



The information contained in this fact sheet was last updated on 10 January 2020.

Fact Sheet – Legal Costs and Court Proceedings

The Legal Profession Conduct Commissioner is established by the *Legal Practitioners Act, 1981 (SA) (Act)* to regulate the conduct of all lawyers in South Australia (from both the private and public sectors), as well as interstate lawyers who practise in South Australia. The Commissioner is an independent statutory agency of the Crown.

The Commissioner has the power to investigate complaints about overcharging by lawyers. The Commissioner's powers in relation to legal costs are limited, and there is some overlap between the role of the Commissioner and the role of the Courts.

This Fact Sheet is designed to explain the role and powers of the Commissioner in relation to legal costs, and how the Commissioner's role interacts with that of the Courts. References in this Fact Sheet to sections or Schedules are references to section or Schedules in the Act.

Court Proceedings about Legal Costs

There are two types of Court proceedings that may be issued where there is a dispute between a lawyer and a client about legal costs.

Supreme Court – Adjudication Proceedings

An application for adjudication of costs may be made to the Supreme Court by a law practice¹, a client (or third party payer)² or the Commissioner.³

An application for adjudication of costs brought by a client must be made within 6 months⁴, although an extension of time can be sought.⁵

The Supreme Court has power to determine:

¹ Schedule 3, Part 7, clause 39

² Schedule 3, Part 7, clause 37

³ Schedule 3, Part 7, clause 42

⁴ of the bill being given, the request for payment being made or the costs being paid.

⁵ Schedule 3, Part 7, clause 37(4) and (5)



- the basis on which the costs should be calculated – that is, either:
 - pursuant to a valid and enforceable costs agreement;⁶
 - pursuant to the Supreme Court scale;⁷ or
 - according to the fair and reasonable value of the legal services provided;⁸ and
- the quantum or amount of the costs.

Magistrates Court – Debt Recovery Proceedings

If a law practice has issued a bill to a client, and the client doesn't pay some or all of it, then the law practice can issue debt recovery proceedings in the Magistrates Court.⁹

The Magistrates Court can determine contractual and liability issues. Those issues include whether or not the law practice was engaged or retained, the identity of the parties to the costs agreement or retainer, and whether and when the costs agreement or retainer was terminated.

The Magistrates Court cannot determine the quantum or amount of disputed legal costs.¹⁰

The Commissioner's Powers in relation to Legal Costs

The Commissioner must investigate complaints of overcharging which are received within 2 years of the law practice having provided the final bill to which the complaint relates.¹¹ He has a discretion to allow a longer period within which a complaint of overcharging can be made.

At the conclusion of an investigation into a complaint of overcharging, the Commissioner will prepare a report on the results of the investigation.¹²

The Commissioner may arrange for the costs which are the subject of a complaint of overcharging to be assessed by a costs assessor, and he must do so before he can make a binding determination as to whether there has been overcharging.¹³ The Commissioner can require the complainant to pay the reasonable costs of the costs assessment upfront. The cost of getting such an assessment will vary depending on the size of the practitioner's file which is to be assessed. If the complaint is upheld, then that amount may be repaid to the complainant.¹⁴

⁶ Schedule 3, Part 4, clause 21(a). A costs agreement is one made in accordance with Schedule 3, Part 5. The costs disclosure requirements are contained in Schedule 3, Part 3.

⁷ Schedule 3, Part 4, clause 21(b). The Supreme Court scale is the default basis on which a lawyer's costs are calculable in South Australia, in the absence of a valid and enforceable costs agreement.

⁸ Schedule 3, Part 4, clause 21(c)

⁹ Debt recovery proceedings cannot be issued until 30 days after a bill has been provided to the client, Schedule 3, Part 6, clause 31(1).

¹⁰ *Cavallaro v FNE Lawyers* [2012] SASC 189 per Lunn J:

"By virtue of the relevant legislation, recovery of lawyers' costs from clients can require separate proceedings in two different courts. It is for the Magistrates Court to determine the retainer and the contractual liability of the client to the lawyer and it is for this Court [the Supreme Court] to determine the proper quantum of the costs which are payable."

¹¹ Section 77N(1) – subject to section 77C which enables the Commissioner to close a complaint (or part of a complaint) without further considerations of its merits, for the reasons set out in section 77C(a)-(g).

¹² Section 77N(6)(a)

¹³ Section 77N(4)(b)

¹⁴ Section 77N(4a)



The Commissioner can make a binding determination in relation to costs, but only where the costs have been assessed by a costs assessor and the amount in dispute does not exceed \$50,000.¹⁵

Regardless of the amount in dispute, if the Commissioner considers that there has been overcharging, he may **recommend** that a legal practitioner or law practice reduce a charge or refund an amount.¹⁶

A recommendation by the Commissioner is not binding, but if the Supreme Court is conducting an adjudication of costs then it must have regard to a recommendation of the Commissioner.¹⁷

Interaction between an Overcharging Complaint to the Commissioner and Court Proceedings

Supreme Court – Adjudication Proceedings

If an application for the adjudication of costs is issued in the Supreme Court, the Commissioner **cannot** proceed to investigate a complaint of overcharging regarding the costs the subject of the application.¹⁸

In these circumstances the Commissioner would ordinarily close the complaint or the part of the complaint about overcharging.¹⁹

Magistrates Court – Debt Recovery Proceeding

If the law practice issues debt recovery proceedings in the Magistrates Court, and a complaint of overcharging either has been or is made to the Commissioner, what happens depends on the amount of the costs the subject of the proceedings and complaint.

For these purposes, in this Fact Sheet:

- **Small Recovery Proceedings** means recovery proceedings in the Magistrates Court where the amount in dispute is \$50,000 or less;
- **Large Recovery Proceedings** means recovery proceedings in the Magistrates Court where the amount in dispute is more than \$50,000.

If Small Recovery Proceedings have been issued and a complaint of overcharging is or has been made to the Commissioner, the Commissioner will suspend the investigation of the complaint until the Magistrates Court has considered and determined any contractual and liability issues.

Once that has occurred, the Commissioner's investigation of the complaint will resume and may include agreement of the amount of the costs by the parties through conciliation²⁰ or determination of the amount of the costs by the Commissioner.

¹⁵ Section 77N(7). For a complaint that was made before 1 December 2019, the amount in dispute needed to be \$10,000 or less before the Commissioner could make a binding determination.

¹⁶ Section 77N(6)(b)

¹⁷ Schedule 3, Part 7, clause 46(2)

¹⁸ Section 77N(3)

¹⁹ Pursuant to section 77C(1)(e) on the basis that its subject matter is the subject of civil proceedings.

²⁰ The Commissioner may arrange for conciliation of a matter before him (including a costs dispute) – section 77O(1).



If Large Recovery Proceedings have been issued and a complaint of overcharging is or has been made to the Commissioner, the Commissioner will usually close the investigation of the complaint (or the part of the complaint about overcharging).²¹

What you need to know about the Commissioner's role if Court Proceedings are issued

- The Commissioner's office cannot provide legal advice, representation or advocacy in relation to Court proceedings or any other matter.
- If you require legal advice, you may approach a solicitor of your choosing, the Legal Services Commission of South Australia on 1300 366 424 or your nearest Community Legal Centre at www.saccls.org.au
- Making a complaint to the Commissioner does not prevent a law practice from issuing or pursuing proceedings or a Court from dealing with those proceedings.
- The Commissioner has no power to vary, suspend or set aside an Order or Judgment of a Court.
- If Court proceedings are issued and you intend to defend or participate in the same, it is important that you take steps to do so yourself by contacting the Court Registry.

²¹ Pursuant to section 77C(1)(e) on the basis that its subject matter is the subject of civil proceedings.