

Supreme Court (Fees) Regulations 2018

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Introduction

About Justice Connect

Justice Connect aims to help build a world that is just and fair — where systems are more accessible and accountable, rights are respected and advanced and laws are fairer. We provide free legal for people experiencing disadvantage and the community organisations that support them. For 25 years, Justice Connect has been working to improve legal and life outcomes for vulnerable people and community groups, through our specialist services and pro bono referral network of over 10,000 lawyers. As well as our direct client work, we conduct community education and undertake law and policy reform aimed at improving social justice outcomes.

Public Interest Law

The Public Interest Law team harnesses the skills and generosity of Australian lawyers and barristers to provide pro bono legal help to individuals and organisations. Our work focuses on addressing unmet legal need. Adopting the principle that access to justice is a public interest concern, we help people experiencing disadvantage as they face a variety of legal matters big and small.

Not-for-profit Law

Not-for-profit Law is a specialist legal service that provides information, training, advice and pro bono referrals for not-for-profit community organisations.

By helping those involved in running not-for-profits and social enterprises to navigate the full range of legal issues that arise during the lifecycle of their organisation, Not-for-profit Law saves their time and resources. This allows them to focus on achieving their various missions including helping vulnerable people, environmental conservation and working towards social cohesion.

Self Representation Services

Our *Federal Self Representation Service* provides advice to people who are without legal representation in the Federal Court and Federal Circuit Courts in the ACT, NSW, Tasmania and Victoria in the areas of bankruptcy, fair work (employment), human rights/discrimination and judicial review.

Our *Domestic Building Legal Service* assists homeowners who are involved in legal proceedings - or who are considering commencing legal proceedings – against a builder, and who are unable to afford a lawyer.

Our *State Self Representation Service Pilot Project* is soon to be established in the Supreme and County Courts of Victoria. The Service will pilot providing assistance to unrepresented litigants in discrete areas of law.

Specialised Legal Services

Our *Seniors Law* team participates in four Health Justice Partnerships, where a lawyer is incorporated into a health care team that aims to improve health and legal outcomes for older clients by minimising the incidence and impact of elder abuse.

Our *Homeless Law* team operates a specialist outreach based service for clients experiencing or at risk of homelessness. We also operate a Women's Homelessness Prevention Project and a homelessness prevention project for Victorian prisoners. Through legal representation, combined with in-house social work support, and targeted evidence-based advocacy, Homeless Law works to prevent homelessness and reduce the negative impact of the law on people experiencing homelessness.

The request for submissions

We thank you for the opportunity to provide a submission in relation to the proposed *Supreme Court (Fees) Regulations 2018*. Many of our clients will benefit from these changes, and we welcome the Supreme Court of Victoria's (**the Court**) reflection on this important element of our justice system.

Justice Connect is eager to see any new fee regime encompass the important guiding principles outlined by the Supreme Court. These provide an important framework that assists to assess the changes proposed.

Further feedback

Justice Connect would be happy to engage in further discussions in relation to this submission. Please contact:

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Executive Summary

Overall, Justice Connect supports the preferred option outlined in the Regulatory Impact Statement to the *Supreme Court (Fees) Regulations 2018 (RIS)* and reflected in the *Supreme Court (Fees) Regulations Exposure Draft (Proposed Regulations)*. However, Justice Connect strongly suggests that a number of important amendments be made within the proposed categories, namely:

Standard fee

The definition of 'standard fee payer' should be extended to include all 'not-for-profit' entities. We note that it is only about 10% of Victoria's 39,665 incorporated associations that are registered as a charity with the Australian Charities and Not-for-Profits Commission (**ACNC**), therefore 90% are excluded from the proposed definition.

Concession fee

Justice Connect recommends that the definition of 'concession fee payer' be amended to refer to a person who holds a 'concession card' within the meaning of section 6A of the *Social Security Act 1991 (Vic)*, which includes pensioner concession cards, health care cards and seniors health cards (as defined in that Act).

We recommend that the individual fee cap amount (being 50% of the standard fee rate, up to a maximum of 20.7 fee units, or \$300) be reconsidered in light of the burden that the cumulative fees can place on Concession fee payers. We further recommend that a fee cap is applied to the cumulative fees payable for a matter.

Waivers

In relation to the automatic waivers under regulation 14, Justice Connect recommends that:

- regulation 14(1)(d) be expanded to cover a person who 'is serving a sentence of imprisonment or is otherwise detained in a detention facility *or public institution, however described*'.
- regulation 14(1) be amended to include individuals who are the subject of an order under the *Mental Health Act 2014 (Vic)* (this could be included, in the alternative, under regulation 6, which specifies a number of categories where no fees are payable).
- Other categories for automatic fee waiver be considered, including children under the age of 18 and refugee and asylum seekers.

In relation to the application for a full fee waiver process, Just Connect recommends that:

- The *Application for waiver of court fees on grounds of financial hardship*¹ be amended and modelled on the equivalent VCAT form.² It should be shorter and less complex, and should allow applicants to describe how paying Court fees will cause them financial hardship.
- The *Application for waiver of court fees on grounds of financial hardship*³ only need to be submitted and assessed once per matter, rather than for each individual fee payable.
- The criteria used for assessing financial hardship be publically available in the interests of transparency and consistency in determining whether an applicant is eligible for a full fee waiver.

¹ Supreme Court of Victoria (June 2018) *Application for waiver of court fees on grounds of financial hardship*, accessible at https://www.supremecourt.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2018/06/16/a2a435cbf/applicationforwaiverofcourtfes2018.pdf.

² Victorian Civil and Administrative Tribunal, *Application for Fee Relief*, accessible at https://www.vcat.vic.gov.au/sites/default/files/resources/application-for-fee-relief_1.pdf.

³ Ibid, 1.

The proposed changes

Preferred option

Justice Connect has considered the three fee options outlined in the RIS being:

1. Modification of Current Arrangements;
2. Full Cost Recovery; and
3. Restructured Fees.

Justice Connect agrees that Option 3 is the preferred option and notes our recommended amendments in relation to the different categories of fees that are proposed, the categories being:

1. **Corporate Fee:** at or close to 100% cost recovery for corporate and government users.
2. **Standard Fee:** at 50% of corporate fee level, applying to individuals, small businesses, registered charities and not-for-profits.
3. **Concession Fee:** at 50% of the standard fee level (with a maximum of \$300 or 20.7 fee units) applying to Health Care Card holders.
4. **Waiver:** full waiver where financial hardship can be demonstrated and/or will be applied automatically in the categories described in Regulation 14.

Justice Connect's recommendations

Standard Rate

Definition should be broadened

Justice Connect broadly welcomes the standard fee payer definition in the Proposed Regulations:

Standard fee payer means—

(a) a natural person other than a natural person acting in the capacity of a statutory office holder; or

(b) an entity registered under the Australian Charities and Not-for-Profit Commission Act 2012 of the Commonwealth;

(c) any entity that has a turnover of less than \$200 000 in the financial year before the financial year in which a fee in Schedule 1 is to be paid;

However, we recommend that this definition be extended to include all 'not-for-profit' entities. We note that it is only about 10% of Victoria's 39,665 incorporated associations that are registered as a charity with the Australian Charities and Not-for-Profits Commission (**ACNC**).⁴ There are about 150 000 not-for-profit entities operating in Victoria.⁵ Many of these not-for-profit entities are charities,⁶ but have chosen not to register with the ACNC. This is often due to wishing to avoid the additional burden of regulation by the ACNC.

Any profits made by not-for-profit entities (including those that do not meet the legal definition of charities)⁷ are used to further the aims of the entities.⁸ That means all the profits are put back into the organisation and used to continue to pay for its activities and functions, as well as to achieve its not for profit purpose. In contrast, in a 'for-profit' corporate entity, any profit can be divided amongst (distributed to) the members, investors or shareholders.

⁴ 12, 903 charities in Victoria reported in the Australian Charities Report (2016), ACNC at <<http://australiancharities.acnc.gov.au>>.

⁵ Australian Productivity Commission, *Contribution of the Not-for-profit Sector Report, 2010*.

⁶ That is, meet the common law definition of a charity, or otherwise meet the definition used by the Victorian State Government for the purposes of state tax exemptions (e.g. *Duties Act 2000* (Vic), *Payroll Tax Act 2007* (Vic), *Land Tax Act 2005* (Vic)).

⁷ *Ibid.*

⁸ It can be noted that most charities registered with ACNC generate revenue of less than \$40,000 per year, and a similar figure it can be assumed applies to not-for-profit entities. See ACNC, *Australian Charities Report* (2016) at <<http://australiancharities.acnc.gov.au>>.

Therefore, all not-for-profit entities should pay less in fees than entities in the Corporate fee category in order to acknowledge that not-for-profits should be directing any profits towards the organisation's purpose (to the full extent possible while balancing this with the costs to the Court).

We cannot see a clear policy rationale for limiting the standard fee definition to only those not-for-profit entities that are registered charities with the ACNC. Broadening the definition is more consistent with the "Guiding principles" to the fee structure outlined in the RIS, in particular Principle 2 (safeguarding access to justice) and Principle 3 (fees should be equitable). We therefore believe that all not-for-profit entities should be subject to the standard fee. This wider definition would be consistent with other Australian jurisdictions.⁹

Recommendation - The definition of 'standard fee payer' should be broadened to include all 'not-for-profit' entities.

Concession Rate

Definition should be broadened

Justice Connect supports the introduction of the Concession rate category and the notion of a fee cap, but does not support the definition of 'concession fee payer' used in the Proposed Regulations. The definition is as follows:

Concession fee payer means a person who holds a current health care card within the meaning of the **Social Security Act 1991** of the Commonwealth at the time a fee is payable.¹⁰

The definition uses the meaning of 'health care card' as used in the *Social Security Act 1991* (Cth) (**Social Security Act**). This definition only includes health care cards issued under Division 3 of Part 2A.1 of the Social Security Act, which requires an individual to meet one of the criteria under section 1061ZK. This section does not cover individuals on the Disability Support Pension (**DSP**), Age Pension or Seniors Health Care Card Holders.

Justice Connect understands that this definition is very similar to that used in the *Victorian Civil and Administrative Tribunal (Fees) Regulations 2016*.¹¹ It is problematic in the same sense that the VCAT definition

⁹ *High Court of Australia (Fees) Regulations 2012* (Cth) reg 4(4); *Federal Court and Federal Circuit Court Regulation 2012* (Cth) reg 1.04; *Supreme Court (Fees) Regulation 2002* (WA) reg 3; *Supreme Court Regulations 2018* (SA) reg 3; *Supreme Court (Fees) Rules 2017* (Tas) r 4(1).

¹⁰ Proposed Regulations, s 5 'concession fee payer'.

¹¹ *Victorian Civil and Administrative Tribunal (Fees) Regulations 2016*, Sch 1 – Fees

<http://assets.justice.vic.gov.au/justice/resources/87d37167-84ae-441b-9d2f-f34a3e059008/regulations_-_vcat_fees_regulations_2016_-_final.pdf>.

is. This is because it does not include people who are reliant on the DSP, the Age Pension or who are entitled to a Seniors Health Care Card. Individuals on the DSP, Age Pension and Seniors Health Care Card holders have limited financial means and are as likely to struggle in paying a full fee as health care card holders.

The definition is therefore unnecessarily restrictive and excludes broad categories of vulnerable Victorians. It therefore inhibits the ability of the Proposed Regulations to achieve greater equity in Victorians' access to justice.

An alternative, and more appropriate source for the definition of "Concession fee payer" can be found in the Social Security Act. The Social Security Act defines "concession card" to mean (under section 6A):

(a) a pensioner concession card; or

(b) a health care card; or

(c) a seniors health card.

This definition includes individuals on the DSP and Age Pension (as such individuals hold a pensioner concession card under the Social Security Act) as well as senior's health care card holders. Justice Connect recommends using this more inclusive definition.

Recommendation - Justice Connect recommends that the definition of 'concession fee payer' be amended to refer to a person who holds a 'concession card' within the meaning of section 6A of the *Social Security Act 1991 (Vic)*, which includes pensioner concession cards, health care cards and seniors health cards as defined in that Act.

Individual fee cap

In the interests of access to justice for individuals in the Concession category (and who are not eligible for the fee waiver category), the proposed fee cap should be reconsidered. The proposed cap is 50% of the standard fee cap, up to a maximum of 20.7 fee units i.e. \$300. As this cap is per fee, the cumulative fees payable by an individual in the concession category can still add up to total over \$2000. This means that the fees payable by someone in the Concession category can still create a genuine access problem for them.

Recommendation – Justice Connect recommends that the individual fee caps for the Concession category be reconsidered in light of the barrier that the proposed fees payable would present for individuals in the Concession category.

Cumulative fee cap (per matter)

Justice Connect recommends that a cumulative fee cap per matter be considered. This is also to acknowledge the cumulative impact that the fees payable could have on individuals in the Concession category as a barrier to access to justice.

Recommendation - Justice Connect recommends that a cumulative fee cap is applied per matter in addition to the individual fees payable by a person in the Concession category.

Automatic waivers

Justice Connect is overall very supportive of automatic fee waivers for vulnerable individuals and organisations specified in the Proposed Regulations under regulation 14. Justice Connect does, however, recommend a number of amendments and additions to regulation 14.

Regulation 14(1)(a) and (b)

Justice Connect welcomes the inclusion at regulation 14 of fee waivers for clients represented by lawyers acting pro bono:

(1) Subject to sub-regulation (2) a fee which is payable under these regulations is waived if, at the time the fee is payable, the person or other entity—

*(a) is legally represented in the proceeding under a pro bono scheme administered by or on behalf of the Victorian Bar Inc. an association incorporated under the **Associations Incorporation Reform Act 2012**, the Law Institute of Victoria Limited ACN 075 475 731 or Justice Connect ABN 54 206 789 276; or*

*(b) is legally represented in the proceeding on a pro bono basis by a member of the Federation of Community Legal Centres Vic Inc. an association incorporated under the **Associations Incorporation Reform Act 2012** ABN 30 036 539 902; or ...*

This regulation supports the work we do to provide pro bono assistance for eligible not-for-profit entities that do not have any resources for legal fees, or those who may have some (albeit limited resources) where we form the view it is in the public interest for those limited resources to better directed towards achieving their charitable purpose.

We note that this regulation would extend to both charitable and not-for-profit entities (who otherwise meet the criteria for pro bono assistance within the Regulation). As such, it is consistent with our recommendation to

expand the standard fee payer category to include all not for profits rather than only those not-for-profit entities registered with the ACNC.¹²

We note that the State Self Representation Service (the **Service**) will provide pro bono legal assistance to self represented litigants (**SRLs**) through an unbundled legal assistance model. As such, the Service will not be 'representing' the SRLs in the proceedings and therefore regulation 14 (1)(a) would not apply to them. SRLs assisted by the Service would therefore need to apply for a fee waiver for financial hardship under section 129 (3) of the *Supreme Court Act 1986* (Vic).

Recommendation - Consideration be given to amending regulation 14 (1)(a) so that it applies to SRLs assisted through Justice Connect's Self Representation Service.

Regulation 14(1)(d) – imprisonment, detention

Regulation 14(1)(d) covers a person who 'is serving a sentence of imprisonment or is otherwise detained in a detention facility, however described.' This does not include a person who is detained in a non-detention facility e.g. a person detained in a public institution. This is different to the circumstances under which VCAT will grant a full fee waiver, which applies to a person who is in a prison or other public institution.

An example of a person in detention in a public institution is someone under compulsory treatment under the *Mental Health Act 2014* (Vic) (**Mental Health Act**). This includes individuals who are subject to a Treatment Order (and in a mental health facility) made by the Mental Health Tribunal and who wish to apply to the Supreme Court for review of a decision by VCAT. Such individuals have a right to appeal decisions of the Mental Health Tribunal to the Supreme Court. Justice Connect recommends that individuals subject to an order under the Mental Health Act be granted a fee waiver under regulation 14(1)(d). Alternatively, individuals undergoing these proceedings should be deemed under regulation 6 to have no fee payable (similarly to regulation 6(1)(a), under which criminal proceedings under the *Criminal Procedure Act 2009* (Vic) have no fee payable under the regulations).

Recommendation - regulation 14(1)(d) is expanded to cover a person who "is serving a sentence of imprisonment or is otherwise detained in a detention facility or public institution, however described".

¹² see 'Standard Rate – Definition should be broadened' above.

Recommendation – Justice Connect recommends that a person subject to an order under the *Mental Health Act 2014 (Vic)* not be required to pay Supreme Court fees, either through the granting of a fee waiver under regulation 14(1) or through deeming no fees to be payable under regulation 6.

Suggested expanded exclusions under regulation 14(1)

Justice Connect wishes to suggest some additional categories of persons who are eligible for a full fee waiver under regulation 14(1):

- 1) Children under 18 years of age (as is the case at VCAT);¹³ and
- 2) Refugees and asylum seekers (alternatively, refugees and asylum seekers could be added to the Concession category).

Application for full fee waiver

Financial hardship under section 129(3)

Justice Connect would like to take the opportunity to provide some recommendations regarding the process for applying for a fee waiver on the basis of financial hardship (as referenced in regulation 14(2) of the Proposed Regulations).

As regulation 14 notes, section 129(3) of the *Supreme Court Act 1986 (Vic)* allows the Court to provide a full fee waiver where payment of a fee by a person would cause him or her financial hardship. The required application form¹⁴ is nine pages in length and is in the form of an affidavit. The form is complex, confusing and unnecessarily burdensome on people experiencing financial hardship, the people assisting them through support services, and for Court services. The Court requires that the form be submitted for each individual fee incurred, rather than the Court conducting one assessment and applying it to all fees payable in a matter. Justice Connect also wishes to note that the criteria for assessing whether someone would experience financial hardship as a result of paying fees in the Supreme Court is not transparent i.e. it is not readily available to the public.

The burdensome nature of the process and the form itself particularly impacts vulnerable applicants, such as self-represented litigants, culturally and linguistically diverse people and older people.

¹³ See VCAT, 'Applicants entitled to a full fee waiver' at <<https://www.vcat.vic.gov.au/steps-to-resolve-your-case/fees-at-vcat/fee-relief>>.

¹⁴ Ibid, above n 1.

The equivalent VCAT form¹⁵ and application process, in contrast, has the following elements that Justice Connect recommends that the Court consider implementing:

- a) It is much shorter (two pages long);
- b) It only needs to be completed once (the decision by VCAT regarding financial hardship and the individual applicant then applies to all VCAT fees in the matter); and
- c) It includes an important prompt: “*Tell us how paying VCAT fees will cause you financial hardship*”. This allows for individuals to explain their circumstances and provide context to the details of their income, assets and expenditure provided in the form.

In the Supreme Court form, individuals who are clearly extremely vulnerable in the context of their circumstances may not obviously be eligible for the fee waiver under the application in its current form. For instance, an 80 year old who is the victim of elder abuse, who has frequent health issues and various medical costs, but who happens to have a few thousand dollars in her bank account at the time of applying for financial hardship. The test applied by the Court in interpreting the form should not simply be whether a person’s income and assets are greater than their expenditure and whether they (technically) have the fee amount available in their bank account. Justice Connect recommends that the Court is able to consider other factors not contemplated by the questions in the application in its current form.

Justice Connect recommends that the criteria used for assessing financial hardship be publically available, perhaps similarly to the guidelines available for the New South Wales Supreme, District and local courts.¹⁶

Recommendation - The *Application for waiver of court fees on grounds of financial hardship* should be amended and modelled on the equivalent VCAT form. It should be shorter and less complex, and should allow applicants to describe how paying Court fees will cause them financial hardship.

Recommendation – The *Application for waiver of court fees on grounds of financial hardship* should only be required to be submitted and assessed once per matter, rather than for each individual fee payable.

¹⁵ Ibid, above n 2.

¹⁶ NSW Supreme, District and Local Courts, ‘Guidelines for the waiver, remission and postponement of fees <http://www.ucprforms.justice.nsw.gov.au/Documents/fee_waiver_guidelines_dagj.pdf>.

Recommendation – The criteria used for assessing financial hardship should be publically available in the interests of transparency and consistency in determining whether an applicant is eligible for a full fee waiver.