

17 August 2022

Megan Pitt
Chief Executive Officer, Legal Services Council
Commissioner for Uniform Legal Services Regulation
By email: submissions@legalservicescouncil.org.au

Dear Ms Pitt

Consultation paper on conditional costs agreements

Thank you for the opportunity to provide feedback in relation to the draft Legal Profession Uniform General Amendment (Conditional Costs Agreements) Rule (No 2) 2022.

Our feedback is confined to the *Guardianship Act 1987* (NSW), *Adoption Act 2000* (NSW), *Children and Young Persons (Care and Protection) Act 1998* (NSW), *Child Support (Assessment) Act 1989* (Cth) and the *Family Court Act 1997* (WA).

[Guardianship, adoption and child protection proceedings](#)

In the experience of our solicitors, Legal Aid NSW is not aware of conditional costs agreements being used in guardianship, adoption or child protection proceedings.

In any event, we are supportive of conditional costs agreements being prohibited in relation to proceedings under the *Guardianship Act 1987* (NSW), *Adoption Act 2000* (NSW) and *Children and Young Persons (Care and Protection) Act* (NSW). Our support for this proposal is for the reasons outlined on pages 6-7 of the consultation paper.

However, we wish to clarify the statement in the consultation paper that “[m]ost receive legal assistance” for proceedings under these pieces of legislation. While this is likely accurate in relation to proceedings under the *Adoption Act 2000* (NSW) and *Children and Young Persons (Care and Protection) Act 1998* (NSW), this is not necessarily the case in relation to proceedings under the *Guardianship Act 1987* (NSW) given that representation is only available to parties when leave is granted by the NSW Civil and Administrative Tribunal.¹ Also, while grants of aid are available

¹ *Civil and Administrative Tribunal Act 2013* (NSW) s 45(1).

from Legal Aid NSW in relation to proceedings under each Act, the availability of grants is subject to strict criteria.²

We note the concerns in relation to the impact that prohibiting conditional costs agreements could have on people undertaking pro bono type work. This does not impact the work of Legal Aid NSW because when a person is represented on a grant of aid, a court or tribunal may make an order as to costs in relation to that person as if they were not in receipt of a grant of aid.³ However, the proposal does have the potential to impact on legal practitioners who enter into conditional costs agreements solely on the basis they will recover costs from the other party in the event of a successful outcome.⁴ This is an aspect of the proposal that may require further consultation with legal practitioners and firms who undertake pro bono work.

We note that while it is possible for costs orders to be made in relation to proceedings under each Act, it is not common because the threshold for the making of a costs order is high. In relation to proceedings under the *Guardianship Act 1987* (NSW), each party is to pay their own costs unless there are “special circumstances warranting an award of costs”.⁵ In proceedings under the *Children and Young Persons (Care and Protection) Act 1998* (NSW), the Children’s Court is prohibited from making a costs order “unless there are exceptional circumstances that justify it in doing so”.⁶ However, we also note that cost orders are more readily available in relation to matters on appeal.

It is therefore uncommon that costs orders are made in relation to proceedings under these Acts and therefore unlikely that the prohibition of conditional costs agreements will deter legal practitioners from electing to take on these types of matters on a pro bono basis.

Child support proceedings

Legal Aid NSW solicitors are also not aware of conditional costs agreements being used in relation to matters under the *Child Support (Assessment) Act 1989* (Cth). We presume that one reason consideration is being given to extending the prohibition on

² For the eligibility criteria for a grant of aid in relation to proceedings under the *Guardianship Act 1987* (NSW), see- <https://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/6.-civil-law-matters-when-legal-aid-is-available/6.16.-guardianship-matters>. For *Adoption Act 2000* (NSW) proceedings see- <https://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/5.-family-law-matters-when-legal-aid-is-available/5.18.-adoption-matters>. For *Children and Young Persons (Care and Protection) Act 1998* (NSW) proceedings see- <https://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/5.-family-law-matters-when-legal-aid-is-available/5.16.-care-and-protection-matters>.

³ *Legal Aid Commission Act 1979* (NSW) s 42.

⁴ For an example of such an arrangement, see *Manieri & Anor v Cirillo* [2014] VSCA 227.

⁵ *Civil and Administrative Tribunal Act 2013* (NSW) s 60(1)-(3). Subsection (3) provides a list of matters the Tribunal may have regard to in determining whether there are “special circumstances warranting an award of costs”.

⁶ *Children and Young Persons (Care and Protection) Act* (NSW) s 88.

conditional costs agreements to child support matters is because they are, broadly speaking, family law matters. However, it is important to note that unlike other family law related proceedings, the child's best interests are not a paramount consideration or object of the *Child Support (Assessment) Act 1989* (Cth).⁷ In contrast to guardianship, adoption and child protection proceedings, we see no clear policy reasons to prohibit conditional costs agreements in relation to proceedings under the *Child Support (Assessment) Act 1989* (Cth).

In particular, we do not believe there are compelling reasons to prohibit conditional costs agreements in relation to "enforcement" proceedings under the *Child Support Assessment Act 1989* (Cth). This is because most enforcement proceedings are brought by the Commonwealth under section 113 of the *Child Support (Registration and Collection) Act 1989* (Cth), which is not covered by the proposal. We note it is also possible for the payee themselves to initiate enforcement proceedings under the *Child Support (Registration and Collection) Act 1989* (Cth) after giving notice to the Child Support Registrar pursuant to section 113A.

In cases where the child support debt is not enforceable by the Child Support Registrar, namely where it is a "private collect" debt matter, then enforcement proceedings are brought pursuant to section 79 of the *Child Support (Assessment) Act 1989* (Cth) and will be covered by the proposed prohibition. Therefore, if the proposed changes were to be implemented, there would be an anomaly where a conditional costs agreement could be entered into in relation to enforcement proceedings under the *Child Support (Registration and Collection) Act 1989* (Cth), but not in relation to enforcement proceedings under the *Child Support (Assessment) Act 1989* (Cth). We can see no logical basis for prohibiting conditional cost agreements to enforce debts in "private collect" cases, but not in "agency collect" cases.

In relation to any concerns about the impact that prohibiting conditional costs agreements in child support matters could have on the willingness of practitioners to undertake pro bono work in this area, we encourage consultation with legal practitioners and firms who undertaken pro bono work. Nonetheless, we note that it is not possible to obtain a cost order in Administrative Appeals Tribunal (AAT) proceedings regarding the *Child Support (Assessment) Act 1989* (Cth).⁸ However, it is possible for cost orders to be made in relation to proceedings under the *Child Support (Assessment) Act 1989* (Cth) that are before the Federal Circuit and Family Court of Australia on appeal in relation to a question of law, or for the purpose of

⁷ *Child Support (Assessment) Act 1989* (Cth) s 4.

⁸ Administrative Appeals Tribunal, *Practice Direction: Taxation of Costs*, 30 June 2015, 1.1 < <https://www.aat.gov.au/AAT/media/AAT/Files/Directions%20and%20guides/Practice-Direction-Taxation-of-Costs.pdf>.

enforcement proceedings.⁹ As well as in relation to appeals on a question of law to the Federal Court.¹⁰

In addition to appeals regarding AAT decisions, other court proceedings under the *Child Support (Assessment) Act 1989* (Cth) include applications for:

- a declaration of parentage (ss 106A and 107)
- leave to depart from an administrative assessment that is more than 18 months old (s 111)
- departure from the administrative assessment (s 116)
- lump sum or non-periodic child support (section 123)
- setting aside or varying a binding or limited child support agreement (s 136)
- urgent maintenance orders (s 139), and
- repayment of overpaid child support (s143).

It is not clear to us that there is any sound policy basis for prohibiting conditional costs agreement in any or all of those proceedings. In light of the above matters, we believe that further consideration of possible unintended consequences is required before extending the prohibition of conditional costs agreement to any child support matters.

Family Court Act 1997 (WA)

We are supportive of the existing prohibition on conditional costs agreements in relation to proceedings under the *Family Law Act 1975* (Cth). For greater consistency in relation to family law proceedings across all jurisdictions, we support in-principle the extension of this prohibition to proceedings under the *Family Court Act 1997* (WA).

If you have any questions or would like to discuss this matter further, please contact [REDACTED] Manager, Strategic Law Reform Unit, [REDACTED] or on [REDACTED].

Yours sincerely

[REDACTED]

Monique Hitter
Chief Executive Officer

⁹ *Administrative Appeals Tribunal Act 1975* (Cth) s 44AAA(1); *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) r 11.03, Pt 12, Sch 3.

¹⁰ *Administrative Appeals Tribunal Act 1975* (Cth) s 44(1); *Federal Court of Australia Act 1976* (Cth) s 43.