid.

Contributions

A contribution may be charged in respect of successful proceedings in accordance with the provisions of section 10 of the Public Solicitor Act at the discretion of the Public Solicitor. Each case will be assessed by the Public Solicitor on an individual basis.

Priority Work Areas

The Public Solicitor's Office is a public office with limited resources. Therefore, it is imperative to focus the delivery of the most critical services to the most financially disadvantaged members of the community. In order to achieve this, priority work areas have been determined to ensure that the limited government resources are utilised in the most effective and efficient manner in assisting the most disadvantaged members of the community.

The Constitution provides that criminal cases and matters directed by the High Court are the first work priorities of the Public Solicitor's Office. After extensive consultation with stakeholders additional priority work areas have been identified. When granting legal aid all lawyers should have regard to the priority work areas and availability of resources.

Matters which will be given first priority in the utilisation of the resources of the PSO are:

1. Criminal cases (including extradition matters and appeals);
2. Matters relating to domestic violence and child protection;
3. Matters directed by the High Court pursuant to section 92(4) of the Constitution; and
4. Family matters.

¹This is the current amount prescribed by the Act. A recommendation has been made to the Ministry of Justice and Legal Affairs for this amount to be increased to reflect current monetary standards.

Criminal, Domestic Violence and Child Protection Matters

Criminal Cases

Section 9s2(4)(a) of the Constitution provides that a function of the Public Solicitor is to provide legal aid, advice and assistance to any person in need who has been charged with a criminal offence. This clearly dictates that criminal cases are a main priority of the PSO. This means test does not apply to any criminal matters.

However, not all applications for legal aid with respect to criminal cases shall be approved. Section 6(1) of the Public Solicitor Act provides that the Public Solicitor may make such enquiries as he thinks fit as to the means of the applicant and the merits of the case. Section 7(3) of the Public Solicitor Act provides the circumstances in which legal aid may be refused.

Given the power to consider the merits of a case and the ability to refuse aid in particular circumstances it is appropriate to divide criminal cases into 2 separate categories based on priority.

Category Type 1 Criminal Cases

Category type 1 matters are criminal matters where legal aid is automatically granted with no merit testing and are as follows:

- The defendant is a child or young person (under the age of 18) and therefore cannot be expected to be self-represented;
- The defendant has a disability or disadvantage which would prevent self-representation;
- The defendant has a real risk of being sentenced to a term of imprisonment²;
- Upon conviction the defendant has a real risk of the loss of livelihood for a substantial period of time³;
- The matter is a criminal appeal, bail application or extradition;
- The matter relates to immigration or mental health detention;
- There is a public interest in representing the defendant; for example the matter deals with a legal issue previously untested, but its determination could be applied for the benefit of other potential defendants.

If the applicant for legal aid satisfies any one of the above criteria legal aid will be granted subject only to resource availability. The Public Solicitor by virtue of the independence of his position will retain residuary discretion to refuse aid if the resources of the Public Solicitor's Office do not enable a matter to be taken on. A refusal on this basis will fall under s.7(3)(c) of the Public Solicitor Act.

²The defendant may be at risk of imprisonment by virtue of nature of the charge, aggravating features of the charge or previous criminal convictions.

³Substantial period of time is a period of time greater than 12 months.

Category Type 2 Criminal Cases

If the case does not satisfy any of the criteria outlined above in category 1 then category 2 must be considered. Category type 2 cases are criminal cases where the merits of the case must be considered before public funds are utilised and the case must not fall within any of the reasons for refusal contained in section 7(3) of the Public Solicitor Act.

If any of the following criteria are satisfied legal aid will ordinarily be **refused**:

1. Only a trivial advantage would be gained by the applicant from the proceedings or the matter in respect of which legal aid is sought. Matters which could be considered under this ground are matters where the penalty is only a small fine such as consuming liquor in public;

2. On account of the simple nature of the proceedings or the matter, a legal practitioner would not ordinarily be employed;

for example a minor or trivial offence where a person can be expected to be self-represented where there is no risk of imprisonment such as careless driving, drunk and disorderly, consuming liquor in public;

3. There are not reasonable prospects of success to warrant a grant of aid. The reasonable prospects of success test may be defined as:-

“Where it appears on the information, evidence and material provided to the Public Solicitor’s Office that the proposed defence for which legal assistance is sought has reasonable prospects of success then legal aid may be granted”.

Example : a defendant wishes to plead not guilty and conduct a trial in the Magistrates Court for an offence where the penalty will be a bond, recognisance or small fine and there are not real prospects of success. Examples of this type of charge include, but are not limited to, careless driving, drunk and disorderly, consuming liquor in public etc. There would be very little prospects of success where a defendant has made admissions to the offence and there are no issues with respect to the voluntariness or fairness of the admissions and the evidence is strong.

4. The matter does not involve an issue of broad public importance, the determination of which will benefit the public in general or a section of the public.

Example – An issue of broad public importance may include inappropriate or illegal behaviour by the police during the course of the investigation/ charging of the defendant.

5. The matter does not deal with a legal issue previously untested, whereby its determination could be applied for the benefit of other potential defendants.
6. The Public Solicitor by virtue of the independence of his/her position will retain residuary discretion to refuse aid if the resources of the Public Solicitor's Office do not enable a matter to be taken on.

Domestic Violence and Child Protection Matters

Domestic violence and child protection matters are a high priority of the Public Solicitor's Office. Access to legal advice and preliminary assistance will be provided on a non means or merit tested basis to those in need of such advice and assistance in respect of domestic violence and child protection matters.

Domestic violence and child protection matters which require court proceedings are not subject to a means test. The only relevant merit test is that such matters satisfy the relevant legislation for the commencement of proceedings.

⁴This is the wording of the prospects of success test adopted by Legal Aid Queensland.

Family Matters

Access to **legal advice** and **preliminary assistance** will be provided on a non means or merit tested basis to those in need of such advice and assistance in respect of family matters. In respect of matters requiring court proceedings legal aid may be granted for family matters provided that the means and merit test is satisfied.

To receive legal aid for any family matter the applicant firstly must meet the means test and secondly the case must **not** fall within one of the categories contained in section 7(3) of the Public Solicitor Act.

Merit Test for family matters

An application of Legal aid for a family matter may be **refused** if any one of the following criteria is satisfied:

1. Only a trivial advantage would be gained by the applicant from the proceedings or the matter in respect of which legal aid is sought. Under this ground legal aid should only be granted when the costs involved in providing legal assistance are warranted by the likely benefit to the applicant or, in some circumstances, the community.

An example of the type of matters which could be refused under this ground are maintenance proceedings where the Respondent is not employed and has no income and no assets. Although the court may make an order, there is no possibility of the Respondent complying with the order. In this circumstance the benefit to the applicant is far outweighed by the cost of the proceedings and the use of public resources;

2. On account of the simple nature of the proceedings or the matter, a legal practitioner would not ordinarily be employed. This ground includes a consideration as to the formality of the proceedings and the length of the proceedings.

3. There are no reasonable prospects of success to grant aid and utilise public funds.
Reasonable prospects of success may be defined as:-

“where it appears on the information, evidence and material provided that the proposed actions, applications, defences or responses for which legal assistance is sought have reasonable prospects of success, then legal aid may be granted.”⁵
4. The applicant for legal aid is not residing in the Solomon Islands. In these circumstances it would be unreasonable to utilise public resources for a personal private matter for a person who is not resident in the Solomon Islands.
5. The proceedings may be regarded as complex and lengthy and therefore may unduly constrain the resources of the Public Solicitor’s Office, thereby impacting on what other types of matters may be conducted which may be of a higher priority. In those situations the Public Solicitor may regard it to be unreasonable to provide legal aid in the circumstances of the case.
6. If the matter requires expertise that is outside the PSO then legal aid may be refused. In those circumstances the case may not be able to be litigated in an efficient and effective manner and therefore it would be unreasonable to utilise public resources.
7. The Public Solicitor by virtue of the independence of his/her position will retain residuary discretion to refuse aid if the resources of the Public Solicitor’s Office do not enable a matter to be taken on.

⁵This is the wording of the prospects of success test adopted by Legal Aid Queensland.

Civil Matters

Access to **legal advice** and **preliminary assistance** will be provided on a non means or merit tested basis to those in need of such advice and assistance in respect of civil matters. Matters which require ongoing representation will require an application for legal aid.

To receive legal aid for any civil matter the applicant firstly must meet the means test and secondly the case must not fall within one of the categories contained in section 7(3) of the Public Solicitor Act. Section 6(1)(a) of the Public Solicitor Act enables the Public Solicitor to make enquiries as he/she thinks fit to determine the merits of the case.

Merit Test for Civil Matters

If the matter satisfies **any one** of the following criteria legal aid will ordinarily **be refused**:

1. Only a trivial advantage would be gained by the applicant from the proceedings or the matter in respect of which legal aid is sought. Under this ground legal aid should only be granted when the costs involved in providing legal assistance are warranted by the likely benefit to the applicant or, in some circumstances, the community. Example – Aid should be refused in relation to a money claim where the amount claimed is outweighed by the cost and resources utilised to make the claim;
2. On account of the simple nature of the proceedings or the matter, a legal practitioner would not ordinarily be employed. This ground includes a consideration as to the formality of the proceedings and the length of the proceedings.
3. On consideration of the matter there are no reasonable prospects of success. The prospects of success test is defined as:-

“where it appears on the information, evidence and material provided that the proposed actions, applications, defences or responses for which legal assistance is sought have reasonable prospects of success, then legal aid may be granted.”⁶

4. The applicant for legal aid is not residing in the Solomon Islands. In these circumstances it would be unreasonable to utilise public resources for a personal private matter for a person who is not resident in the Solomon Islands..
5. The proceedings may be regarded as complex and lengthy and therefore may unduly constrain the resources of the Public Solicitor's Office, thereby impacting on what other types of matters may be conducted which may be of a higher priority. In those situations the Public Solicitor may regard it to be unreasonable to provide legal aid in the circumstances of the case.
6. If the matter requires expertise that is outside the PSO then legal aid may be refused. In those circumstances the case may not be able to be litigated in an efficient and effective manner and therefore it would be unreasonable to utilise public resources.
7. Land matters which do not comprise an environmental or public interest component;
8. Land matters which are not in relation to contempt proceedings;
9. Land matters which are before either the Customary Land Appeal Courts⁷ or in the Local Courts⁸.
10. The matter does not involve an issue of broad public importance, the determination of which will benefit the public in general or a section of the public.
11. The matter does not deal with a legal issue previously untested, whereby its determination could be applied for the benefit of other potential litigants.
12. Conveyancing matters that are not an ancillary part of the proceedings for which legal aid has been granted;

⁶This is the wording of the prospects of success test adopted by Legal Aid Queensland.

13. Company formation and disputes – eg. The development of articles of association, board disputes etc;
14. The matter does not relate to a constitutional right or obligation;
15. The matter may be adequately dealt with by the assistance of a lawyer and the utilisation of “self-help kits” (eg. small debt claim guides);
16. The Public Solicitor by virtue of the independence of his/her position will retain residuary discretion to refuse aid if the resources of the Public Solicitor’s Office do not enable a matter to be taken on.

⁷As per section 255(6) of the Land and Titles Act which prohibits legal representation

⁸As the precedent has been established that lawyers do not appear in this jurisdiction.

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Appeals against Refusal of Legal Aid

Persons aggrieved by any decision of a legal practitioner to refuse legal aid, advice or assistance may make representations to the Public Solicitor or any person designated by him/her for a reconsideration of the initial decision refusing a grant of legal aid, advice or assistance. If upon review the application for legal aid, advice or assistance is still refused a person aggrieved by the decision may make an application to the High Court under section 92(5) of the Constitution.

This policy was endorsed by the Public Solicitor on 12 April 2011.

Mr Douglas Hou
Public Solicitor