

17 November 2022

Ms Heather Moore
Chief Executive Officer | Legal Services Council
Commissioner for Uniform Legal Services Regulation
PO Box H326
AUSTRALIA SQUARE NSW 1215

By email:



Dear Ms Moore

Consultation paper on conditional costs agreements

I refer to the consultation paper released by the Legal Services Council in July 2022 calling for submissions on proposed amendments to Uniform General Rule 72B. The proposed amendments would extend the existing (nation-wide) prohibition on making conditional costs agreements in criminal and *Family Law Act 1975* (Cth) matters to include guardianship, adoption, and child protection proceedings under specified laws of Western Australia, New South Wales and Victoria.

As mentioned in its letter of 4 August 2022, the Law Council notes that the proposed amendments would represent a significant change in both New South Wales and Victoria. It was also noted that jurisdictions other than the Uniform Law jurisdictions have taken differing approaches to conditional costs agreement prohibitions in guardianship, adoption, and child protection, but that the policy reasons for these differing approaches are unclear.

The Law Council sought comments from its constituent bodies and Sections on this issue, including the extent to which conditional costs agreements are currently being used (or, more importantly, misused) and the impact the proposals might have on pro bono or reduced fee services to provide access to justice. This submission incorporates the views of the Law Society of New South Wales, the Law Institute of Victoria, and the Victorian Bar.

The consultation paper sets out policy arguments in support of extending the prohibition to all guardianship, adoption, and child protection proceedings, which include:

- vulnerable parties 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 the interests of vulnerable parties would not be served by protracted litigation;

- the principle in non-adversarial proceedings that the safety, welfare and well-being of a child or young person is paramount may be compromised if legal services were provided on condition of a successful outcome, which could lead legal practitioners to run these kinds of proceedings in an adversarial manner;
- guardianship, adoption, and child protection matters do not generally involve achieving a financial or commercial benefit to provide a source of funds from which a law practice can then be paid, and thus conditional costs agreements would not be an attractive option for lawyers; and
- conditional costs agreements would provide little benefit to clients because the vast majority of parties to these proceedings are either government representatives, or are legally assisted through Legal Aid or the Aboriginal Legal Service, or are self-represented.

The responses received by the Law Council, from its constituent bodies, do not identify any instances in practice where conditional costs agreements are being misused to achieve the ends implicit in the above policy arguments. On the contrary, conditional costs agreements are often seen as simply inappropriate, and therefore rarely suggested, in the great majority of guardianship, adoption, and child protection matters.

Accordingly, a policy argument that the Uniform Law prohibitions on conditional costs agreements must be extended to address a risk of misuse occurring in guardianship, adoption, and child protection matters is somewhat moot.

The Law Council shares the concerns identified by its constituent bodies that introducing a blanket prohibition on conditional costs agreements in guardianship, adoption, and child protection proceedings could, in some circumstances, unreasonably limit access to legal representation by excluding situations where a conditional costs agreement would seem to be quite an appropriate mechanism to deploy.

The Law Council notes that section 181 of the *Guardianship and Administration Act 2019* (Vic) provides that the Supreme Court or VCAT may order a guardian or administrator to compensate a represented person for a loss caused by the guardian or administrator contravening the Act. Contraventions can include a guardian using that position for profit, or an administrator failing to properly manage the property or financial affairs of the represented person. A concern raised is that persons such, for example, victims of 'elder abuse' may not be able to fund the making of an application for compensation, and that that lack of funding in the first instance might result in proper claims not being made. In these situations, the availability of a conditional costs agreement is likely to increase the propensity for proper claims to be heard and determined. A legal practitioner who proposes a conditional costs agreement in this situation is clearly acting in the best interests of a client who would otherwise lack the financial resources to obtain access to justice, and is bearing the financial risk if the claim fails.

Also noted is the practical complexity of applying a prohibition on conditional costs agreements in contested proceedings involving multiple enactments. By way of example, a contested matter can involve an application for orders relating to wrongdoing or maladministration by an attorney under section 36(4) of the *Powers of Attorney Act 2003* (NSW), an application for the appointment of a guardian under section 14 of the *Guardianship Act 1987* (NSW) and an application for a financial management order under Part 3A of *Guardianship Act 1987* or under section 40 of the *NSW Trustee and Guardian Act 2009* (NSW).

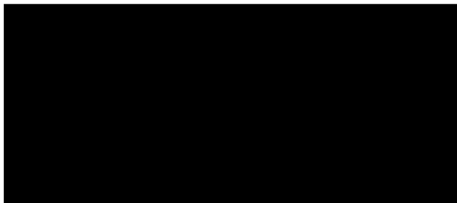
A further matter raised by the Law Council's constituent bodies concerns the meaning of the expression "successful outcome of the matter" in sections 181 and 182 of the Uniform Law. A meaning limited to a financial outcome would seem to run counter to the best interest and decision-making principles in, for example, the *Children, Youth and Families Act 2005* (Vic) and the requirement for proceedings in the Family Division of the Children's Court of Victoria to be conducted informally and without regards to legal forms. However, it is noted that section 528A of that Act provides for the enforcement of orders relating to costs in proceedings in the Family Division of the Children's Court of Victoria. Also, section 88 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) provides that the Children's Court can make an order for costs in care proceedings, though only in exceptional circumstances.

The Law Council suggests that the legislatures clearly had in mind that, in some situations, the complexities of the issues involved justify the court awarding costs. However, in these situations the concept of "successful outcome of the matter" must be seen in the context of the legislative purpose of an outcome that is in the best interests of the child or young person, rather than a "successful outcome" being an award of costs to fund legal fees under a conditional costs agreement. It is also suggested that the court would be quick to exercise its inherent powers to discipline any legal practitioner it considered to be engaging in "protracted litigation" and running proceedings in an "adversarial manner" simply for the purpose of obtaining an award of costs.

The Law Council suggests that a more nuanced response to this issue is required. It appears that there is too great a variety in the individual circumstances faced in guardianship, adoption, and child protection matters to safely support a policy response that conditional costs agreements must be prohibited in all such matters.

The Law Council recommends that the proposed amendments to Uniform Rule 72B be deferred, pending further policy development to identify circumstances and safeguards (including safeguards other than a Uniform Rule) in which an appropriate and beneficial role for conditional costs agreements can be preserved in guardianship, adoption, and child protection matters.

Yours sincerely



James Popple
Chief Executive Officer