

PARLIAMENT OF VICTORIA

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**Legal Aid (Amendment) Act 1998**

**Act No.**

**TABLE OF PROVISIONS**

<i>Clause</i>	<i>Page</i>
<b>PART 1—PRELIMINARY</b>	<b>1</b>
1. Purposes	1
2. Commencement	2
3. Principal Act	2
<b>PART 2—PROCEEDINGS FOR REVIEW UNDER THE CRIMES (MENTAL IMPAIRMENT AND UNFITNESS TO BE TRIED) ACT 1997</b>	<b>3</b>
4. Means test waived in certain circumstances	3
<b>PART 3—LEGAL AID FUND</b>	<b>4</b>
5. Certain contributions deemed not to be trust money	4
6. New section 27A inserted	4
27A. Refund of money paid in accordance with section 27	4
<b>PART 4—MATTERS RELATING TO PRACTITIONERS</b>	<b>5</b>
7. New sub-sections (4) to (16F) substituted	5
8. Appeal to Supreme Court removed	10
9. New section 30A inserted	10
30A. Immunity of participants	10
10. Repeal of section 40—complaints mechanism	11
11. Supreme Court—limitation of jurisdiction	11
12. Transitional provisions	11
52. Transitional provisions: <b>Legal Aid (Amendment) Act 1998</b>	11
<b>PART 5—FUNDING ARRANGEMENTS AND AGREEMENTS</b>	<b>13</b>
13. New definition inserted	13
14. Attorney-General may give directions	13
15. Power to enter legal aid arrangements	14
49AA. VLA's power to enter legal aid arrangements	14

<i>Clause</i>	<i>Page</i>
16. Amendments consequential on new section 49AA	14
17. Repeal of spent provisions relating to funding	15
<b>NOTES</b>	<b>16</b>

# PARLIAMENT OF VICTORIA

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Initiated in Assembly 21 October 1998

## A BILL

to amend the **Legal Aid Act 1978** to provide for funding matters, to clarify powers in relation to legal practitioners and for other purposes.

### **Legal Aid (Amendment) Act 1998**

**The Parliament of Victoria enacts as follows:**

#### **PART 1—PRELIMINARY**

##### **1. *Purposes***

The main purposes of this Act are—

- (a) to provide for the waiver of a "means test" in relation to legal assistance for certain matters under the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**;

*Legal Aid (Amendment) Act 1998*

*Act No.*

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- (b) to make provision for certain money to be paid directly to the Legal Aid Fund;
- (c) to clarify the powers of VLA in respect of panels of legal practitioners;
- (d) to provide for VLA to enter into legal aid arrangements.

**2. Commencement**

- (1) This Act (except Parts 3 and 4) comes into operation on the day on which it receives the Royal Assent.
- (2) Subject to sub-section (3), the provisions of Parts 3 and 4 of this Act come into operation on a day or days to be proclaimed.
- (3) If a provision referred to in sub-section (2) does not come into operation before 1 January 1999, it comes into operation on that day.

**3. Principal Act**

In this Act, the **Legal Aid Act 1978** is called the Principal Act.

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No. 9245.  
Reprint No. 3  
as at 1 July  
1998. Further  
amended by  
No. 61/1989.

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**PART 2—PROCEEDINGS FOR REVIEW UNDER THE  
CRIMES (MENTAL IMPAIRMENT AND UNFITNESS TO BE  
TRIED) ACT 1997**

**4. Means test waived in certain circumstances**

In section 24 of the Principal Act, after sub-section  
(2) insert—

"(2A) In the making of a decision whether legal assistance is to be provided to a person who is subject to a supervision order under Part 5 of the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997** (including a person who is deemed to be subject to a custodial supervision order by force of clause 2 of Schedule 3 to that Act) in relation to any proceeding under that Act with respect to that supervision order, VLA is to have regard only to the matters referred to in sub-section (1)(b)."

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**PART 3—LEGAL AID FUND**
**5. *Certain contributions deemed not to be trust money***

In section 27 of the Principal Act, after sub-section (3) **insert—**

"(4) All money paid by persons in accordance with a condition imposed under sub-section (1) on account of costs or out-of-pocket expenses in advance of legal assistance to be provided by VLA—

(a) is not required to be treated as trust money within the meaning of the **Legal Practice Act 1996**, despite anything to the contrary in that Act; and

(b) must be paid into the Fund."

**6. *New section 27A inserted***

After section 27 of the Principal Act **insert—**

**"27A. *Refund of money paid in accordance with section 27***

If a person has paid money in accordance with a condition imposed under section 27 on account of costs or out-of-pocket expenses in advance of legal assistance to be provided by VLA and that assistance is not provided, VLA must refund to that person any unexpended part of that money out of the Fund."

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**PART 4—MATTERS RELATING TO PRACTITIONERS**

**7. *New sub-sections (4) to (16F) substituted***

In section 30 of the Principal Act, for sub-sections (4) to (16) **substitute—**

- "(4) A sole practitioner, firm or incorporated practitioner may apply to VLA for inclusion on a referral panel.
- (5) A sole practitioner, firm or incorporated practitioner is not eligible to apply under sub-section (4) during any period—
- (a) for which the sole practitioner, firm or incorporated practitioner is disqualified from applying in accordance with this section; or
  - (b) of removal under sub-section (10) or (11).
- (6) On receiving an application under sub-section (4), VLA may—
- (a) accept the application and include the name of the sole practitioner, firm or incorporated practitioner on a referral panel; or
  - (b) subject to sub-section (14), refuse the application and may disqualify the sole practitioner, firm or incorporated practitioner from making another application under sub-section (4) for a specified period.
- (7) VLA must prepare and maintain panels of names of sole practitioners, firms and incorporated practitioners from the names of the sole practitioners, firms and incorporated

practitioners who have applied under sub-section (4) and been accepted for inclusion.

5 (8) If the name of a firm or incorporated practitioner is included on a referral panel, the names of all the partners or directors and the practitioners who are employed by the firm or incorporated practitioner are, by force of this sub-section, also included on the panel, except the name of any of those partners, directors or practitioners employed by the firm or incorporated practitioner which has been removed under this section.

10 (9) If the name of a sole practitioner is included on a referral panel, the names of all the practitioners who are employed by the sole practitioner are, by force of this sub-section, also included on the panel, except the name of any of those practitioners employed by the sole practitioner which has been removed under this section.

15 (10) Subject to sub-section (15), VLA may remove from a referral panel for a specified period the name of—

20 (a) any sole practitioner; or

25 (b) any firm or incorporated practitioner; or

(c) any practitioner who is the employee of a sole practitioner; or

30 (d) any partner or director of, or practitioner who is an employee of, a firm or incorporated practitioner.

(11) Without limiting VLA's powers to refuse an application made under sub-section (4) or remove a name from a referral panel, VLA may—



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- (a) refuse an application made under sub-section (4) or remove from a referral panel the name of—
- (i) a sole practitioner, if the name of a practitioner who is his or her employee is removed from the panel; or
  - (ii) a firm or incorporated practitioner if the name of a partner or director of, or a practitioner who is an employee of, the firm or incorporated practitioner is removed from the panel;
- (b) remove from a referral panel the name of any sole practitioner, firm or incorporated practitioner who or which habitually takes an excessive time to defend persons charged with criminal offences.
- (12) VLA may amend a referral panel—
- (a) to remove the name of any sole practitioner, firm or incorporated practitioner who or which has ceased to practise; or
  - (b) to record any change in name of a sole practitioner, firm or incorporated practitioner; or
  - (c) to remove a name in accordance with a request under sub-section (13).
- (13) A sole practitioner, firm or incorporated practitioner may, by writing to VLA, request that their name be removed from a referral panel and VLA must comply with that request.
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(14) Before refusing an application made under sub-section (4), VLA must—

(a) give written notice to the applicant setting out—

(i) the reasons for the proposed refusal; and

(ii) the period of any proposed disqualification; and

(b) afford the applicant a reasonable opportunity to be heard and show cause why the application should not be refused or the disqualification should not be made.

(15) Before removing a name from a referral panel under sub-section (10) or (11), VLA must—

(a) give written notice to the sole practitioner, firm, incorporated practitioner, partner, director or employee concerned setting out the reasons for the proposed removal; and

(b) afford that person a reasonable opportunity to be heard and show cause why the removal should not be made.

(16) A notice given to a firm or incorporated practitioner under sub-section (14) or (15) may be given to any partner or director of the firm or incorporated practitioner.

(16A) If a person wishes to be heard in accordance with sub-section (14) or (15), the panel chairperson must appoint an independent reviewer to hear and determine the matter of the refusal, removal or disqualification.

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- (16B) Subject to this Act and the regulations (if any), in hearing and determining a matter under this section the reviewer—
- (a) may consider any relevant matters as grounds for removal, refusal or disqualification and is not limited to consideration of the grounds set out in the notice provided by VLA under sub-section (14)(a) or (15)(a);
  - (b) may—
    - (i) confirm, vary or refuse to confirm the proposed removal, refusal or disqualification; or
    - (ii) substitute his or her own determination for the proposed removal, refusal or disqualification—and make a determination accordingly;
  - (c) may regulate his or her own proceedings.
- (16C) The independent reviewer must determine a matter under this section as expeditiously as possible after the end of the hearing.
- (16D) After hearing the matter, the independent reviewer must advise VLA of his or her determination.
- (16E) An independent reviewer must keep records of his or her determinations and proceedings under this section.
- (16F) VLA must give notice of its decision under sub-section (6)(b), (10) or (11) or the determination of the independent reviewer under sub-section (16A) to the sole

practitioner, firm, incorporated practitioner,  
partner, director or employee concerned."

### 8. *Appeal to Supreme Court removed*

In section 30 of the Principal Act, for sub-section  
(18) **substitute**—

"(18) A decision of VLA or a determination of an  
independent reviewer under this section is  
final and not subject to appeal.

(18A) Nothing in sub-section (18) prevents the  
taking of proceedings—

(a) seeking the grant of any relief or remedy  
in the nature of certiorari, prohibition,  
mandamus or quo warranto or the grant  
of a declaration or an injunction; or

(b) seeking any order under the  
**Administrative Law Act 1978**—

in respect of any decision of VLA or  
determination of an independent reviewer  
under this section."

### 9. *New section 30A inserted*

After section 30 of the Principal Act **insert**—

#### **"30A. Immunity of participants**

In a proceeding before an independent  
reviewer under section 30—

(a) a person representing a party has the  
same protection and immunity as a legal  
practitioner has in a proceeding in the  
Supreme Court; and

(b) a party to the proceeding has the same  
protection and immunity as a party to a  
proceeding has in a proceeding in the  
Supreme Court; and

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- (c) a person appearing as a witness has the same protection and immunity as a witness has in a proceeding in the Supreme Court."

**10. *Repeal of section 40—complaints mechanism***

- (1) Section 40 of the Principal Act is **repealed**.
- (2) In section 19(1) of the Principal Act, paragraph (d) is **repealed**.

**11. *Supreme Court—limitation of jurisdiction***

After section 49B(3) of the Principal Act **insert—**

- "(4) It is the intention of section 30(18) as substituted by section 8 of the **Legal Aid (Amendment) Act 1998** to alter or vary section 85 of the **Constitution Act 1975**."

**12. *Transitional provisions***

After section 51 of the Principal Act **insert—**

**"52. *Transitional provisions: Legal Aid (Amendment) Act 1998***

- (1) Section 30 of this Act as in force immediately before the commencement of Part 4 of the **Legal Aid (Amendment) Act 1998** continues to apply to—
- (a) the taking of any action or the making of any decision by VLA under that section; and
- (b) the hearing and determination of any matters by an independent reviewer under that section; and
- (c) any application to the Supreme Court under section 30(18)—

which had begun before that commencement.

5 (2) Despite the substitution of section 30(18) of this Act by section 8 of the **Legal Aid (Amendment) Act 1998**, an application may be made to the Supreme Court under that sub-section as in force immediately before the commencement of section 8 of that Act for an order setting aside an exclusion or removal that occurred—

10 (a) before the commencement of Part 4 of that Act; or

15 (b) after the commencement of Part 4 of that Act but to which section 30 as in force immediately before that commencement continues to apply by virtue of sub-section (1)—

and that application may be dealt with and determined as if section 30(18) of this Act had not been so substituted."

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**PART 5—FUNDING ARRANGEMENTS AND AGREEMENTS**

**13. *New definition inserted***

In section 2(1) of the Principal Act **insert**—

'**"legal aid arrangement"** means an arrangement with respect to the provision of legal aid under which—

(a) the Commonwealth—

(i) makes available amounts of money for the provision of legal aid; and

(ii) specifies the legal aid VLA is to provide in consideration of those amounts of money, including any priorities to be observed by VLA in providing legal aid as between classes of persons or classes of matters; and

(b) VLA provides that legal aid in accordance with that arrangement;'

**14. *Attorney-General may give directions***

(1) In section 12M(1) of the Principal Act, after paragraph (b) **insert**—

"(c) the provision of legal aid by VLA in accordance with a legal aid arrangement."

(2) After section 12M(1) of the Principal Act **insert**—

"(1A) The Attorney-General may only give a direction under sub-section (1)(c) if that direction has been requested in writing by the Commonwealth Attorney-General after the Commonwealth Attorney-General has consulted with the Attorney-General and VLA."

**15. Power to enter legal aid arrangements**

After section 49 of the Principal Act **insert**—

**"49AA. VLA's power to enter legal aid arrangements**

- 5 (1) Despite anything to the contrary in section 49, VLA may enter into legal aid arrangements.
- (2) The Attorney-General must approve a legal aid arrangement before VLA enters into that arrangement."
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**16. Amendments consequential on new section 49AA**

(1) In the Principal Act—

- (a) in section 6(2)(f), after "State" (where first occurring) **insert** "under section 49";
- 15 (b) in section 6(2), after paragraph (f) **insert**—  
 "(fa) subject to this Act, enter into legal aid arrangements and provide legal aid in accordance with those arrangements;"
- (c) in section 7(c)—
- 20 (i) after "in accordance with" **insert** "any legal aid arrangement and";
- (ii) after "State" **insert** "under section 49";
- (iii) **omit** "in that behalf";
- (d) in section 7(d), before "determine" **insert** "subject to any legal aid arrangement,"
- 25 (e) in section 8(2), after paragraph (a) **insert**—  
 "(ab) the requirements (if any) of any legal aid arrangement;"
- (f) in section 9, after "funds available" **insert** " , any legal aid arrangement";
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- (g) in section 10(f), for "and 9" **substitute** ", 9 and 49AA";
- (h) in section 32—
- (i) in sub-section (2), for "VLA" **substitute** "Subject to any legal aid arrangement, VLA";
  - (ii) in sub-section (2BA), after "this Act" (where first occurring) **insert** "and subject to any legal aid arrangement";
- (i) in section 35(2A)(b), after "this Act" **insert** ", any legal aid arrangement";
- (j) in section 36(2A)(b), after "this Act" **insert** ", any legal aid arrangement".
- (2) In section 12 of the Principal Act, after sub-section (3) **insert**—
- "(4) The board must have regard to any legal aid arrangement in carrying out its role under sub-sections (2) and (3)."
- (3) In section 24 of the Principal Act, after sub-section (6) **insert**—
- "(7) This section is subject to any legal aid arrangement."

**17. *Repeal of spent provisions relating to funding***

In section 49(1) of the Principal Act—

- (a) in paragraph (c), sub-paragraph (i) is **repealed**;
  - (b) paragraphs (d) and (e) are **repealed**;
  - (c) in paragraph (f), for ", (c), (d) or (e)" **substitute** "or (c)".
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*Legal Aid (Amendment) Act 1998*  
*Act No.*

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**NOTES**

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