

# Consultation paper on conditional costs agreements

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PO Box H326, Australia Square NSW 1215  
P 02 8293 5900 E [lsc@legalservicescouncil.org.au](mailto:lsc@legalservicescouncil.org.au)  
[legalservicescouncil.org.au](http://legalservicescouncil.org.au)

  
LEGAL PROFESSION  
**Uniform Law**

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## Call for submissions

The Legal Services Council (**Council**) invites public comment on the draft Legal Profession Uniform General Amendment (Conditional Costs Agreements) Rule (No 2) 2022 (**Attachment A**). Submissions can be sent to the Council by email to: [submissions@legalservicescouncil.org.au](mailto:submissions@legalservicescouncil.org.au) on or before 19 August 2022 and may be published on the Council's website unless you advise us otherwise.

## Overview of the Uniform Law scheme

The Legal Profession Uniform Law (**Uniform Law**) commenced on 1 July 2015 in Victoria and NSW and on 1 July 2022 in Western Australia. The objectives of the Uniform Law framework are to promote the administration of justice and an efficient and effective Australian legal profession through:

- interjurisdictional consistency in the law applying to the Australian legal profession
- ensuring legal practitioners are competent and maintain high ethical and professional standards
- enhancing the protection of clients and the public
- empowering clients to make informed choices about their legal options
- efficient, effective, targeted and proportionate regulation, and
- a co-regulatory framework with an appropriate level of independence for the legal profession.

The Uniform Law establishes a seven member Council and the office of the Commissioner for Uniform Legal Services Regulation. The Council sets the rules and policy to underpin the Uniform Law, ensuring it is applied consistently across participating jurisdictions. The Commissioner promotes compliance with, and ensures the consistent and effective implementation of, the dispute resolution and professional discipline provisions of the Uniform Law and Rules.

The Council's work is overseen by a Standing Committee, which comprises the Attorneys General of jurisdictions participating in the scheme.

Designated local regulatory authorities (**DLRAs**) are responsible for day-to-day regulation of the legal profession. In NSW, the DLRAs are the NSW Legal Services Commissioner, Law Society of NSW, NSW Bar Association, Legal Profession Admission Board (NSW) and Civil and Administrative Tribunal of NSW. In Victoria, the DLRAs are the Victorian Legal Services Board and Commissioner, Victorian Bar Association and Victoria Legal Admissions Board. In Western Australia, the DLRAs are the Legal Practice Board of Western Australia and Legal Services and Complaints Committee.

## Conditional costs agreements under the Uniform Law

Section 181 of the Uniform Law governs conditional costs agreements. Those are costs agreements that provide that the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate. An example of this is a "no win no-fee" agreement which is commonly used in personal injury matters.

Section 181(7) provides that a conditional costs agreement may relate to any matter except a matter that involves:

- (a) criminal proceedings
- (b) proceedings under the *Family Law Act 1975* (Cth)
- (c) proceedings under legislation specified in the Uniform Rules for the purpose of section 181 of the Uniform Law.

The *Family Court Act 1997* (WA) is specified in rule 72B of the Legal Profession Uniform General Rules 2015 (**Uniform General Rules**) for the purposes of section 181(7)(c).

The purpose of this consultation paper is to seek views on a proposed amendment to the Uniform General Rules that operate under section 181(7)(c) of the Uniform Law to provide that conditional costs agreements may not be entered into for matters that involve proceedings under the following Acts:

- *Guardianship Act 1987* (NSW)
- *Guardianship and Administration Act 2019* (Vic)
- *Guardianship and Administration Act 1990* (WA)
- *Adoption Act 2000* (NSW)
- *Adoption Act 1984* (Vic)
- *Adoption Act 1994* (WA)
- *Children and Young Persons (Care and Protection) Act 1998* (NSW)
- *Children, Youth and Families Act 2005* (Vic)
- *Children and Community Services Act 2004* (WA)
- *Child Support (Assessment) Act 1989* (Cth)

The consultation paper also seeks views on the continuation of the prohibition on conditional costs agreements in proceedings that involve the *Family Court Act 1997* (WA).

In particular, the Council is interested to hear from legal practitioners about the extent to which conditional costs agreements are currently used in these proceedings as well as any impact this may have on the provision of pro bono legal services.

## Conditional costs agreements in other jurisdictions

Historically, the States and Territories took different approaches to conditional costs agreements. The consensus forged by the Standing Committee of Attorneys General in 2004 was that the Legal Profession Model Bill (**Model Bill**) would contain non-core, but textually uniform if adopted, provisions permitting conditional costs agreements, except in criminal matters, Family Law Act matters and other local jurisdictional legislation as appropriate. The relevant Model Bill provision is set out below.

### **1023 Conditional costs agreements** [NC; but textually uniform if adopted]

- (1) A costs agreement may provide that the payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate, and a costs agreement containing a provision of that kind is referred to in this Act as a conditional costs agreement.
- (2) A conditional costs agreement may relate to any matter, except a matter that involves criminal proceedings or proceedings under the *Family Law Act 1975* of the Commonwealth [*insert reference to other local jurisdiction laws as appropriate; for example, adoption or child protection legislation*].

In Queensland, the Northern Territory and the Australian Capital Territory, conditional costs agreements may relate to any matter except a matter that involves criminal proceedings or proceedings under the *Family Law Act 1975* (Cth).<sup>1</sup>

In South Australia, conditional costs agreements may relate to any matter, except a criminal matter, a matter that relates to or involves child protection, custody, guardianship or adoption, or proceedings under the *Family Law Act 1975* (Cth) or *Child Support (Assessment) Act 1989* (Cth).<sup>2</sup>

In Tasmania, conditional costs agreements may relate to any matter, except a matter that involves criminal proceedings, proceedings under the *Adoption Act 1988* (Tas), *Children and Young Person and Their Families Act 1997* (Tas), *Youth Justice Act 1997* (Tas), *Relationships Act 2003* (Tas) or *Family Law Act 1975* (Cth).<sup>3</sup>

In Western Australia immediately prior to joining the Uniform Law scheme on 1 July 2022, conditional costs agreements could relate to any matter, except a matter that involved criminal proceedings, proceedings that relate to or involve child protection, custody, guardianship or adoption or proceedings under the *Family Court Act 1997* (WA), *Children and Community Services Act 2004* (WA), *Family Law Act 1975* (Cth), *Migration Act 1958* (Cth) or *Child Support (Assessment) Act 1989* (Cth).<sup>4</sup>

## Developing Uniform General Rules

The Uniform Law provides that the Council may develop Uniform General Rules.<sup>5</sup> In developing a proposed Uniform General Rule, the Council:

- (a) must consult with the Commissioner, and such of the Council's advisory committees and local regulatory authorities as it considers appropriate, and may consult more broadly if it so chooses, for a minimum period of 30 days
- (b) must release a draft of the proposed rule for public consultation and invite written submissions about the draft to be made to the Council during a specified period of at least 30 days before finalising the draft, and
- (c) must consider all reasonable submissions made and received.<sup>6</sup>

The Council may, after considering the submissions and making any amendments to the draft, submit the proposed rule to the Standing Committee.<sup>7</sup>

<sup>1</sup> *Legal Profession Act 2007* (QLD), s 323(2); *Legal Profession Act 2006* (NT), s 318(2); *Legal Profession Act 2006* (ACT), s 283(2).

<sup>2</sup> *Legal Practitioners Act 1985* (SA), Sch 3, cl 25(2).

<sup>3</sup> *Legal Profession Act 2007* (Tas), s 307(2).

<sup>4</sup> *Legal Profession Act 2008* (WA) repealed, s283(2)

<sup>5</sup> Uniform Law, s 425(1), (2).

<sup>6</sup> Uniform Law, s 425(3).

<sup>7</sup> Uniform Law, s 425(4).

## Consultation with DLRAs and other key stakeholders

In November 2021, the Council consulted with the following DLRAs about the proposal to amend the Uniform General Rules to provide that conditional costs agreements may not be entered into for matters that involve guardianship, adoption, child protection and child support proceedings as well as proceedings under the *Family Court Act 1997 (WA)*: Law Society of NSW, NSW Bar Association, NSW Legal Services Commissioner, Victorian Legal Services Board and Commissioner, Victorian Bar Association and Legal Practice Board of Western Australia. The Council also sought the views of the Australian Bar Association, Law Council of Australia, Law Institute of Victoria, Law Society of Western Australia and the Western Australia Bar Association.

In March 2022, the Council consulted with the following courts and tribunals on whether, and the extent to which, any such amendments would affect the exercise of their jurisdiction in relation to those proceedings: Federal Circuit and Family Court, Supreme Court of NSW, Children's Court of NSW, NSW Civil and Administrative Tribunal, Supreme Court of Victoria, County Court of Victoria, Children's Court of Victoria, Victorian Civil and Administrative Tribunal, Family Court of Western Australia, Western Australian State Administrative Tribunal and Children's Court of Western Australia.

## Guardianship, adoption and child protection proceedings

As noted above, conditional costs agreements are currently prohibited in relation to guardianship, adoption and child protection proceedings in South Australia and Tasmania and were previously prohibited in Western Australia immediately prior to the commencement of the Uniform Law on 1 July 2022.

Based on consultation to date, there appears to be general support from stakeholders to extend the prohibition on using conditional costs agreements to guardianship, adoption and child protection matters under the Uniform Law. The policy arguments in support of extending the prohibition are summarised below:

- ***The best interests of the child are paramount*** – These proceedings are unique, in that the focus is on the best interests of the child or young person who is the subject of the application, as opposed to others who may initiate or seek to become a party to those proceedings.
- ***Parties are vulnerable*** – These matters often involve vulnerable parties, who should not be in a position where they receive advice or feel pressured to fight for unrealistic outcomes because the practitioner has negotiated an agreement that means they will only be paid if that outcome is achieved, and whose interests would not be served by protracted litigation.
- ***Proceedings are non-adversarial*** – Proceedings are conducted with as little formality and legal technicality as the case permits. The principle that the safety, welfare and well-being of a child or young person is paramount in any action or decision is incompatible with a legal service assisting on condition of a successful outcome and may result in legal practitioners seeking to run proceedings in an adversarial manner.

- **There is no financial benefit** – Conditional costs agreements are generally offered by lawyers where there is a very good chance of a financial or commercial benefit for a client arising from litigation (for example, an award of damages) from which the law practice can in turn be paid. Such agreements would unlikely be an attractive prospect for lawyers in guardianship, adoption and child protection matters because the nature of such proceedings is that it is not as simple as achieving a “successful” outcome because of the range of outcomes and decisions that may be reached. For example, in some cases a successful resolution will involve the child not living with the parent.
- **Most receive legal assistance** – The vast majority of parties involved in guardianship, adoption and child protection proceedings are either government representatives or are legally assisted through Legal Aid or the Aboriginal Legal Service or are self-represented. Therefore, the benefit of a conditional costs agreement to a client would not often arise.

However, stakeholders were unable to advise on the extent to which conditional costs agreements are being used in these matters. In addition, a number of submissions from the courts and tribunals suggested that the profession is best placed to comment on policy matters including the use of conditional costs agreements in relevant proceedings.

## Child support proceedings

As noted above, conditional costs agreements are currently prohibited in child support matters in South Australia and were previously prohibited in Western Australia immediately prior to the commencement of the Uniform Law on 1 July 2022.

Based on consultation to date, there appears to be general support from stakeholders to extend the prohibition on using conditional costs agreements to child support proceedings under the Uniform Law. However, some stakeholders suggested that further consideration is needed in relation to the use of pro bono briefs in child support matters to ensure that there would be no unintended consequences.

## Family law proceedings

Based on consultation to date, there was broad support from stakeholders for the prohibition on conditional costs agreements to be extended to the *Family Law Act 1997* (WA) to ensure a consistent approach between participating jurisdictions given the existing prohibition in relation to proceedings under the *Family Law Act 1975* (Cth), as set out in section 181(7)(b) of the Uniform Law.

Stakeholders noted that this would simply be a technical adjustment in recognition of the way Western Australia went about implementing the *Family Law Act 1975* (Cth) package.

On 1 July 2022, the Council made the Legal Profession Uniform General Amendment (Conditional Costs Agreements) Rule 2022 which prohibits the use of conditional costs agreements in relation to proceedings under the *Family Court Act 1997* (WA). The draft Legal Profession Uniform General Amendment (Conditional Costs Agreements) Rule (No 2) 2022 would retain the prohibition of conditional costs agreements in relation to proceedings under that legislation.

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public consultation draft

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New South Wales

# **Legal Profession Uniform General Amendment (Conditional Costs Agreements) Rule (No 2) 2022**

under the

Legal Profession Uniform Law

*[The following enacting formula will be included if this Rule is made—]*

The Legal Services Council has made the following Rule under the *Legal Profession Uniform Law*.

Chief Executive Officer, Legal Services Council



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# public consultation draft

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Legal Profession Uniform General Amendment (Conditional Costs Agreements) Rule (No 2) 2022 [NSW]

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## Legal Profession Uniform General Amendment (Conditional Costs Agreements) Rule (No 2) 2022

under the

Legal Profession Uniform Law

### 1 Name of Rule

This Rule is the *Legal Profession Uniform General Amendment (Conditional Costs Agreements) Rule (No 2) 2022*.

### 2 Commencement

This Rule commences on the day on which it is published on the NSW legislation website.

### 3 Amendment of Legal Profession Uniform General Rules 2015

#### Rule 72B

Omit the rule. Insert instead—

#### 72B Conditional costs agreements

For the purposes of section 181(7)(c) of the Uniform Law, the following Acts are specified—

- (a) the *Adoption Act 2000* of New South Wales,
- (b) the *Adoption Act 1984* of Victoria,
- (c) the *Adoption Act 1994* of Western Australia,
- (d) the *Children and Community Services Act 2004* of Western Australia,
- (e) the *Children and Young Persons (Care and Protection) Act 1998* of New South Wales,
- (f) the *Children, Youth and Families Act 2005* of Victoria,
- (g) the *Child Support (Assessment) Act 1989* of the Commonwealth,
- (h) the *Family Court Act 1997* of Western Australia,
- (i) the *Guardianship Act 1987* of New South Wales,
- (j) the *Guardianship and Administration Act 1990* of Western Australia,
- (k) the *Guardianship and Administration Act 2019* of Victoria.