



THIRTY-NINTH PARLIAMENT

REPORT 63
JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION

INFORMATION REPORT IN RELATION TO:

CHILDREN'S COURT (FEES) AMENDMENT REGULATIONS (No. 2) 2012, CIVIL JUDGMENTS ENFORCEMENT AMENDMENT REGULATIONS 2012, CORONERS AMENDMENT REGULATIONS 2012, DISTRICT COURT (FEES) AMENDMENT REGULATIONS (No. 3) 2012, EVIDENCE (VIDEO AND AUDIO LINKS FEES AND EXPENSES) AMENDMENT REGULATIONS (No. 2) 2012, MAGISTRATES COURT (FEES) AMENDMENT REGULATIONS (No. 3) 2012, STATE ADMINISTRATIVE TRIBUNAL AMENDMENT REGULATIONS (No. 3) 2012, SUPREME COURT (FEES) AMENDMENT REGULATIONS (No. 3) 2012

Presented by Mr Peter Abetz MLA (Chair)

and

Hon Ljiljana Ravlich MLC (Deputy Chair)

September 2013

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed:

28 June 2001

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“6. Joint Standing Committee on Delegated Legislation

- 6.1 A *Joint Standing Committee on Delegated Legislation* is established.
- 6.2 The Committee consists of 8 Members, 4 of whom are appointed from each House. The Chairman must be a Member of the Committee who supports the Government.
- 6.3 A quorum is 4 Members of whom at least one is a Member of the Council and one a Member of the Assembly.
- 6.4 (a) A report of the Committee is to be presented to each House by a Member of each House appointed for the purpose by the Committee.
- (b) Where a notice of motion to disallow an instrument has been given in either House pursuant to recommendation of the Committee, the Committee shall present a report to both Houses in relation to that instrument prior to the House’s consideration of that notice of motion. If the Committee is unable to report a majority position in regards to the instrument, the Committee shall report the contrary arguments.
- 6.5 Upon its publication, whether under section 41(1)(a) of the *Interpretation Act 1984* or another written law, an instrument stands referred to the Committee for consideration.
- 6.6 In its consideration of an instrument, the Committee is to inquire whether the instrument –
- (a) is within power;
- (b) has no unintended effect on any person’s existing rights or interests;
- (c) provides an effective mechanism for the review of administrative decisions; and
- (d) contains only matter that is appropriate for subsidiary legislation.
- 6.7 It is also a function of the Committee to inquire into and report on –
- (a) any proposed or existing template, *pro forma* or model local law;
- (b) any systemic issue identified in 2 or more instruments of subsidiary legislation; and
- (c) the statutory and administrative procedures for the making of subsidiary legislation generally, but not so as to inquire into any specific proposed instrument of subsidiary legislation that has yet to be published.
- 6.8 In this order –
- “instrument” means –
- (a) subsidiary legislation in the form in which, and with the content it has, when it is published;
- (b) an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law;
- “subsidiary legislation” has the meaning given to it by section 5 of the *Interpretation Act 1984*.”

Members as at the time of this inquiry:

Mr Peter Abetz MLA (Chair)	Hon Ljiljana Ravlich MLC (Deputy Chair)
Hon John Castrilli MLA	Hon Robin Chapple MLC
Hon Peter Katsambanis MLC	Hon Mark Lewis MLC
Ms Simone McGurk MLA	Mr Peter Watson MLA

Staff as at the time of this inquiry:

Felicity Mackie (Advisory Officer (Legal))	Alex Hickman (Advisory Officer (Legal))
Anne Turner (Advisory Officer (Legal))	Steve Hales (Advisory Officer)
Stacey Martin (Committee Clerk)	

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Government Response

This Report is subject to Standing Order 191(1):

Where a report recommends action by, or seeks a response from, the Government, the responsible Minister or Leader of the House shall provide its response to the Council within not more than 2 months or at the earliest opportunity after that time if the Council is adjourned or in recess.

The two-month period commences on the date of tabling.

CONTENTS

GOVERNMENT RESPONSE	
EXECUTIVE SUMMARY AND RECOMMENDATIONS	i
EXECUTIVE SUMMARY	i
RECOMMENDATIONS	i
1 REFERENCE AND PROCEDURE	1
2 THE FEE INSTRUMENTS	2
3 HISTORICAL APPROACH TO THE SCRUTINY OF FEES	3
Committee approach	3
Scrutiny of court fees in 2012	5
4 COMMITTEE SCRUTINY OF THE FEE INSTRUMENTS	7
Hearing with Attorney General	7
Difference of approach to determining validity of fees	8
Level of financial detail	8
District Court Project	8
Committee observations on the additional evidence	10
5 CONCLUSIONS	12

EXECUTIVE SUMMARY AND RECOMMENDATIONS OF THE
REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION
IN RELATION TO
INFORMATION REPORT ON VARIOUS COURT FEE INSTRUMENTS

EXECUTIVE SUMMARY

- 1 The Joint Standing Committee on Delegated Legislation (**Committee**) has been unable to properly perform its scrutiny of the eight instruments the subject of this report that seek to increase court and related fees by the Consumer Price Index.
- 2 This has been due to the inadequate level of financial information given by the Department of the Attorney General to justify the increase in fees, including the lack of a costing methodology that can be used to cost individual fees.
- 3 To enable the Committee to properly perform its scrutiny function, it must receive enough information to demonstrate to the Committee's satisfaction that each fee is at or below cost recovery. This information is especially vital when the empowering legislation does not authorise any of the fees covered by the eight instruments to be a tax.
- 4 The Committee has previously set out its concerns with fee increases in its 32nd Report and this report re-iterates these issues in terms of the Committee's ongoing inquiry into the level of cost recovery behind fees set by government departments. This report does not re-examine the principles canvassed in Report 32, but applies them to the eight instruments under consideration.
- 5 While the Committee has decided not to recommend disallowance of the eight instruments for the reasons set out on page 14 of this report, it has recommended a costing model be developed by the Department of the Attorney General to demonstrate at or below cost recovery for each fee covered by eight instruments.

RECOMMENDATIONS

- 6 Recommendations are grouped as they appear in the text at the page number indicated:

Page 12

Recommendation 1: The Committee recommends that the Department of the Attorney General develop a costing model for court fees that demonstrates at or below cost recovery for each individual fee and report to the Legislative Council on its progress by 31 March 2014.

Page 13

Recommendation 2: The Committee recommends that the notices of motion previously placed against the following instruments:

- *Children’s Court (Fees) Amendment Regulations (No. 2) 2012;*
- *Civil Judgments Enforcement Amendment Regulations 2012;*
- *Coroners Amendment Regulations 2012;*
- *District Court (Fees) Amendment Regulations (No. 3) 2012;*
- *Evidence (Video and Audio Links Fees and Expenses) Amendment Regulations (No. 2) 2012;*
- *Magistrates Court (Fees) Amendment Regulations (No. 3) 2012;*
- *State Administrative Tribunal Amendment Regulations (No. 3) 2012; and*
- *Supreme Court (Fees) Amendment Regulations (No. 3) 2012,*

be discharged from the notice paper.

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO

INFORMATION REPORT ON VARIOUS COURT FEE INSTRUMENTS

1 REFERENCE AND PROCEDURE

- 1.1 The Parliament of Western Australia has delegated the role of scrutinising subsidiary legislation to the Joint Standing Committee on Delegated Legislation (**Committee**).
- 1.2 The Committee carefully scrutinises fees imposed by subsidiary legislation to ensure that the fees imposed are within power of the enacting legislation. One issue it considers is whether a cost recovery model, used by a government department or agency, provides a reasonable assurance that fees for services do not over recover the cost of providing the services.
- 1.3 The following instruments increasing fees in respect of court and related proceedings (**Fee Instruments**) were referred to the Committee for scrutiny pursuant to its Terms of Reference.
- *Children’s Court (Fees) Amendment Regulations (No. 2) 2012.*
 - *Civil Judgments Enforcement Amendment Regulations 2012.*
 - *Coroners Amendment Regulations 2012.*
 - *District Court (Fees) Amendment Regulations (No. 3) 2012.*
 - *Evidence (Video and Audio Links Fees and Expenses) Amendment Regulations (No. 2) 2012.*
 - *Magistrates Court (Fees) Amendment Regulations (No. 3) 2012.*
 - *State Administrative Tribunal Amendment Regulations (No. 3) 2012.*
 - *Supreme Court (Fees) Amendment Regulations (No. 3) 2012.*
- 1.4 All of the Fee Instruments were published in the *Government Gazette* on 30 November 2012 and tabled in the Legislative Council on 14 May 2013.

- 1.5 Copies of each of the Fee Instruments as they appeared in the *Government Gazette* are available on the Committee's webpage.¹
- 1.6 Individual explanatory memoranda were provided to the Committee for each of the Fee Instruments and are available on the Committee's webpage.²
- 1.7 In order to facilitate Committee scrutiny, notices of motion to disallow the Fee Instruments were tabled in the Legislative Council on 27 June 2013.
- 1.8 The Committee's scrutiny included a hearing with the Attorney General, Hon Michael Mischin MLC and the Deputy State Solicitor, Mr Robert Mitchell SC, on 26 June 2013. The transcript of evidence is available on the Committee's webpage.³

2 THE FEE INSTRUMENTS

- 2.1 The explanatory memoranda for each of the Fee Instruments advise of an increase in various fees under each fee instrument of between 2.8% and 4.2% "*to match CPI movements as determined by the Department*", as part of the annual review of fees and charges by the Department of the Attorney General (**Department**).
- 2.2 In each of the empowering statutes for the Fee Instruments the relevant provisions state that regulations may provide for or prescribe fees to be paid in connection with a number of matters (including proceedings) in the jurisdiction of the court or tribunal. For example, section 53 of the *Children's Court of Western Australia Act 1988* provides:

53. Fees, regulations may prescribe

(1) Without limiting section 52, regulations may provide for or prescribe the fees to be paid in respect of or in connection with any case in the Court's jurisdiction.

(2) Without limiting subsection (1), regulations may provide for or prescribe the fees to be paid —

(a) when commencing a case in the Court;

(b) when entering a case for trial or at any other stage of proceedings in a case;

¹ Go to:

<http://www.parliament.wa.gov.au/parliament/commit.nsf/all/E72B1759E16EF3AD4825794800070349?opendocument&tab=tab3>

² Ibid.

³ Ibid.

(c) when lodging a document with the Court;

(d) for the issue of any document by the Court;

(e) for the service of any document;

(f) in respect of the conduct of the business of any office of or connected with the Court; and

(g) for the carrying out of any order or warrant of the Court.

(3) Without limiting subsection (1), regulations may prescribe the fees and expenses to be paid to mediators and experts.

(4) All fees received by the Court are to be credited to the Consolidated Account.

- 2.3 None of the empowering Acts authorise any of the fees to be in the nature of a tax. Nor are there any separate taxing Acts in respect of any of the Fee Instruments.

3 HISTORICAL APPROACH TO THE SCRUTINY OF FEES

Committee approach

- 3.1 The Committee's approach to the scrutiny of fees was succinctly outlined in its 10th Report as follows:

The Committee's scrutiny of fees generally involves identifying whether the prescription of the fee in the instrument is expressly or impliedly authorized by the primary Act. If so, the Committee attempts to identify whether the quantum of the fee:

- (where the fee is to be paid for a service) bears a reasonable relationship to the costs of providing that service;

or

- (where the fee is to be paid for a licence) bears a reasonable relationship to the costs incurred in establishing or administering the scheme or system under which the licence is issued, or is incurred in respect of matters to which the licence relates.

Where the Committee receives evidence that the quantum of the fee does not satisfy the above criteria, in the absence of any criteria to the contrary, it views the fee as being in the nature of a tax. The Committee will recommend disallowance of an instrument if it

*prescribes, without the authority of an Act of Parliament, a fee which in reality is a tax.*⁴

3.2 This was confirmed in the Committee's 32nd Report⁵, which also outlined the following principles and observations in relation to court fee increases similar to the fees the subject of the Fee Instruments.

- Absent any contrary intent in an Act of Parliament, the delegated legislation-making power conferred on the Executive must be interpreted consistently with section 46(7) of the *Constitution Acts Amendment Act 1899*⁶, which provides:

46 . Powers of the 2 Houses in respect of legislation

(7) *Bills imposing taxation shall deal only with the imposition of taxation.*

- In the absence of an express or necessarily implied authorisation in an Act for the imposition of a tax through subsidiary legislation, an over-recovery "fee" is not authorised by legislation empowering the imposition of a fee.⁷
- The Executive is not authorised to introduce a tax in the guise of a fee for services.⁸
- The practice of the Department of the Attorney General, of estimating its costs at either Registry or whole of court level, results in the Committee being unable to reach a conclusion about whether instruments are authorised by the empowering legislation.⁹

3.3 In addition, the following principles are also relevant.

- In order for the Committee to properly perform its scrutiny function in determining whether fees are at or below cost recovery, it requires sufficient

⁴ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 10, *Report of the Joint Standing Committee on Delegated Legislation in relation to the Overview of the Committee's Operations: Second Session of the Thirty-Sixth Parliament (August 2002 to November 2004)*, 19 November 2004, p7.

⁵ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 32, *Supreme Court (Fees) Amendment Regulations (No. 2) 2008, Children's Court (Fees) Amendment Regulations (No. 2) 2008, District Court (Fees) Amendment Regulations 2008, Magistrates Court (Fees) Amendment Regulations (No. 2) 2008, Fines, Penalties and Infringement Notices Enforcement Amendment Regulations (No. 2) 2007 and Other Court Fee Instruments*, 14 May 2009, pi.

⁶ Ibid, pii.

⁷ Ibid, p2.

⁸ Ibid, piv.

⁹ Ibid.

evidence from the relevant government agency to demonstrate this, to the Committee's satisfaction. This often comes in the form of a costing methodology and is supported by information/figures/data from the agency that the percentage of cost recovery is 100% or less.

- In the absence of such evidence, it is open to the Committee to question whether cost recovery is being achieved.
- Committee scrutiny has frequently been undertaken at the level of the individual fee. The main reason for this is that the empowering statute is often referring to exactly that.
- Advice that a fee has increased by the Consumer Price Index (**CPI**) does not, in itself, provide the Committee with sufficient information to establish the necessary relationships set out in paragraph 4.1 above.¹⁰
- The Auditor General stated in his 2010 Second Public Sector Performance Report:

Some agencies have interpreted DTF's current guidelines to mean they can increase their fees by CPI as an alternative to undertaking a costing exercise to determine fees or fee increases.

If agencies determine their costs accurately, as they are required to do, they should not need to refer to CPI.¹¹

- 3.4 The Committee has had regard to the principles and observations outlined in paragraphs 4.1 to 4.3 above in its scrutiny of the Fee Instruments.

Scrutiny of court fees in 2012

- 3.5 The Committee has previously reported on court fee increases in Report 32 referred to above, which recommended disallowance of a number of regulations providing for fees that were gazetted due to increases in CPI.¹²

- 3.6 The former Committee's Annual Report 2012 gives the following summary:

¹⁰ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 40, *Betting Control Amendment Regulations (No.4) 2009, Casino Control Amendment Regulations 2009, Casino Control (Burswood Island) (Licensing of Employees) Amendment Regulations (No.2) 2009, Gaming and Wagering Commission Amendment Regulations 2009, Racing and Wagering Western Australia Amendment Regulations 2009 and Liquor Control Amendment Regulations (No.7) 2009*, 18 May 2010, p4.

¹¹ Western Australia Auditor General, *2010 Second Public Sector Performance Report*, Report No.12, 24 November 2010, p22.

¹² Op.cit., n5.

In 2012 eight pieces of subsidiary legislation were published in the Government Gazette and referred to the Committee for scrutiny.

On initial consideration of the instruments effecting the court fee increases, the Committee formed the view that it has not been provided with sufficient information to enable it to carry out its scrutiny role to determine whether the proposed fee increases were authorised or, alternatively, amounted to unauthorised taxes.

Numerous correspondence between the Committee and Hon Christian Porter MLA, the then Attorney General, followed in an attempt by the Committee to ascertain the basis of the fee increases. As in previous years in correspondence with the Committee in relation to court fee increases, the then Attorney General referred to a pilot project that was undertaken in the District Court in 2011. The aim of this pilot project was to examine the feasibility of conducting a detailed examination of individual fee rates and the costs involved in providing individual services.

The then Attorney General advised that the results of the project:

are currently being audited to ensure the appropriateness of the model developed and the accuracy of the resulting data. Once completed, this research will inform the development of government policy in relation to the setting of cost based individual fees.

The then Attorney General went on to state:

Given that I have not yet seen the results of the District Court fee pilot, I cannot comment on whether I support any change in direction in this area. Should I support a change in court fee policy, it is important to note that such a change would take several years to implement. A long lead time would be involved due to the variety of system, procedure and operational impacts that would need to be carefully dealt with.

The Committee is disappointed that the cost based fee pilot project has still not been finalised. In August 2012 the Committee wrote to the current Attorney General, Hon Michael Mischin MLC, advising that it expects this project to be finalised as a matter of urgency and the findings provided to it.

Although the Committee resolved to take no action in relation to the 2012 fee increases, it advised the Attorney General that future fee

*increases, in the absence of a finalised pilot project, will continue to attract close scrutiny.*¹³

3.7 A major factor in the former Committee agreeing not to recommend disallowance of the eight instruments, referred to in paragraph 4.6 above, was to enable the results of the District Court fee pilot project (**District Court Project**) to be considered by the Attorney General and communicated to the Committee.

3.8 The District Court Project was initiated by the Department to determine whether a costing model could be developed that would cost individual fees and link them to services performed by the District Court. If successful, the approach would be rolled out to other courts and tribunal services overseen by the Department.

4 COMMITTEE SCRUTINY OF THE FEE INSTRUMENTS

4.1 On initial consideration of the Fee Instruments in June 2013, the Committee formed the preliminary view that it had not been provided with sufficient information to enable it to carry out its scrutiny role to determine whether the fee increases proposed in the Fee Instruments were within power of the relevant Acts or, alternatively, amounted to unauthorised taxes.

4.2 This was due to the explanatory memoranda containing no information on:

- a costing methodology;
- whether each fee was at, or below, cost recovery; and
- any cost recovery percentage for each fee.

4.3 This information is essential to enable the Committee to undertake its scrutiny role.

Hearing with Attorney General

4.4 On 11 June 2013 the Committee resolved to hold a hearing with the Attorney General to discuss the following.

- The basis upon which the fees can be considered, on an individual basis, at or below cost recovery.
- An update on the District Court Project to examine the feasibility of costing each fee.

¹³ Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 61, *Annual Report 2012*, 15 November 2012, pp10-11.

- Obtaining information on any other source of a costing methodology which would enable the Committee to assess whether each fee is at or below cost recovery and not unauthorised taxes under the relevant empowering legislation.¹⁴

4.5 A copy of the transcript of the hearing on 26 June 2013 is available on the Committee's webpage.¹⁵

4.6 Evidence was provided at the hearing on the following issues.

Difference of approach to determining validity of fees

4.7 Mr Robert Mitchell SC, Deputy State Solicitor, re-stated the different approaches of the Committee and the Department which are outlined in Report 32.¹⁶

Level of financial detail

4.8 It was confirmed that the Department continues to estimate its costs of delivering services to the public at a higher level than individual fees (such as business areas).¹⁷

District Court Project

4.9 Feedback on the Committee's request for an update on this project is expressed in the following passages from the transcript of the hearing.

The CHAIR: Regarding the pilot project at the District Court to examine the feasibility of costing each individual fee—that was referred to in explanatory material for previous instruments to increase fees by CPI, as well as previous correspondence from the committee—can you give us some details about the purpose of the pilot project and its current status? Is it still under way?

Mr Mitchell: I can only say what I have been told by the departmental officers, but the pilot project involved developing a model for the purposes of assessing the feasibility of charging fees on a narrow basis of working out how much it costs to do a particular

¹⁴ Letter from Mr Peter Abetz MLA to Hon Michael Mischin MLC, Attorney General, 11 June 2013, p1.

¹⁵ Op.cit., n1.

¹⁶ Mr Robert Mitchell SC, Deputy State Solicitor, State Solicitor's Office, *Transcript of Evidence*, 26 June 2013, p2. See also Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 32, *Supreme Court (Fees) Amendment Regulations (No. 2) 2008, Children's Court (Fees) Amendment Regulations (No. 2) 2008, District Court (Fees) Amendment Regulations 2008, Magistrates Court (Fees) Amendment Regulations (No. 2) 2008, Fines, Penalties and Infringement Notices Enforcement Amendment Regulations (No. 2) 2007 and Other Court Fee Instruments*, 14 May 2009, pp20-24.

¹⁷ Hon Michael Mischin MLC, Attorney General, *Transcript of Evidence*, 26 June 2013, p5 and p10.

activity and charging for that activity. I am told that a good deal of work went into that. It was subject to an audit review, and the audit review identified a number of difficulties with the approach or the modelling which had been taken and the assumptions which had been made for that modelling, which even in the context of the District Court meant that there was a good deal more work to do, much less rolling that out to other courts. Having received that audit advice, I understand the department is not intending at this stage to progress that matter any further.

.....

Hon PETER KATSAMBANIS: *Will any of this material be made available to the committee? Is there a report or are there any outcomes or findings?*

Hon MICHAEL MISCHIN: *I will consult with the department about that. I do not see a difficulty in providing the report of the independent assessor if that is of any assistance. It is my understanding, though, that it determined that it was necessary to do that on the basis of assessing each stage of the process and formulating a fee to reflect the cost of that, and that it was going to be immensely resource hungry, and not particularly efficient or effective, and in any event as a matter of policy would result in inflexibility in being able to allocate an appropriate cost to different stages of a litigation process.¹⁸*

Mr G.M. CASTRILLI: *We are talking about not the legal question, but the financial question. So what you are telling me is that in the pilot program you are trying to identify the cost structures for each activity within the District Court to determine the cost and the cost recovery, but what you are saying is you cannot do it because it is too complex and it is going to cost too much in resources to arrive at a specific cost structure per activity; is that right?*

Hon MICHAEL MISCHIN: *That is my understanding of what was being attempted there, yes.*

Mr Mitchell: *Anything is possible but it is a question of the amount of resources that are consumed.¹⁹*

¹⁸ Hon Michael Mischin MLC, Attorney General, *Transcript of Evidence*, 26 June 2013, pp4-5.

¹⁹ Hon G.M. Castrilli MLA, *Transcript of Evidence*, 26 June 2013, p8.

4.10 Subsequent to the hearing, the Attorney General provided a copy of the audit report into the District Court Project by Deloitte Touche Tohmatsu (**Deloitte**) requested by the Committee. This is available on the Committee's webpage.²⁰

4.11 Significantly, Deloitte's findings included the following.

- Not all the explanations provided by the Department on the assumptions made and applied in the model are sufficient.
- Not all assumptions were reflected in the calculations due to incorrect or incomplete formulas.
- User instructions for the spreadsheet model are not comprehensive and do not provide direction or guidance on:
 - a) the source of cost and other data; or
 - b) which assumptions and financial data require updating each year.
- The structure of the model is not conducive to the prediction of costs as capital-related costs have been combined with overhead expenses. Both have different factors which drive the level of costs.
- The model was in need of significant structural improvement and is not yet suitable for deployment to other areas of court and tribunal services.²¹

4.12 These findings indicate to the Committee that the information underpinning the model was so insufficient, unreliable and unfit for purpose that Deloitte was unable to verify that the model was capable of costing individual fees and linking them to services performed by the District Court.

4.13 This appears to be the principal reason why the District Court Project was abandoned by the Department.

Committee observations on the additional evidence

4.14 The Committee makes the following observations on the evidence provided with respect to the Fee Instruments.

- Owing to the number of deficiencies of the costing model identified in the audit report, it is not a model that can be used as an effective costing methodology to demonstrate that each fee imposed by the Department is at or below cost recovery.

²⁰ Op.cit., n1.

²¹ Department of the Attorney General, *Examination of District Court's Fee Model*, 25 June 2012, p5.

- The termination of the District Court Project by the Department has deprived it of the ability to provide a sufficient level of financial detail to demonstrate cost recovery of the fees covered by the Fee Instruments.
- The Department's inability to determine cost recovery on a fee by fee basis for 256 out of the 276 fees covered by the Fee Instruments underlines the Committee's concern about the lack of sufficient information it has been provided to perform its scrutiny function.²²
- While the Department has asserted that the level of cost recovery at most levels is 20-30%, there appear to be some examples of over recovery at the individual fee level. For example, there is a charge of \$1.50 per page for photocopying under a number of the Fee Instruments and \$5.30 per page of transcript under the *District Court (Fees) Amendment Regulations (No.3) 2012*. There may be a number of potential instances of over recovery.

This appears to be contrary to what is stated in the Department of Treasury and Finance's Costing and Pricing Government Services, which states:

*The term 'fee' has been interpreted to mean 'cost recovery'. Therefore, the level of a fee should be set on a basis that gives a reasonable expectation that cost recovery will not be exceeded, in order to comply with the enabling legislative power. If a fee is set at a level beyond what would reasonably be expected to recover costs, in practice it may have become a tax. If the enabling legislation only provides for a fee, making it a tax would invalidate it.*²³

4.15 The Committee accepted the following evidence.

- The costs of the justice system are heavily subsidised.²⁴
- The cost recovery rates at the level assessed by the Department are at approximately 20-30%.²⁵
- Undertaking the work recommended by Deloitte in the audit report would involve significant human and financial resources.²⁶

²² Letter from Hon Michael Mischin MLC, Attorney General, to Hon Ljiljana Ravlich MLC, 24 July 2013, p1.

²³ Department of Treasury and Finance, *Costing and Pricing Government Services*, April 2007, p4.

²⁴ Hon Peter Katsambanis MLC, *Transcript of Evidence*, 26 June 2013, p9.

²⁵ Hon Michael Mischin MLC, Attorney General, *Transcript of Evidence*, 26 June 2013, p5.

²⁶ Ibid. See also Letter from Hon Michael Mischin MLC, Attorney General to Hon Ljiljana Ravlich MLC, 24 July 2013.

5 CONCLUSIONS

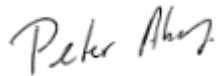
- 5.1 There has been a paucity of financial information in the explanatory memoranda and additional evidence from the Department to demonstrate to the Committee's satisfaction that the fees in the Fee Instruments are at or below cost recovery.
- 5.2 In particular, the lack of a costing methodology to demonstrate this means the Committee is unable to make an assessment about whether there is a reasonable relationship between the quantum of the fees and the costs incurred by the Department in rendering the services for which the fees are paid.
- 5.3 However, the Committee recognises that it is a decision for Government whether to expend financial and human resources:
- on developing a proper costing methodology to cost individual fees and link these to services; or
 - on the continuing operation of the justice system.
- 5.4 The Committee also recognises that any disallowance by the Parliament of the Fee Instruments would revive the previous regulations resulting in the Department being unable to rely upon CPI increases to increase fees. This would have negative financial implications for the justice system.
- 5.5 Accordingly, the Committee resolved:
- not to recommend the Parliament disallow the Fee Instruments; and
 - to recommend that the various Notices of Motion to Disallow be discharged from the notice paper.
- 5.6 Nonetheless, the Committee recommends the Department addresses the deficiencies identified by Deloitte in the audit report. It is incumbent upon a Government agency to understand how it is costing its services at the lowest level possible. This will also give the people of Western Australia assurance that fees they are being charged for justice system services are not recovering more than the cost to the Department of administering these services.
- 5.7 The Committee will also continue to closely monitor fee increases by the Department as part of its scrutiny role.

Recommendation 1: The Committee recommends that the Department of the Attorney General develop a costing model for court fees that demonstrates at or below cost recovery for each individual fee and report to the Legislative Council on its progress by 31 March 2014.

Recommendation 2: The Committee recommends that the notices of motion previously placed against the following instruments:

- *Children’s Court (Fees) Amendment Regulations (No. 2) 2012;*
- *Civil Judgments Enforcement Amendment Regulations 2012;*
- *Coroners Amendment Regulations 2012;*
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- *Evidence (Video and Audio Links Fees and Expenses) Amendment Regulations (No. 2) 2012;*
- *Magistrates Court (Fees) Amendment Regulations (No. 3) 2012;*
- *State Administrative Tribunal Amendment Regulations (No. 3) 2012; and*
- *Supreme Court (Fees) Amendment Regulations (No. 3) 2012,*

be discharged from the notice paper.



**Mr Peter Abetz MLA
Chairman**

19 September 2013