

8 March 2022

Clare Thompson SC
Chair
Legal Costs Committee

By email: cthompson@francisburt.com.au

Dear Ms Thompson

LEGAL COSTS COMMITTEE REVIEW CONTENTIOUS BUSINESS DETERMINATIONS

Thank you for your letters dated 1 November and 4 November 2021.

Please find enclosed the Law Society's submission.

If you have any queries please contact Mary Woodford, General Manager Advocacy and Professional Development on 9324 8646 or mwoodford@lawsocietywa.asn.au

Yours sincerely



Rebecca Lee
President

REVIEW OF CONTENTIOUS BUSINESS DETERMINATIONS

To
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Date
FRIDAY, 25 FEBRUARY 2022

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1. Introduction

- 1.1 The Law Society of Western Australia is the peak professional association for lawyers in Western Australia. Established in 1927, the Law Society is a not-for-profit association dedicated to the representation of its members and the enhancement of the legal profession through being a respected leader and advocate on law reform, access to justice and the rule of law.
- 1.2 This submission is made in response to an invitation by letters dated 1 and 4 November 2021 from the Chair of the Legal Costs Committee, Ms Clare Thompson, to submit any comments or suggestions by 10 March 2020 to a review of the following:
- *Legal Profession (Supreme and District Courts) (Contentious Business) Determination 2020*
 - *Legal Profession (Supreme and District Courts) (Criminal) Determination 2020*
 - *Legal Profession (Magistrates Court) (Civil) Determination (No 2) 2020*
 - *Legal Profession (Magistrates Court) (Criminal) Determination 2020*
 - *Legal Profession (Official Prosecutions) (Accused's Costs) Determination 2020*
 - *Legal Profession (Family Court of Western Australia) Determination 2020*
 - *Legal Profession (Magistrates Court) (Family Law) Determination 2020; and*
 - *Legal Profession (State Administrative Tribunal) Determination 2020.*
- 1.3 The Legal Costs Committee has resolved to review these determinations (also referred to as scales) with a view to the commencement date of each new determination being 1 July 2022.

2. Issues highlighted by the Legal Costs Committee

2.1 The adoption of more fixed or flat fees.

The Law Society does not recommend including more fixed or flat fees in the scales. The Society notes that if too many items within scales are fixed, this may have the inadvertent result of an increase in special costs applications and further pressure on the Courts to determine such applications. This, in turn, could also lead to additional legal costs for litigants which otherwise may not have been required. Furthermore, proceedings inevitably contain a large variation in complexity, and accordingly, in providing a limit on a maxima, rather than a fixed fee, the taxing officers' discretion remains intact to determine the reasonableness of the fees claimed for the work conducted in that particular matter.

2.2 Whether any procedural changes have brought about a need for new items or the deletions of any items.

The Law Society does not consider that any procedural changes have occurred since the previous review of the scales that warrant deletion of items or insertion of new items.

2.3 Whether any specialist practices have developed which require specific items, e.g. as a result of the changes to the jurisdiction including historical child sexual assault. Of interest to the Committee is whether an uplift to the usual scale rates should be included for a plaintiffs lawyers in these cases, given they are otherwise limited to the scale.

The Law Society does not recommend an uplift to the scale rates for historic abuse matters. It is the position of the Society that the rates in the scales already allow a reasonable recovery on a party and party basis, and that there is no shortage of lawyers in the market who would

be prepared to act on these matters at scale rates. Furthermore, allowing the recovery of additional legal fees above those provided in the Scale for one particular category of matter may create a 'slippery slope' where lawyers in other areas of practice agitate for uplifted rates to the detriment of the consumer and other legal professionals who are restricted to the ordinary scale rates. While it is noted that an increase of Scale rates is applicable in catastrophic personal injury matters, such a declaration must first be made by the Court. In any event, the normal procedures for seeking an uplift in the scale apply to historical sexual abuse cases similar to any other litigation, such as applying for special costs orders if the proceeding is of unusual difficulty, complexity and/or importance.

2.4 Whether impending changes to disclosure amounts brought about by the proposed National Law, should impact rates

The Law Society does not consider that the new disclosure amounts in the Legal Profession Uniform Law should impact rates in the contentious business scales.

2.5 The Committee's history of attempting to close the gap between levels of counsel and between senior practitioner and counsel rates should be continued

The Law Society is well apprised of the ongoing incongruence in rates whereby, for example, the rate for Counsel arguing a case in a trial is less than the rate of the solicitor in the back of the courtroom who is taking the notes. The Law Society has previously made submissions on this matter in the 2019 review.

The Law Society is of the view that no action should be taken in this review of the contentious business scales, however the matter should be revisited when the scales are next up for review.

2.6 Whether the present items for discovery and inspection might be reformed, for example, by merging the two items, or by abandoning limits on the amounts, or by increasing the limits.

The Law Society is of the view that the Discovery and Inspection Items should be unlimited.

The Law Society notes that the Inspection Item (Item 8, below) currently has \$495 in the final column, however it was the Society's understanding that this column is supposed to be blank.

3. Other Issues

3.1 The Workers' Compensation (Legal Profession and Registered Agents) Costs Determination 2018

The Law Society is of the view that a separate Costs Committee for Workers Compensation Determinations should not exist. Review of these scales should be the responsibility of the Legal Costs Committee, whose membership should consist of a practitioner who has a significant understanding of this practice area.

3.2 Legal Costs Committee website and access to searchable PDFs of the Scales

The Law Society laments the extinguishment of the accessible Legal Costs Committee website and the transfer of the scales to a generic WA Gov page. This has been an inconvenient change for our members, and the inconvenience is exacerbated by many of the PDF documents not available in a searchable format. The Law Society recommends that the text of each of the scales is able to be highlighted and selected in each of the PDF documents.



Rebecca Lee
President