



28 July 2014

104.3
MB; ylh

Commissioners Warren Mundy and Angela MacRae
Access to Justice Arrangements

Productivity Commission
LB2 Collins Street East
MELBOURNE VIC 8003

and via email: access.justice@pc.gov.au

Dear Commissioners

Access to Justice Arrangements

I refer to the hearing of the Productivity Commission that took place in Adelaide on 5 June 2014. Thank you for visiting Adelaide and thank you for the invitation to appear.

At the hearing, you asked the Society to clarify several aspects of our submission and to provide further information in relation to certain topics.

In relation to page 78 of the Society's submission dated 21 May 2014, the Society was asked to clarify a statement concerning the recovery of costs from children in cases concerning personal safety or the protection of children. The Society retracts this statement and notes the Productivity Commission said that children would be exempt from the charging of court fees that reflect the cost of providing the service for which the fee is charged.

With respect to court fees, we note that a level of court fees is appropriate; that fees should be subject to principles, for example, means to pay and the nature of the claim; and that court fees should not limit the ability of people to come before the court. We also note that it was not the Productivity Commission's intention to exclude legal representation in Tribunals.

During the hearing, we were invited to provide further information about the South Australian Civil and Administrative Tribunal (**SACAT**). It was queried whether general administrative appeals were to be included in the SACAT.

On 18 June 2014, the Attorney-General, the Honourable John Rau MP, introduced the *Statutes Amendment (SACAT) Bill 2014* into the South Australian Parliament. The Bill seeks

to amend a range of Acts for the purposes of conferring jurisdiction upon the SACAT. The task of conferring jurisdiction upon the SACAT is a significant undertaking, to occur in five proposed stages over the next two years.

In summary, the Bill proposes to transfer to the SACAT:

- functions of the Residential Tenancies Tribunal (RTT) established under the *Residential Tenancies Act 1995*, and to make related and consequential amendments to the *Retirement Villages Act 1987* and the *Residential Parks Act 2007*;
- functions of the Guardianship Board established under the *Guardianship and Administration Act 1993*, and to make related and consequential amendments to the *Advance Care Directives Act 2013*, *Mental Health Act 2009*, *Aged and Infirm Persons' Property Act 1940*, and *Consent to Medical Treatment and Palliative Care Act 1995*;
- functions of the Housing Appeal Panel under the *Community Housing Providers (National Law) (SA) Act 2013* and the *South Australian Housing Trust Act 1995*;
- functions of the Public Sector Grievance Review Commission established under the *Public Sector Act 2009*;
- functions of the Magistrates Court under the *First Home and Housing Construction Grants Act 2000*;
- functions of the Administrative and Disciplinary Division of the District Court under the *Freedom of Information Act 1991*; and
- District Court appeals from the RTT and Guardianship Board.

In addition to conferring jurisdiction on the SACAT, the Bill proposes to make amendments to the SACAT Act. These amendments correct omissions and further refine appeal mechanisms in response to feedback and advice received since the SACAT Act was proclaimed and the President of the Tribunal, Justice Greg Parker, was appointed.

For more information, a copy of the Bill and the Report on the Bill is available from the website of the South Australian Parliament.

As to cost disclosure, we note the Productivity Commission does not favour an approach which would see a model adopted by that of financial services regulation where the size of the font is reduced in order to fit more text into a contract or other information statement.

The Society appreciates your concerns and we have been working hard to provide more transparent information to consumers about legal costs and a consumer's rights to challenge costs. We enclose copies of several fact sheets that we recently prepared titled "*Legal Costs – Your Right to Know*" and "*Your Right to Challenge Legal Costs*". The fact sheets are also available on our website.

We look forward to receiving the Commission's final report in due course and to the opportunity to provide further comments at that point.

I trust these comments are of assistance.

Please do not hesitate to contact me should you require any further information or to discuss any aspect of our submission.

Yours sincerely

Morry Bailes
PRESIDENT



**THE LAW SOCIETY
OF SOUTH AUSTRALIA**
THE VOICE OF THE SOUTH AUSTRALIAN LEGAL PROFESSION

Fact Sheet: Legal Costs – Your Right to Know **(Legal Practitioners Regulations 2014 - Schedule 1)**

This Fact Sheet has been prepared by the Law Society of South Australia and is made available to you in accordance with the relevant provisions of the *Legal Practitioners Act 1981*.

You have the following rights in relation to legal costs which arise when you engage a law practice to act for you, and when you receive bills from the law practice.

1. You have the right to negotiate a costs agreement with a law practice.

You have the right not to accept, or ask for amendments to, a costs agreement that is provided by the law practice. You have the right to decline to sign the costs agreement immediately and to take it away with you to consider before signing. You have the right to a reasonable period of time within which to do this.

You have the right to obtain independent legal advice on the costs agreement, and a reasonable period of time in which to do so.

If you ask for amendments to be made to the proposed agreement which the law practice is not prepared to agree to, then you have the right to decline to sign the costs agreement and seek legal representation elsewhere.

2. You have a right to receive a bill of costs from a law practice.

A law practice is not entitled to payment of its fees or other costs, or to take action against you to recover unpaid fees, until you have been provided with a bill of costs.

You have the right to request an itemised bill of costs (at no charge to you). An itemised bill of costs is a bill that separately lists each task or item of work performed by the law practice and attributes a separate charge to each task or item. Under clause 34 of Schedule 3 to the *Legal Practitioners Act 1981* you have a statutory right to require the law practice to provide you with an itemised bill of costs within 21 days of your request.

The law practice is not permitted to take recovery action against you in relation to an itemised bill until 30 days have passed after providing the itemised bill.

3. You have a right to challenge the amount of legal costs billed.

You can do the following if you are not happy with a bill from a law practice:

a) Requesting an itemised bill
See paragraph 2 above.

b) Discussing your concerns with your law practice.

It is always open to you to approach the law practice and discuss your concerns regarding a bill. If you think the bill is too high, it is open to you to ask the law practice to reduce it. The costs agreement you signed when you engaged the law practice should specify who you can see to do this. This should usually be your first step, as it may be the quickest and cheapest way to resolve matters.

c) Having the costs adjudicated

You may apply to the Supreme Court under clause 37(1) of Schedule 3 of the *Legal Practitioners Act 1981* for an adjudication of the billed costs.

i) You need to make this application within 6 months of receiving the bill however you may be able to apply for an extension of time for this under clause 37(5) of Schedule 3 to the *Legal Practitioners Act 1981*.

ii) The form for making the application is Form 54 of the Supreme Court Rules. You will need to attach to it the bill or bills you are seeking to have adjudicated.

iii) If such an application is made, the Court will probably go through the bill on an item by item basis, allowing or disallowing each item. If a properly itemised bill has not been provided to you by the law practice, the Court may order it to do so. You will probably have to tell the Court, either in writing or verbally, which charges you do not agree with and why.

d) Applying to have a costs agreement set aside

If you do not want the costs you have to pay to a law practice calculated on the basis of a costs agreement that you signed, you can apply to have the costs agreement set aside under section 30 of Schedule 3 to the *Legal Practitioner's Act 1981*. The Supreme Court has the power to set aside a costs agreement if it finds that it is not fair and reasonable.

If the costs agreement is set aside by the Supreme Court, the costs you will have to pay to the law practice, if any, will be calculated based on the Supreme Court scale of costs. A copy of the Supreme Court scale is available on the Law Society

of South Australia website, www.lawsociety.sa.asn.au. You may wish to obtain independent legal advice when considering this option.

- e) Making a complaint to the Legal Profession Conduct Commission (if you believe there has been overcharging).

If you believe that you have been overcharged by a law practice, then you may complain to the Commissioner. The Commissioner **must** investigate your complaint if it is made within 2 years of the final bill about which you are complaining being delivered to you. The Commissioner **may** investigate your complaint if it is made outside of that 2 year period (but is not obliged to do so). However, there are some circumstances in which the Commissioner might determine not to investigate your complaint, no matter when it is made – for example, if it is frivolous, if the bill complained of is already the subject of civil proceedings between you and your lawyer, or if it is not otherwise in the public interest for the Commissioner to deal with it.

The Commissioner can require a fee to be paid before investigating an overcharging complaint, but he does not currently do so.

Once a complaint is received, the first step the Commissioner will normally take will be to see if, through a conciliation process, the bill complained of can be sorted out by agreement between the parties.

If conciliation isn't successful, then the Commissioner will go through the process of determining what he thinks is a fair and reasonable amount for the legal fees to have been. If that amount is less than the amount charged, then the Commissioner may recommend that the law practice reduce the bill (or, if you have already paid it, that it refund some or all of it to you). The Commissioner's recommendation is not binding on you or a law practice – but at the very least, it should be persuasive.

If either you or the law practice don't accept the Commissioner's recommendation, then:

- if the amount in dispute is more than \$10,000, the Commissioner is unlikely to be able to do anything further (although there are still some steps that are potentially open to the Commissioner in that situation);
- if the amount in dispute is \$10,000 or less, the Commissioner may make a determination as to whether or not there has been overcharging and, if so, the amount that has been overcharged – and that determination is binding on both you and the law practice.

You can find out more about what happens if you complain to the Commissioner about overcharging by going to the Commissioner's website at www.lpcc.sa.gov.au and clicking on the overcharging section.

If you would like further advice in relation to your rights with respect to costs you can do the following:

- Go to the Legal Profession Conduct Commissioner's website at www.lpcc.sa.gov.au.
- Contact the Legal Services Commission Legal Help Line on 1300 366 424.
- Obtain independent legal advice. For details of legal practitioners who specialise in costs, community & specialist legal services that may be able to provide you with free advice, contact the Law Society on 82290200.



**THE LAW SOCIETY
OF SOUTH AUSTRALIA**
THE VOICE OF THE SOUTH AUSTRALIAN LEGAL PROFESSION

Fact Sheet: Your Right to Challenge Legal Costs **(Legal Practitioners Regulations 2014 - Schedule 1)**

This Fact Sheet has been prepared by the Law Society of South Australia and is made available to you in accordance with the relevant provisions of the *Legal Practitioners Act 1981*.

You have the following rights if you do not agree with, or are not happy with, a bill that you receive from a law practice:

1. Requesting an itemised bill

If you have received a lump sum bill and you want more information on what you have been charged for and the rates that apply, you have the right to request an itemised bill of costs (at no charge to you).

An itemised bill of costs is a bill that separately lists each task or item of work performed by the law practice and attributes a separate charge to each task or item. Under clause 34 of Schedule 3 to the *Legal Practitioners Act 1981* you have a right to require the law practice to provide you with an itemised bill of costs within 21 days of your request.

The law practice is not permitted to take recovery action against you in relation to an itemised bill until 30 days have passed after providing the itemised bill.

2. Discussing your concerns with the law practice

It is always open to you to approach the law practice and discuss your concerns regarding a bill. If you think the bill is too high, it is open to you to ask the law practice to reduce it. The costs agreement you signed when you engaged the law practice should specify who you can see to do this. This should usually be your first step, as it may be the quickest and cheapest way to resolve matters.

3. Having the law practice's costs adjudicated

You may apply to the Supreme Court under clause 37(1) of Schedule 3 of the *Legal Practitioners Act 1981* for an adjudication of the billed costs.

- (a) You need to make this application within 6 months of receiving the bill however you may be able to apply for an extension of time for this under clause 37(5) of Schedule 3 to the *Legal Practitioners Act 1981*.
- (b) The form for making the application is Form 54 of the Supreme Court Rules. You will need to attach to it the bill or bills you are seeking to have adjudicated.
- (c) If such an application is made, the Court will probably go through the bill on an item by item basis, allowing or disallowing each item. If a properly itemised bill has not been provided to you by the law practice, the Court may order it to do so. You will probably have to tell the Court, either in writing or verbally, which charges you do not agree with and why.

4. Applying to set aside the costs agreement with the law practice

If you do not want the costs you have to pay to a law practice calculated on the basis of a costs agreement that you signed, you can apply to have the costs agreement set aside under section 30 of Schedule 3 to the *Legal Practitioner's Act 1981*. The Supreme Court has the power to set aside a costs agreement if it finds that it is not fair and reasonable.

If the costs agreement is set aside by the Supreme Court, the costs you will have to pay to the law practice, if any, will be calculated based on the Supreme Court scale of costs. A copy of the Supreme Court scale is available on the Law Society of South Australia website, www.lawsocietysa.asn.au. You may wish to obtain independent legal advice when considering this option.

5. Making a complaint to the Legal Profession Conduct Commission (if you believe there has been overcharging)

If you believe that you have been overcharged by a law practice, then you may complain to the Commissioner. The Commissioner **must** investigate your complaint if it is made within 2 years of the final bill about which you are complaining being delivered to you. The Commissioner **may** investigate your complaint if it is made outside of that 2 year period (but is not obliged to do so). However, there are some circumstances in which the Commissioner might determine not to investigate your complaint, no matter when it is made – for example, if it is frivolous, if the bill complained of is already the subject of civil proceedings between you and your lawyer, or if it is not otherwise in the public interest for the Commissioner to deal with it.

The Commissioner can require a fee to be paid before investigating an overcharging complaint, but he does not currently do so.

Once a complaint is received, the first step the Commissioner will normally take will be to see if, through a conciliation process, the bill complained of can be sorted out by agreement between the parties.

If conciliation isn't successful, then the Commissioner will go through the process of determining what he thinks is a fair and reasonable amount for the legal fees to have been. If that amount is less than the amount charged, then the Commissioner may recommend that the law practice reduce the bill (or, if you have already paid it, that it refund some or all of it to you). The Commissioner's recommendation is not binding on you or a law practice – but at the very least, it should be persuasive.

If either you or the law practice don't accept the Commissioner's recommendation, then:

- if the amount in dispute is more than \$10,000, the Commissioner is unlikely to be able to do anything further (although there are still some steps that are potentially open to the Commissioner in that situation);
- if the amount in dispute is \$10,000 or less, the Commissioner may make a determination as to whether or not there has been overcharging and, if so, the amount that has been overcharged – and that determination is binding on both you and the law practice.

You can find out more about what happens if you complain to the Commissioner about overcharging by going to the Commissioner's website at www.lpcc.sa.gov.au and clicking on the overcharging section.

If you would like further advice in relation to your rights with respect to costs you can do the following:

- Go to the Legal Profession Conduct Commissioner's website at www.lpcc.sa.gov.au.
- Contact the Legal Services Commission Legal Help Line on 1300 366 424.

Obtain independent legal advice. For details of legal practitioners who specialise in costs, community & specialist legal services that may be able to provide you with free advice, contact the Law Society on 82290200.