



National Association of Community Legal Centres (NACLC) Inc  
Tel: 61 2 9264 9595  
Fax: 61 2 9264 9594  
Email: [naclc@clc.net.au](mailto:naclc@clc.net.au)  
Mail: PO Box A2245 Svdnev South NSW 1235 Australia

## **NACLC Position Statement on CLCs Charging**

### **Introduction**

During meetings in 2010 - 2011 the NACLC Management Committee, which comprises representatives of all state and territory associations of CLCs, and staff from state associations of CLCs, discussed the issue of CLCs requesting or requiring clients to reimburse matter related expenditure or to pay a contribution or fee, including a fee for service.

The CLC sector, while remaining consistently focussed on providing services to the disadvantaged, has grown greatly in its size and diversity of operations. The NACLC Management Committee was aware that, in this context, there is now a variety of CLC practices and views on charging clients.

The NACLC Management Committee noted that the definition of 'community legal centre' in the Common Membership Rules adopted over the last couple of years by all State and Territory Associations, requires a CLC to be not-for-profit, but does not refer to whether the CLC's services must be provided free. One State Association at least, however, has chosen to add a requirement that their members aim to provide free services<sup>1</sup>.

The NACLC Management Committee recognises the right of every centre to determine its own model of operation. The Committee's also believes that centres having common fundamental values is a strength of the CLC sector and that each CLC has a collegiate responsibility to other CLCs and a concern for and responsibility to all centres' clients.

For these reasons, the NACLC Management Committee considered it important to ascertain a fuller picture of the current views and practices of CLCs around Australia on charging clients and to develop and publish a NACLC position statement on this issue.

NACLC encourages CLCs and their State and Territory Associations to consider, consult and decide a policy on this issue suitable for their centre or association in its particular context, taking into account sector considerations.

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<sup>1</sup> *Objectives and Rules for the Queensland Association of Independent Legal Services Inc.* May 2010, Part 2 Definitions, clause 5:

'Community Legal Centre ...

(d) is an organisation which aims to:

(i) provide free legal and support services to the community or a section of the community; ...'

## **NACLC survey**

To inform it in drafting a position statement, NACLC invited CLCs to respond to a survey about their centre's charging policy and practice and their view on the general principle of CLCs charging. A total of 68 responses were received, expressing a wide variety of views. These were taken into account in drafting the NACLC position statement.

### **Considerations – potential benefits and risks**

A number of possible benefits and risks of CLCs charging were identified by NACLC and centres. There were a significant number of centres that were against ever charging a client for a legal assistance service. Most centres were comfortable with charging where the costs were being recovered from another party.

Some of the suggested possible benefits of CLCs being able to charge in some circumstances were that:

- charging organisations or individuals that could afford to pay for, say, community legal education activities, could support service delivery to the disadvantaged, could raise the centre's profile and potentially foster collaborations and partnerships with other agencies
- obtaining reimbursement of out of pocket expenses such as fees for medical and expert reports, might mean that a centre could take on a case when it otherwise could not (as CLCs are generally not funded to pay disbursements).

A far greater number of risks and concerns were suggested about charging, including that charging by CLCs may:

- undermine the philosophy and ethos of the sector, weakening one of the sector's strengths and a tie that binds CLCs together, and reducing CLCs' credibility
- work against the rights based approach that CLCs endorse, where centres advocate that it is the government's responsibility to ensure the equal protection of every person's human rights, and that it is not appropriate to apply a user pays model for access to justice when there are people who cannot afford to pay
- cause workers and centres to feel pressure, directly or indirectly, to give priority to work that has a financial return, leading to reduced service delivery for those who cannot afford to contribute financially
- risk damage to partnerships with volunteers, pro bono partners and relations with the private profession generally
- encourage, at the organisational level, a strict legal service delivery model, contrary to the effective holistic service delivery model supported by NACLC and the CLC sector, which gives a priority to preventative and early intervention activities
- encourage, at the individual client level, an emphasis on providing a client with only a legal service, rather than the range of assistance and the holistic response that may most support the client

- alarm some potential clients, causing them not to seek assistance, or to seek assistance later, to their disadvantage
- adversely affect the centre's charitable (PBI) status, adversely affecting donations and also the ability to pay staff fringe benefits – exacerbating difficulties in recruiting and retaining staff.

### **Other considerations – funding, charitable status, incorporated associations requirements**

NALCLC also took into account a range of other matters, including centres' obligations under funding agreements and charitable status and associated incorporations legislation.

The major CLC funding program, the Community Legal Services Program (CLSP), recognises and accepts that CLCs may recover costs and provides that CLCs may seek contributions (not defined) for 'certain services'<sup>2</sup>. Importantly, the Commonwealth CLSP Guidelines go on to say that:

...clients are not to be excluded from assistance on the basis of their inability to make a financial contribution. It is fundamental to the Program that services are accessible to economically disadvantaged members of the community and those with special needs.... In seeking contributions for services funded by the Program, CLCs must ensure that any such policy is in keeping with these Guidelines and individual service agreements.

Costs, client contributions and fees for community legal education activities are specifically included in the definition of 'Service Generated Income' in both the Service Agreement<sup>3</sup> and the CLSP Guidelines<sup>4</sup> and are considered as part of the funding; hence their use is restricted: it must go to support service delivery.

Funding programs for some specialist services stipulate that costs recovery or a client contribution is a funding requirement in some matters.

Some centres obtain grants of legal aid to conduct particular cases, and those grants may contain a requirement for centres to obtain a contribution from the client and/or to recover party/party costs if successful.

State or territory legislation regulating not-for-profits and incorporated associations may also be relevant and should be carefully considered by any centre developing a policy on charging.<sup>5</sup> Not-for-profit organisations can make a profit, but cannot distribute that profit to their members: their not-for-profit purpose and status means that any profit must be put back into the running of the organisation to fulfil its objectives.

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<sup>2</sup> Community Legal Service Program Guidelines, clause 3.5

<sup>3</sup> Community Legal Service Program Service Agreement 2010-2013, clause 2

<sup>4</sup> Community Legal Service Program Guidelines, clause 3.4

<sup>5</sup> See, eg, the Associations Incorporation Act 1981 (Vic), which states that an association is unable to secure a financial benefit for its members, with some limited exceptions; and the recent Federal Court case *Commissioner of Taxation v Cooperative Bulk Handling Limited* [2010] FCAFC 155 which reiterated that not-for-profit organisations are prohibited from securing pecuniary benefits for themselves.

## NACLC Position Statement on CLCs Charging Clients

*This statement only refers to situations where the charge would be paid by the client her or him self, and does not apply, for example, to recovery of party-party costs.*

1. NACLC believes that it is fundamental to the ethos of the sector that CLCs strive for equitable access to justice by providing services to the disadvantaged and people with special needs, and by conducting casework in the public interest; and that for this reason, centres should have a policy that:
  - ensures that no-one should “be excluded from assistance on the basis of their inability to make a financial contribution”<sup>6</sup> and, further,
  - the imposition of any fee or charge must not cause disadvantage to, or add to the disadvantage of, the client.

In NACLC’s view, it necessarily follows that:

- a client who is, for example, in receipt of a benefit or pension, should not be asked to pay a fee for a service or to access a service, and
  - in considering the potential to cause disadvantage to, or add to the disadvantage of, a client, consideration should be given not only to the person’s financial situation but to their physical, mental and emotional well being and their personal and social situation.
2. NACLC regards member CLCs as having an obligation not to engage in activities that may diminish public confidence in, or in any other way adversely affect, the reputation and credibility of the sector.
  3. NACLC and the State and Territory Associations of CLCs have all agreed on Common Membership Rules for Associations of CLCs that include a requirement for a community legal centre to be a not-for-profit organisation.
  4. NACLC believes that a CLC must direct any profit it may achieve into the running of the centre in accordance with the organisation’s purposes. Most commonly this will mean directing profits into maintaining or extending service delivery. Service delivery includes activities such as law reform and community development work. NACLC believes that this obligation is inherent in the CLC Associations’ requirement for CLCs to be not-for-profit as well as being a compliance obligation under some Commonwealth or State/Territory funding agreements and/or law.
  5. NACLC recognises and respects the right of each State and Territory Association of CLCs to add to the Common Membership Rules, including to the definition of a community legal centre, any additional consistent requirements adopted by their members. This may include a requirement that member CLCs provide or aim to provide their legal services free.
  6. NACLC recognises and respects the right of each CLC to develop its own operational model.

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<sup>6</sup> These words are taken from the Commonwealth Community Legal Services Program Guidelines (2010), clause 3.5 *Client Contributions*

7. NACLC acknowledges an individual CLC's right to adopt a policy of charging in some situations, but believes that where charging is occurring or is being considered for introduction:
- this NACLC Position Statement should be brought to the attention of the centre's Management Committee or Board for consideration before they determine the question of their centre charging
  - the decision regarding adopting a charging policy should be made by the centre's Management Committee or Board and duly minuted
  - a charging policy should be in writing, set out clear guidelines and parameters of the charging and the purposes to which the money will be put, and should be made publicly available within the centre and to its actual and potential clients (its community)
  - the charging policy should be clearly communicated to the client before any cost is incurred, with the centre having a positive obligation to ensure that the client understands the policy and its possible effect on her or him: mere communication is not sufficient.
  - if it is not possible to ensure that the client fully understands the possible charge/s they may incur, they should not be charged.
8. NACLC strongly recommends to any centre considering adopting a policy that provides for charging, to first investigate and ensure that the practice proposed to be introduced is permissible and consistent with
- the legal or other status of the organisation (eg the association's purposes, not-for-profit or PBI status etc)
  - current and potential funding agreements

and

- will not adversely affect the centre's critical relationships within its community or with key partners such as volunteers or pro bono partners, or
- reduce its service delivery to or operational effectiveness for its identified target client group/s (this may require ongoing monitoring or regular review).

NACLC appreciates that ongoing monitoring or regular review is difficult for CLCs with limited resources, but believes that the importance of ensuring appropriate equitable access to services warrants this additional administrative work.