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Date 29 September 2022

Megan Pitt

Chief Executive Officer
Legal Services Council
PO Box H326
Australia Square, NSW 1215

By email only: [REDACTED]

Dear Ms Pitt,

Proposed Prohibition on Conditional Costs Agreements in Guardianship and Child Protection Matters

The Law Institute of Victoria (LIV) welcomes the opportunity to provide feedback to the Legal Services Council (LSC) in response to the LSC's July 2022 Consultation Paper (Consultation Paper) on the proposed amendment to the Uniform General Rules 2015 to prohibit conditional costs agreements (CCAs) in certain types of matters (the Proposed CCA Prohibitions).

The LIV appreciates the importance of a nationally consistent approach to regulation of the legal profession, specifically, uniformity across jurisdictions participating in the Legal Profession Uniform Law (Uniform Law).¹ A proposed change to the Uniform Law cannot, however, be made solely to meet the objective of uniformity. Any proposed change to the Uniform Law must be justified with evidence-based research and conclusions and must be "efficient, effective, targeted and proportionate", aligning with the objectives set out in s 3(e) of the Uniform Law.

In the short timeframe provided, the LIV consulted with members of the Litigation Lawyers Committee, Succession Law Section, Elder Law Committee, Costs Executive Committee, Litigation Executive Committee, Courts Practice Committee, Disability Committee and the Children and Youth Issues Committee.

Whilst the use of CCAs in guardianship and child protection matters appear to be rarely used, the LIV is of the view that prohibiting these altogether could, in some circumstances, unreasonably limit clients' ability to access legal representation, for little identifiable benefit and with potential unintended consequences.

¹ as set out in the Uniform Law, (n 10) s 3. objective of 'providing and promoting interjurisdictional consistency in the law applying to the Australian legal profession'.

The LSC's policy arguments for introducing the Proposed CCA Prohibitions

The Consultation Paper (on page 6) presents the LSC's policy arguments supporting the introduction of the Proposed CCA Prohibitions. The LIV members note the possible legitimacy of these assertions. For example, in *Guardianship and Administration Act 2019* (GAA) matters, there are questions about the capacity of the client subject to the guardianship proceedings. Although some may be found to have capacity generally or for specific decisions, CCAs are potentially confusing and require high level cognitive skills to properly understand them. Prohibiting CCAs in guardianship matters has the potential to protect those who do lack capacity.

However, the LIV remains of the view that further exploration as to the legitimacy of the assertions is required to demonstrate the benefits of the Proposed CCA Prohibitions and how introducing these changes meets the objectives of the Uniform Law.

Practical effect of the Proposed CCA Prohibitions

LIV members who provided their feedback were collectively of the view that introducing the Proposed CCA Prohibitions would likely have little practical effect given that it is understood (anecdotally) that CCAs are rarely used in guardianship and child protection matters, reflecting the LSC's assertions on page 7 of the Consultation Paper. Notwithstanding this, the LIV remains concerned that there could be circumstances where CCAs are appropriate (as set out below).

Guardianship Matters

The LIV understands that the use of CCAs in GAA Act matters is uncommon, likely because it is impractical to define a 'successful' outcome in a guardianship matter. The Victorian Civil and Administrative Tribunal Guardianship List (Guardianship List) has exclusive originating jurisdiction in relation to matters under the GAA Act in Victoria. The Guardianship List is generally considered to be a no-costs jurisdiction, and clients often fund the application themselves, there being no right of recourse against the estate of a represented person. An application for a guardian or administrator is not a judiciable dispute but rather administrative in nature.² It is difficult to understand how a CCA might work in the context of guardianship matters as CCAs are usually dependent upon a successful or other pre-determined outcome which leads to a direct financial benefit. In guardianship matters the outcome can be quite varied, and rarely financial, making it challenging for lawyers to try to define a successful outcome.

The LIV understands that it is not uncommon for lawyers (including Counsel) to reduce their overall fees for guardianship matters, although this may occur when a bill is rendered rather than through a CCA. Whether and the extent to which this occurs is largely dependent on the course the matter takes. The LIV understands that pro bono work is sometimes carried out by lawyers acting for clients in GAA Act matters. These circumstances arise as a result of the benevolence of the solicitor or Counsel involved, or through community legal services.

² *PJB v Melbourne Health*, [123] to [129]

Circumstances where CCAs may be appropriate (in Guardianship matters)

LIV members did, however, identify circumstances where use of a CCA may be appropriate in guardianship matters. These circumstances include applications for compensation against a former guardian or administrator (section 181 of the GAA Act), and for matters brought by an administrator under section 51 of the GAA Act.³

Section 181 of the GAA Act includes provisions that allow for individuals to seek compensation from their appointed administrator or guardian in certain circumstances. In these matters, it is possible to define a successful outcome with a financial benefit, making CCAs more appropriate. It would be improper to deny vulnerable individuals' access to CCAs, where required, in order for them to pursue such claims.

Section 51 of the GAA Act, allows for administrators to pursue litigation on behalf of represented persons. The LIV presumes that the Proposed CCA Prohibitions would not preclude the ability of administrators to enter into a CCA in the course of exercising their powers under s 51 of the GAA Act. In some circumstances a CCA may facilitate access to legal representation. It would not be desirable to exclude persons represented by an administrator from access to such arrangements, subject to appropriate oversight from the Tribunal.

Child Protection Matters

The experience of LIV members who provided feedback suggests that a prohibition on CCAs in child protection matters would not materially affect current practices. LIV members report that CCAs are very rarely used in child protection proceedings. These matters can be differentiated from other jurisdictions on the basis that the best interests of the children involved in the matter are paramount over the interests of other parties. Unlike a civil matter where costs follow the event, parties to a child protection matter are unlikely to receive any financial benefit resulting from successful litigation and are often eligible for some degree of financial legal aid. The LIV also notes that while lawyers will generally provide some degree of pro bono work on individual child protection files, it is unusual for a client to be entirely pro bono as this area of law is generally supplemented by grants of legal aid.

Notwithstanding this, the LIV is concerned that unintended consequences could arise given there has been no evidenced-based research to justify altering the current status quo.

Conclusion

The LIV acknowledges that establishing carve outs for particular circumstances where the use of CCAs may be appropriate (like those identified above) would defeat the objective of achieving uniformity across the participating Uniform Law jurisdictions.

The LIV is further concerned that other circumstances, not readily identifiable at this time, may become apparent with further exploration and consultation. In the absence of further exploration and

³ Refer section 181 and section 51 of the *Guardianship and Administration Act 2019*

consultation, the Proposed CCA Prohibitions may result in unintended consequences, with possible access to justice implications.

For these reasons, LIV does not support the introduction of the Proposed CCA Prohibitions at this time.

If you have any queries, please contact [REDACTED] at [REDACTED] or telephone [REDACTED].

Yours sincerely

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Adam Awty
Chief Executive Officer
Law Institute of Victoria