



16 January 2015

Legal Services Council
Level 11, 170 Phillip Street
Sydney NSW 2000

BY EMAIL: submissions@legalservicescouncil.org.au

Dear Sir/Madam

Consultation on General Rules

We write in relation to the Legal Services Council's (**LSC**) current consultation on the proposed General Rules under the Legal Profession Uniform Law.

1. About the contributors

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

The Financial Rights Legal Centre (**FRLC**) is a community legal centre specialising in financial services, particularly in the areas of consumer credit, banking, debt recovery and insurance. It fully integrates telephone assistance and financial counselling with legal advice and representation. FRLC also operates the Insurance Law Service, a national specialist consumer insurance advice service.

We have two main areas of concern with the proposed General Rules—the standard costs disclosure form and the award of costs in pro bono matters.

2. Standard costs disclosure form

For matters where costs are likely to be between \$750 and \$3000, rule 68 of the General Rules provides that a lawyer can give their client written costs disclosure using the standard form set out in Schedule 1 of the General Rules. If not using the standard form, lawyers are required to provide the client with costs information in accordance with section 174 of the Legal Profession Uniform Law, unless total legal costs in the matter are not likely to exceed \$750.

We welcome the requirement for providers of legal services to take reasonable steps to ensure that clients understand the billing information presented (section 174(3) of the Legal Profession Uniform Law) and the facilitation of simplified costs disclosure. However, we are

concerned that the proposed standard costs disclosure for uses legalistic language that will be difficult for consumers to understand.

When consumers seek legal assistance, there is an information asymmetry that favours providers of legal services. Consumers of legal services, particularly those who are not familiar with legal processes, often do not understand how legal billing works or how much their matter will eventually cost them.

As noted by the Productivity Commission, the difficulty in gauging a rough range of costs, particularly for first time litigants, can discourage them from engaging legal advice.ⁱ We strongly support the Productivity Commission's view that:

Regulatory requirements for costs disclosure should promote brief, clear and easily understood documents... It is important that the objective—ensuring that the client is adequately informed—is not forgotten.ⁱⁱ

We strongly recommend that the proposed standard disclosure form be reviewed with a focus on plain English drafting. As part of this review, the standard form should be consumer-tested for comprehension.

We also support the Financial System Inquiry's comments that 'although disclosure remains a valuable tool to improve consumer outcomes, it should not be relied on in isolation.'ⁱⁱⁱ Effective billing regulation requires more than just adequate disclosure. It requires a comprehensive regulatory approach that focuses on consumer understanding of billing arrangements and ensuring that costs are fair and reasonable having regard to the quality and extent of legal assistance received.

3. Awards of costs in pro-bono matters

We are concerned about the lack of clarity in the Legal Professional Uniform Law as to whether community legal centres (**CLCs**) offering pro-bono legal assistance are entitled to an award of costs.

Costs agreements between CLCs and their clients generally provide that the client need not pay legal fees except to the extent that the client actually recovers them from the other side. Following the decision of *King v King*,^{iv} there has been uncertainty as to whether an award of costs can be made on this basis. The Victorian Supreme Court of Appeal decision of *Mainieri & Anor v Cirillo*^v expressly rejected *King v King*, and supported an award of costs in pro bono matters where the relevant costs agreement makes the obligation to pay contingent upon an award of costs. However, as this decision is not binding in New South Wales, we remain concerned that this position has not been confirmed in the Legal Profession Uniform Law.

We recommend that the General Rules include a supplementary rule in Part 4.3 which clarifies that legal firms and CLCs providing pro bono assistance are entitled to an award of costs where the relevant costs agreement makes the obligation to pay contingent upon the award.^{vi} In its report into Access to Justice, the Productivity Commission similarly

recommended that parties represented on a pro bono basis should be entitled to seek awards for costs.^{vii}

Please contact us on 03 9670 5088 or at gerard@consumeraction.org.au if you would like to discuss these matters further.

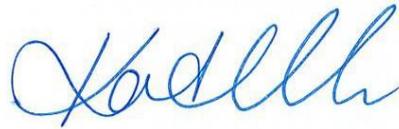
Yours sincerely,

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ⁱ Productivity Commission, Access to Justice Report, Vol. 1 p. 190, 5 September 2014, available at: http://www.pc.gov.au/__data/assets/pdf_file/0018/145404/access-justice-volume1.pdf

ⁱⁱ Productivity Commission, Access to Justice Report, Vol. 1 p. 202, 5 September 2014, available at: http://www.pc.gov.au/__data/assets/pdf_file/0018/145404/access-justice-volume1.pdf

ⁱⁱⁱ Financial System Inquiry, Final Report, p.9, 7 December, available at: http://fsi.gov.au/files/2014/12/FSI_Final_Report_Consolidated20141210.pdf

^{iv} *King v King & Ors* [2012] QCA 81

^v *Mainieri & Anor v Cirillo* [2014] VSCA 227

^{vi} Section 208(1) of the Legal Profession Uniform Law provides that the Uniform Rules may make provision with respect to any aspect of legal costs.

^{vii} Productivity Commission, Access to Justice Report, Recommendation 13.4, 5 September 2014, available at: http://www.pc.gov.au/__data/assets/pdf_file/0018/145404/access-justice-volume1.pdf