

**THE LAW SOCIETY
OF SOUTH AUSTRALIA**

THE VOICE OF THE SOUTH AUSTRALIAN LEGAL PROFESSION

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Council
JAC
Pres file
Subns

65-7

7 May 2010

RM,rp

The Honourable John Rau MP
Attorney General
DX 336
ADELAIDE

Dear Mr Attorney

Re: Guardianship and Administration Regulations – Legal Costs

It is understood that the Guardianship and Administration Regulations lapse in September this year and that it will be necessary to promulgate fresh Regulations. It would therefore seem to be timely to revisit the question of the costs which are prescribed by Regulation 12 of those Regulations.

My predecessor John Goldberg took up the issue with the then Attorney General by letter dated 19 January 2009. I am enclosing a copy of that letter which sets out in detail the issues relating to the current costs prescribed by the Regulations.

Both the Justice Access and the Costs Committees of the Law Society have a particular interest in the guardianship and mental health jurisdiction and are concerned that despite representations made over many years steps have still not been taken to address the very real disadvantages affecting a very vulnerable group of Society. Since 19 January 2009 there have been further increases in the Supreme Court scale further disadvantaging parties involved in such matters.

Legal costs

As noted by Mr Goldberg the costs as prescribed by the Guardianship and Administration Regulations were fixed by reference to the applicable scales of costs in 1992. At that time the hourly rate prescribed by the Supreme Court scale for solicitors was \$124.00. The current scale rate is \$288.51 per hour. This is an increase of 132.5%. The scale prescribed in the current Regulations is very low and completely out of alignment with current rates. It is a disincentive for solicitors to act in these matters although it is understood that there is a handful of practitioners who do act out of a sense of personal and professional obligation but at a significant cost to themselves. I am therefore attaching a schedule with a revised proposal for fees in Guardianship matters for your favourable consideration. It is suggested that these fees should be indexed to the Supreme Court scale as it applies from time to time.

Travelling time and mileage

There is no provision in the present regulations for payment for travelling time or mileage. I understand that with the decentralisation of mental health services over the years there has been an increase in

travelling time required of practitioners to take instructions and to attend on matters. These expenses are being borne by the lawyers personally which is a disincentive to act for patients at Lyell McEwin and Noarlunga in particular. It is suggested that the scale be amended to make provision for travelling and mileage particularly as it is understood that it has been government policy to decentralise mental health services.

Costs of medical reports and other disbursements


The other area where clients are very significantly disadvantaged is that there is no allowance for disbursements. This means that they are not in a position to seek alternative or clarifying medical reports nor call any professional witnesses unless those witnesses are happy to come along and not charge for their attendance.

These are matters which are all outlined in the letter of 19 January 2009 and obviously prejudice the rights of those people affected by the Guardianship and Administration Act and remain of concern. The Society reiterates the submissions made in the letter of 19 January 2009 and requests that any new scale of fees be, at a minimum, in accordance with revised proposal attached together with provision for indexing to the Supreme Court scale and proper allowance for travelling, mileage and disbursements.

The Society would welcome the opportunity of discussing these matters with you.

Thank you for your consideration of these matters.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Richard Mellows', with a horizontal line underneath.

Richard Mellows
PRESIDENT

PROPOSED FEES FOR 2010

COMPARISON OF FEES FOR APPEALS AGAINST GUARDIANSHIP BOARD ORDERS

Current Rate (exclusive of GST)	Proposed Rate 2010 (exclusive of GST)
Appeal to Guardianship Board	
\$223.00 preparation	\$518.47 preparation
\$73.00 per hour	\$169.72 per hour
Appeal to District Court	
\$296.00 preparation	\$688.20 preparation
\$98.00 per hour	\$227.85 per hour
\$88.00 application for leave	\$204.60 application for leave
Appeal to Supreme Court	
\$296.00 preparation	\$688.20 preparation
\$98.00 per hour	\$227.85 per hour
\$88.00 application for leave	\$204.60 application for leave

NOTE: Increase to Supreme Court Scale

In 1993 the Supreme Court Scale for the hourly attendance rate for a solicitor was \$124.00.

In 2010 the Supreme Court Scale for the hourly attendance rate for a solicitor is \$288.51.

This amounts to an increase of 132.5 % over this period.



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65-7

19 January 2009

C155, M32
JG; rp

The Honourable M J Atkinson MP
Attorney-General
DX 336
ADELAIDE SA

Dear Mr Attorney

Legal Costs in the Guardianship and Mental Health Jurisdiction

The Law Society's Justice Access Committee takes a particular interest in the guardianship and mental health jurisdiction.

The Committee has agreed to raise a number of issues which concern the provision of legal representation under section 72 of the Act in respect of appeals before the District and Supreme Courts.

As you would be aware, the *Mental Health Act* and the *Guardianship and Administration Act* allow for various orders to be made which can impact significantly upon the rights and freedoms of those subject to them.

These people comprise one of the most vulnerable groups in society who are least able to represent their own interests. Effective legal representation is crucial to ensure that their rights are respected and the provisions of the Act are only used in appropriate cases.

In recognition of these concerns, Division 4 of the *Guardianship and Administration Act* establishes a scheme whereby any person appealing to the District or Supreme Courts against an order has a right to be represented by legal counsel.

Subsection 73(3) provides that the legal practitioner is entitled to receive fees for his or her services in accordance with the prescribed scale.

The prescribed scale is laid down in Regulation 12 of the *Guardianship and Administration Regulations*. A legal practitioner is not entitled to receive additional fees from any other source for such work. The Society is seriously concerned that the prescribed scale is so low that the scheme's viability is at risk. A table illustrating the fees in this jurisdiction is attached.

The Crown which appears on behalf of the treating team is always able to obtain a medical report to support their case before the appeal court.

The cost of paying for their own report, plus the cost of the expert's attendance at the hearing if necessary, is simply out of the question for most clients, who are usually on pensions or low incomes. As a consequence, the person the subject of the order is at a significant disadvantage in the appeal hearing. Without a medical report which provides an alternative view, the appeal court has no option but to prefer the evidence of the treating team contained in the report tendered by the Crown. In reality this renders the safeguards provided by the appeal process meaningless.

It is submitted that a disbursement for medical reports should be allowed where the issue of the existence of the mental illness or its appropriate treatment is at issue.

Similar issues arise in relation to appeals under the *Mental Health Act 1993*. The Society is writing separately to the Minister administering that Act. The Society seeks a joint approach whereby the schemes for legal costs under both Acts can be amended together.

The Society is of course happy to discuss these issues with you further.

Thank you for your consideration of these matters.

Yours sincerely



John Goldberg
PRESIDENT

Annexure A

APPEALS AGAINST DETENTION ORDERS			APPEALS AGAINST GSB ORDERS		
APPEALS AGAINST MHRT		Appeal to GSB	Appeal to MHRT		Appeal to District Court
1976	1987	1993	1976	1987	1993
\$100 prep	\$185 prep	\$223 prep	\$100 prep	\$185 prep	\$296 prep
\$30 per hr	\$61 per hr	\$73 per hr	\$30 per hr	\$61 per hr	\$98 per hr
Appeal to Supreme Court		Appeal to Supreme Court	Appeal to Supreme Court		Appeal to Supreme Court
1976	1987	1993	1976	1987	1993
\$100 prep	\$246 prep	\$296 prep	\$100 prep	\$246 prep	\$296 prep
\$30 per hr	\$81 per hr	\$98 per hr	\$30 per hr	\$81 per hr	\$98 per hr
		2000 (GST)			2000 (GST)
		\$245.30 prep			\$325.60 prep
		\$80.30 per hr			\$107.80 per hr

Notes:

- There has been no increase at all since the 1993 legislation which came into force in 1997.
- The 2000 increase was simply to take into account the GST.
- The difference between the current rate which is the **1987 rate** and the **1987 rate** is highlighted showing that the fees have only increased by \$12.00 per hour for detention appeals and \$27.00 per hour for District Court Appeals over 21 years.
- There is also a fee paid for applications for leave to appeal to the Supreme and District Courts which applies to some appeals only. This is currently \$88.00

Annexure B
**COMPARISON OF FEES FOR APPEALS AGAINST GUARDIANSHIP BOARD
ORDERS**

Current Rate (exclusive of GST)	Proposed Rate 2008 (exclusive of GST)
Appeal to Guardianship Board	
\$223.00 preparation	\$472.98 preparation
\$73.00 per hour	\$154.83 per hour
Appeal to District Court	
\$296.00 preparation	\$627.82 preparation
\$98.00 per hour	\$207.86 per hour
\$88.00 application for leave	\$186.65 application for leave
Appeal to Supreme Court	
\$296.00 preparation	\$627.82 preparation
\$98.00 per hour	\$207.86 per hour
\$88.00 application for leave	\$186.65 application for leave

NOTE: Increase to Supreme Court Scale

In 1993 the Supreme Court Scale for the hourly attendance rate for a solicitor was \$124.00
In 2008 the Supreme Court Scale for the hourly attendance rate for a solicitor is \$263.00
This amounts to an increase of **112.10%** over this period.