



Law Council
OF AUSTRALIA

2019 Inquiry into Legal Practitioners' Scales of Costs

Joint Costs Advisory Committee

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2019 Executive as at 28 June 2019 are:

- Mr Arthur Moses SC, President
- Ms Pauline Wright, Treasurer
- Mr Tass Liveris, Executive Member
- Dr Jacoba Brasch QC, Executive Member
- Mr Ross Drinnan, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of the New South Wales Bar Association, Queensland Law Society, Law Society of South Australia, Law Society of Western Australia, Law Society of New South Wales and the Family Law Section, in the preparation of this submission.

General Concern

1. The Law Council is grateful for the opportunity to provide a submission to the Joint Costs Advisory Committee's (**JCAC**) annual inquiry into the quantum of costs allowable to legal practitioners pursuant to the scales of costs contained in the rules of the High Court of Australia (**High Court**), Federal Court of Australia (**Federal Court**), Family Court of Australia (**Family Court**) and Federal Circuit Court of Australia (**Federal Circuit Court**). These inquiries provide an opportunity to ensure that parties awarded costs are, as much as possible, not out-of-pocket following resolution of their legal matter.
2. The cost of litigation and accessing legal representation in Australia is an issue of ongoing concern to the community and the legal profession. Clients must be able to have confidence that what is charged by lawyers, and what may be recovered, is appropriate and reasonable, while legal practitioners have a right to be fairly remunerated for their skill and labour. The award of costs should provide a just result to the successful party, who should not be substantially out-of-pocket after an order for costs is made.
3. Scales of recoverable costs therefore serve an important role in promoting the administration of justice and providing greater clarity and certainty for the benefit of parties, Courts and the legal profession.
4. The Law Council remains concerned, as stated in its submission to the JCAC's 2018 review,¹ and as noted by the JCAC in its Eleventh Report on Legal Practitioners' Costs,² that the scales of recoverable costs have failed to keep pace with actual costs incurred by parties and do not reflect the value of the intellectual work undertaken by practitioners; current charging practices; or changes in the technology used within firms and by practitioners.
5. As one example, the Law Council notes that Items 2 and 3 of Schedule 3 of the *Federal Court Rules 2011* (Cth) require consideration of the number of words in particular documents, rather than the complexity and time spent in drafting/reading documents. This approach devalues the intellectual work that may be involved in drafting or reading a document and does not reflect, in many cases, actual charging methods.
6. Consideration could be given in future years to the need to revisit the current approach to reviewing the scales of costs to better reflect the amounts charged by the profession. For example, the scales could be adjusted to reflect the type of document and the time required for reading/drafting it rather than the number of words contained in the document.

Application of the Federal Costs Advisory Committee Formula

7. Under the JCAC's Terms of Reference, in reviewing the quantum of costs contained in the rules of the federal courts, the JCAC is required to consider the Federal Costs Advisory Committee (**FCAC**) formula 'as an indicative mechanism, to be adjusted

¹ Law Council of Australia, Submission to the Joint Costs Advisory Committee, *2018 Inquiry into Legal Practitioners' Scales of Costs* (30 July 2018).

² Joint Costs Advisory Committee, *Eleventh Report on Legal Practitioners' Costs*, (September 2018) 4.

according to available data (including but not exclusive to statistics provided by the Australian Bureau of Statistics).³

8. The FCAC formula is as follows:

$$\text{Recommended change} = Ax + By + Cz$$

Where:

- A = percentage change in wages and salaries, as indicated by the change in the wage price index (**WPI**);
- B = percentage change in other overheads, as indicated by the change in the consumer price index (**CPI**);
- C = percentage partners' salaries and profits as indicated by the change in the WPI;
- x = the weighting given to wages and salaries = 31%
- y = the weighting given to other overheads = 39%
- z = the weighting given to partners' salaries and profit = 30%.

9. The above relative weight of each component is determined by reference to the Australian Bureau of Statistics' *Legal Services Australia* survey, most recently undertaken in 2007-08 (published June 2009).⁴ The Law Council reiterates its concern that these weightings have not been adjusted in more than a decade, and are unlikely to reflect current economic conditions or legal practice expenditures.
10. Adopting the weightings from the 2007-08 survey and using CPI and WPI data for the March 2019 quarter,⁵ the Law Council submits that the JCAC should recommend an adjustment of at least **1.95 per cent** to the federal scales of costs (see calculation at Table 2). Consistent with the JCAC's previous practice, the Law Council encourages the JCAC to have regard to all statistics available to it in arriving at the final level of the recommended increases.⁶

Table 1. Movement in indices

	Mar-18	Mar-19	Change in indices	% change in indices
WPI	128.2	131.2	3.0	2.34
CPI	112.6	114.1	1.5	1.33

³ As extracted in Joint Costs Advisory Committee, *Eleventh Report on Legal Practitioners' Costs*, (September 2018) 1.

⁴ Australian Bureau of Statistics, *Legal Services, Australia, 2007-08* (Catalogue No 8667.0, 24 June 2009).

⁵ Australian Bureau of Statistics, *Consumer Price Index, Australia, March Quarter 2019* (Catalogue No 6401.0, 24 April May 2019); Australian Bureau of Statistics, *Wage Price Index, Australia, March Quarter 2019* (Catalogue No 6345.0, 15 May 2019).

⁶At the date of this submission, the most recent available values for the CPI and WPI were as published for the 2019 March quarter. It is anticipated that figures for the 2019 June quarter will be released on 25 July 2018 (CPI) and 14 August 2019 (WPI).

Table 2. Application of the FCAC formula

	Weighting	% change in indices	% Increase
Wages and Salaries	0.31	2.34	0.73
Other Overheads	0.39	1.33	0.52
Partners Salaries and Profit Share	0.30	2.34	0.70
Recommended Increase			1.95

Recommendation:

- **That the JCAC recommend an increase in the scales of costs that is at least in accordance with the Federal Costs Advisory Committee Formula (currently 1.95 per cent).**

Implementation of the JCAC's Recommendations

11. The Law Council notes that in previous years there have been concerning delays between the JCAC's annual recommendation for the adjustment of costs and the courts' implementation of the recommendation, particularly the Federal Court, and to a lesser extent, the Federal Circuit Court.
12. The Eleventh Report of the JCAC noted that at the time of release in September 2018, amendments to the Federal Court's rules were being drafted to implement the Federal Court's Rules Committee's recommendation that the increases from the four previous JCAC Reports be implemented. The Federal Court increased the amounts prescribed for costs in Schedule 3 of the Federal Court Rules 2011 on 2 May 2019. The costs had not been increased since 1 January 2014.
13. Such delays mean practitioners are losing the benefit of the annual increases recommended by the JCAC, which are based, at least in part, on contemporaneous data. The Law Council urges the JCAC to recommend that its recommendations be implemented by each Court as soon as practicable.

Recommendation:

- **That the JCAC recommend that its recommendations be implemented by each Court as soon as practicable.**

Family Court and Federal Circuit Court

14. As outlined in the Law Council's submission to the JCAC's 2018 review, on 30 May 2018 the Attorney-General announced a proposal to abolish the stand-alone specialist Family Court and merge it into the Federal Circuit Court.⁷ The Federal Circuit and Family Court of Australia Bill 2018 and its Consequential Amendments Bill

⁷ See Federal Circuit and Family Court of Australia Bill 2018 (Cth); Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (Cth).

(the Bills) were introduced in August, with an intended commencement date of 1 January 2019.

15. The Bills were not passed by the 45th Parliament and lapsed in April 2019 when the Parliament was prorogued prior to the Federal Election in May 2019.⁸ The Attorney-General has indicated the merger proposal will be reintroduced in the current Parliament but is yet to confirm a proposed timeline or release a copy of the legislation to be reintroduced for public comment.⁹
16. The Law Council maintains its strong opposition to the Bills. The Law Council, alongside a coalition of domestic violence service providers, specialist family law and child protection legal assistance providers and academics, recently urged the Government not to reintroduce the flawed merger bills into the 46th Parliament, warning the merger will only hurt families and children already at their most vulnerable.¹⁰
17. The Law Council has urged the Government to instead explore holistic alternatives for reform. The Australian Law Reform Commission's recent, landmark review of the family law system raises prospects of alternate reform and holistic structural change that differ significantly from the merger and deserve careful consideration, as do other proposals including the model proposed by the Semple Report.¹¹
18. The scales of costs for the Federal Circuit Court and the Family Court remain particularly low. As a first step, the Law Council submits that the JCAC should recommend that the scales of costs in the Family Court and the Federal Circuit Court be adjusted at least in accordance with the FCAC formula.
19. Further, careful regard should be had to the scales of costs in the context of any structural reform considered by the 46th Parliament.

Barristers' Costs¹²

20. Barristers' work is included in the scales of costs for the Federal Circuit Court and the Family Court. Recoverable fees for barristers' work undertaken in matters in these Courts are therefore impacted by the implementation of the JCAC's recommendations and any other revisions to the scales of costs. However, barristers' fees are not included in either the Federal Court or High Court scales of costs.
21. The Federal Court has produced a National Guide to Counsel Fees (**the Guide**) which may be applied by taxing officers. The Guide was issued on 28 June 2013 and has not been updated since. Failure to take into account market and cost-of-living changes over time and revise amounts in the Guide has meant that barristers' fees payable under the Guide have decreased in real dollar terms.

⁸ See Federal Circuit and Family Court of Australia Bill 2018 (Cth); Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (Cth).

⁹ Hon Christian Porter MP, Attorney-General for Australia, 'Continuing reforms priority for Attorney-General' (Media Release, 26 May 2019) <<https://www.attorneygeneral.gov.au/Media/Pages/Cabinet-Appointment-26-May-2019.aspx>>.

¹⁰ Rape & Domestic Violence Services Australia, Women's Legal Services Australia, Law Council of Australia, 'Put children first, abandon flawed family court merger' (Media Release, 18 July 2019).

¹¹ Des Semple, *Future Governance Options for Federal Family Law Courts in Australia: Striking the Right Balance* (August 2008) <<https://www.ag.gov.au/LegalSystem/Courts/Documents/court-reform-semble-report.PDF>>.

¹² The following content is based on the input of the New South Wales Bar Association and may not represent the position of each of the Law Council's Constituent Bodies.

22. There is no published guideline with respect to barristers' fees in the High Court.
23. The Law Council submits that the JCAC should recommend that the High Court and the Federal Court ensure that continuing changes in market rates and market conditions affecting barristers' fees are recognised no less than similar changes affecting solicitors' fees and charges.
24. Furthermore, the Law Council encourages the JCAC to recommend that the Federal Court update the Guide to recognise changes since 2013, and to conduct future reviews and updates of the Guide at the same time as reviews and updates concerning solicitors' fees.
25. The Law Council notes that rates for experienced barristers under the Guide are higher than the rates allowed for experienced solicitors under Schedule 3 of the *Federal Court Rules 2011* (Cth). In the course of any update to the Guide, consideration should be given to ensure any difference between solicitors and barrister rates is proportionate to and reflects the differing nature of work undertaken, and the skill and expertise brought to bear in undertaking this work.

Recommendations:

- **That the JCAC recommend that the High Court and the Federal Court ensure that continuing changes in market rates and market conditions affecting barristers' fees receive equal recognition to similar changes affecting solicitors' fees and charges.**
- **That the JCAC recommend that the Federal Court update the National Guide to Counsel Fees to recognise changes in market rates and market conditions affecting barristers' fees since 2013.**