

40TH PARLIAMENT



Report 5

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Legal Profession (Law Library Fees) Rules 2017

Presented by
Ms Emily Hamilton MLA (Chair)

and

Hon Robin Chapple MLC (Deputy Chair)

November 2017

Joint Standing Committee on Delegated Legislation

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REPORT 5
**JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION**
LEGAL PROFESSION
(LAW LIBRARY FEES) RULES 2017

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EXECUTIVE SUMMARY AND FINDING

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE

LEGAL PROFESSION (LAW LIBRARY FEES) RULES 2017

EXECUTIVE SUMMARY

- 1 The *Legal Profession (Law Library Fees) Rules 2017* (Instrument) imposes 11 fee categories for certain services offered at the new Law Library situated at the David Malcolm Justice Centre. The services include photocopying, printing, document delivery and interlibrary loans.
- 2 The Joint Standing Committee on Delegated Legislation (Committee) has been provided with the rationale, including cost recovery information, for only five of the 11 fee categories. This is despite the requirements of Premier's Circular 2014/01, entitled '*Subsidiary Legislation—Explanatory Memoranda*', and two formal requests for the information.
- 3 The remaining six fee categories, for which the Committee has no rationale, all relate to the Law Library's document delivery service. These six fees are imposed by rules 6(1)(a) and (b), 6(2), 6(3), 6(4) and 6(5) of the Instrument. Without vital information for these six fees, the Committee is unable to perform its scrutiny function in relation to the relevant rules in the time available.
- 4 Accordingly, the Committee is also unable to make any recommendations with respect to the disallowance of the relevant rules of the Instrument.

FINDING

- 5 The Committee's finding appears in the text at the page number indicated:

Page 7

Finding 1: The Committee finds that, because of the Government's provision of inadequate information, it is unable to perform its scrutiny function on behalf of the Parliament in relation to rules 6(1)(a) and (b), 6(2), 6(3), 6(4) and 6(5) of the *Legal Profession (Law Library Fees) Rules 2017*.

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE

LEGAL PROFESSION (LAW LIBRARY FEES) RULES 2017

1 REFERENCE AND PROCEDURE

- 1.1 The *Legal Profession (Law Library Fees) Rules 2017* (Instrument) was published in the *Government Gazette* on 13 January 2017. Upon that gazettal, the Instrument stood referred to the Joint Standing Committee on Delegated Legislation (Committee).¹ On 16 and 17 May 2017, the Instrument was tabled in the Legislative Assembly and Legislative Council, respectively, and became subject to disallowance.

2 THE INSTRUMENT

- 2.1 On 1 July 2016, the Instrument's empowering Act, the *Legal Profession Act 2008* (Act), was amended to facilitate the amalgamation of the Law Library at the Supreme Court (operated by the Legal Practice Board) with the Department of Justice's main library. The new Law Library, at the David Malcolm Justice Centre, opened on 1 July 2016. Consistent with its predecessor, the Law Library provides services to the judiciary, government legal officers, members of the legal profession and other prescribed persons.² It is not open to the public.³
- 2.2 The purpose of the Instrument (replicated in Appendix 1) is to impose fees for certain services offered at the Law Library, such as photocopying, printing, document delivery and interlibrary loans. The Instrument imposes 11 fee categories—the same fees which were charged by the previous Law Library.⁴
- 2.3 The Instrument was made by the Director General of the Department of Justice⁵ pursuant to regulations made under sections 596(1) and 596A of the Act, which provide as follows:

¹ Committee Term of Reference 10.5: *Standing Orders of the Legislative Council* Schedule 1, clause 10.5.

² See *Legal Profession (Law Library) Regulations 2016* reg 8.

³ See: <http://www.supremecourt.wa.gov.au/L/law_library.aspx?uid=5486-5815-1353-9760>. Viewed 30 October 2017.

⁴ *Explanatory Memorandum*, p 3.

⁵ Formerly the Department of the Attorney General, before machinery of government changes on 1 July 2017.

596. Regulations

- (1) *The Governor may make regulations for or with respect to any matter or thing that is required or permitted by this Act to be prescribed or necessary to be prescribed to give effect to this Act.*

...

596A. Law library

- (1) *The State may establish and manage a law library for the use of the judiciary, local lawyers and other prescribed persons.*
- (2) *Without limiting section 596, the Governor may make regulations with respect to the provision, operation and management of the law library, including —*
- (a) *access to and use of the law library; and*
 - (b) *the terms on which persons may be given access to and use of the law library facilities (including the payment of fees); and*
 - (c) *the borrowing of resources and the manner of securing a resource if it has been loaned.*
- (3) *Regulations made for the purposes of subsection (2) may —*
- (a) *adopt wholly or partly any rules or administrative procedure published by any person or body —*
 - (i) *with or without any modification or amendment; and*
 - (ii) *as in force at the time of adoption or as amended from time to time;*
 - or*
 - (b) *provide for the making of rules or administrative procedures by a person or body.*

2.5 The empowering regulation is regulation 14 of the *Legal Profession (Law Library) Regulations 2016*:

14. Rules

- (1) *The Director General [of the Department of Justice] may, after considering any advice from the committee [the Law Library Advisory Committee⁶], make rules to administer the library and any services provided by the library.*
- (2) *Subject to subregulation (3), the Director General must consult with the committee if the Director General intends to make a rule that is not in accordance with previous advice given by the committee.*
- (3) *The Director General may not impose a fee of an amount that exceeds the costs reasonably anticipated to be incurred in providing a service without the agreement of the committee.*
- (4) *If rules include a fee being charged for a particular service, the amount must be shown on the library website, as well as in the rules.*

3 THE COMMITTEE'S ROLE

3.1 When considering whether an instrument of delegated legislation is 'within power' of the Act enabling it,⁷ the Committee:

carefully scrutinises fees imposed by subsidiary legislation to ensure that the fees imposed are authorised by 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 for which they are imposed.⁸

⁶ A committee established to advise the Director General on the management of the Law Library, including 'the amount of any fee charged by the library for any service': see *Legal Profession (Law Library) Regulations 2016* reg 7, in particular, reg 7(3)(d).

⁷ Committee Term of Reference 10.6(a): *Standing Orders of the Legislative Council* Schedule 1, clause 10.6(a).

⁸ Parliament of Western Australia, Legislative Council, Joint Standing Committee on Delegated Legislation (2013-17), Report 90, *Energy Operators (Electricity Generation and Retail Corporation) (Charges) Amendment By-Laws 2016*, 17 November 2016, p 1.

4 SCRUTINY OF THE INSTRUMENT

4.1 The Committee first scrutinised the Instrument at its meeting on 7 August 2017, during which the Committee resolved to write to the Attorney General requesting further information about the fees imposed by the Instrument. The Committee noted that the Explanatory Memorandum explained that:

As the Department of the Attorney General [now the Department of Justice] has not previously provided these services, the Director General has been unable to fully assess the costs reasonably anticipated to be incurred in providing photocopying, printing, document delivery and interlibrary loans.⁹

4.2 This did not meet the requirements of Premier's Circular 2014/01¹⁰ (Appendix 2), which sets out the supporting documentation which must accompany instruments of delegated legislation which come before the Committee for scrutiny. In particular, the Explanatory Memorandum did not provide a rationale for the fees imposed by the Instrument, including the cost recovery percentage achieved by each fee (see page 3 of the circular).

4.3 The Explanatory Memorandum also advised that the Director General had charged the Law Library Advisory Committee¹¹ with monitoring the cost of providing the library's services and to review the fees six months after they had been imposed.¹² As nearly seven months had passed since the substantive parts of the Instrument commenced operation on 13 January 2017,¹³ the Committee wrote to the Attorney General on 9 August 2017 requesting an update of the cost recovery status of the fees by 6 September 2017.

4.4 The Attorney General only responded to the Committee on 21 September 2017, although the letter was dated 8 September 2017. This letter informed the Committee that the Law Library Advisory Committee had reviewed the fees which had been charged in the period of 1 February 2017¹⁴ to 31 July 2017. The letter did not satisfy the concerns of the Committee because:

- despite the Attorney General's assertion that the fees are charged at '*full cost recovery*', two of the fee categories listed in the letter were cost recovering at

⁹ p 3.

¹⁰ The circular is entitled '*Subsidiary Legislation—Explanatory Memoranda*'.

¹¹ See footnote 6.

¹² p 3.

¹³ Instrument, rule 2.

¹⁴ Due to technical difficulties, the Law Library only began charging fees on and from 1 February 2017: Hon John Quigley MLA, Attorney General, Letter, 8 September 2017, p 1.

over 100 per cent and the remaining two fee categories were cost recovering at various levels under 100 per cent

- the letter did not provide any information about a further seven fee categories imposed by the Instrument, namely by rules 6(1)(a) and (b), 6(2), 6(3), 6(4), 6(5) and 8(2).¹⁵

4.5 The Committee again wrote to the Attorney General on 11 October 2017 requesting:

- an undertaking to reduce the two over-recovering fees to 100 per cent or a lower level of cost recovery within six months of the undertaking
- the provision of information about the cost recovery status of the remaining seven fees imposed by the Instrument. The Committee's staff had already attempted unsuccessfully to obtain this fee information in time for the Committee's meeting on 9 October 2017. The letter warned that if the information was not forthcoming, the Committee would be required to report that fact to the Parliament.

4.6 In a response received on 24 October 2017, the Attorney General provided:

- information which suggested that the two fee categories which were cost recovering at over 100 per cent were actually cost recovering at less than 100 per cent
- the cost recovery information for only one additional fee category¹⁶
- an explanation that the remaining six fee categories (see Table 1 on page 6) had not yet been charged by the new Law Library and, therefore, no cost recovery information existed for those fees.¹⁷

4.7 The Committee gave notice of motion to disallow the Instrument in the Legislative Council on 15 August 2017 in order to preserve the Parliament's ability to disallow the Instrument.¹⁸ Under Legislative Council Standing Order 67, the disallowance motion is due to be debated in that House by 9 November 2017 at the latest. This time constraint has prevented the Committee from continuing its requests for evidence of the cost of providing the services listed in Table 1 on page 6.

¹⁵ Hon John Quigley MLA, Attorney General, Letter, 8 September 2017.

¹⁶ That fee category was cost recovering at less than 100 per cent.

¹⁷ Hon John Quigley MLA, Attorney General, Letter, 24 October 2017.

¹⁸ Pursuant to section 42 of the *Interpretation Act 1984*.

5 INADEQUATE FEE INFORMATION

5.1 While the Committee was prepared to accept the accuracy of the cost recovery information which was provided by the Attorney General in his two letters, the Committee could not accept the fact that the Law Library Advisory Committee, the Director General, and by extension, the Attorney General, are not aware of the cost recovery status of the following six fee categories which have been imposed by the Instrument:

Table 1: Remaining six fee categories for which there is no cost recovery information

No.	Description of fee	Fee	Rule
1.	Document delivery service—via post	\$1.10 per page (plus postage)	6(1)(a)
2.	Document delivery service—via fax	\$3.30 per page	6(1)(b)
3.	Document delivery service—via post (regional user)	\$0.55 per page (plus postage)	6(2)
4.	Document delivery service—via fax (interstate user)	\$4.40 per page	6(3)
5.	Document delivery service—minimum fee	\$5.50	6(4)
6.	Document delivery service—research fee ¹⁹	\$11	6(5)

5.2 The above fees have been imposed by the Instrument and are currently payable upon a user's request for the relevant document delivery service. Therefore, in the Committee's view, a costing methodology for each of these fees should have been in place to assist the Government in formulating the amount of each fee prior to the Instrument being made by the Director General. The existence of such a methodology should not depend on whether the fees have actually been charged. The lack of fee information for these six fees suggests that a costing methodology does not exist.

5.3 The Parliament, and the public which it represents (particularly those people who can expect to incur the fees in question) has a right to expect that the Government will impose fees for services via delegated legislation only after the cost of providing those services has been calculated with an accurate costing methodology. This is also the case for fees which are being imposed for the first time by the administering government agency. Consistent with this approach, the Auditor General has stated that:

¹⁹ To be applied when, in the librarian's opinion, the research required is likely to take longer than 90 minutes: Instrument rule 6(5).

To achieve cost recovery, agencies need to first establish the scope of the services provided by the fee and then cost their services to a reasonable level of accuracy. This is not always a simple exercise and agencies endeavour to balance the administrative effort involved against the revenue raised by each fee. However, such an approach needs to be reconciled with government and the public's expectation that fee calculations are materially accurate.²⁰

6 CONCLUSION

- 6.1 The Act and regulation 14 of the *Legal Profession (Law Library) Regulations 2016* authorises and contemplates the imposition of fees, via the making of rules, for services rendered by the Law Library. Due to the absence of information for six of the 11 fees imposed by the Instrument, the Committee is unable to make a judgment on whether these fees are a genuine attempt to recover the cost of providing the associated services. Therefore, the Committee cannot determine whether the six fees in question are authorised by the empowering provisions.
- 6.2 The Committee has not received the information it requires to scrutinise the fees imposed by rules 6(1)(a) and (b), 6(2), 6(3), 6(4) and 6(5) of the Instrument. It is, therefore, unable to perform its scrutiny function in relation to those rules in the time available.

Finding 1: The Committee finds that, because of the Government's provision of inadequate information, it is unable to perform its scrutiny function on behalf of the Parliament in relation to rules 6(1)(a) and (b), 6(2), 6(3), 6(4) and 6(5) of the *Legal Profession (Law Library Fees) Rules 2017*.

- 6.3 Accordingly, the Committee is also unable to make any recommendations with respect to the disallowance of the relevant rules of the Instrument.



Hon Robin Chapple MLC
Deputy Chair

7 November 2017

²⁰ Office of the Auditor General, *Second Public Sector Performance Report 2010*, Report 12, Government of Western Australia, Perth, 24 November 2010, p 5.

APPENDIX 1

LEGAL PROFESSION (LAW LIBRARY FEES) RULES 2017

LEGAL PROFESSION ACT 2008

LEGAL PROFESSION (LAW LIBRARY FEES) RULES 2017

Made by the Director General of the Department of the Attorney General.

PART 1—PRELIMINARY

1. Citation

These rules are the *Legal Profession (Law Library Fees) Rules 2017*.

2. Commencement

These rules come into operation as follows on the day on which these rules are published in the *Gazette*.

3. Terms used

In these rules—

agency has the meaning given by section 3 of the *Public Sector Management Act 1994* (WA);

committee means the committee created under regulation 8 of the *Legal Profession (Law Library) Regulations 2016*.

document delivery service means the provision of a copy of a document within the library's collection by post, fax or email;

fee paying user means a person entitled to use the library under regulation 8 of the *Legal Profession (Law Library) Regulations 2016* but who is not entitled to borrow books under regulation 12(1) of the *Legal Profession (Law Library) Regulations 2016* and is not employed by an agency;

interstate user means a person entitled to use the library under regulation 8(2) of the *Legal Profession (Law Library) Regulations 2016*;

librarian means the person employed or appointed to manage the library, or anyone acting in that position, or any staff under the librarian's supervision;

library means the law library established under section 596A of the Act;

interlibrary loan means the provision of a copy of a document from outside the library's collection, which the library has obtained through the Australian Interlibrary Resource Sharing network, by email;

metropolitan region has the meaning given by section 4 of the *Planning and Development Act 2005* (WA);

regional fee paying user means a fee paying user who nominates a postal delivery address outside the metropolitan region.

PART 2—LIBRARY FEES

4. Photocopying fee

A fee paying user must pay a fee of 30 cents per page to photocopy at the library.

5. Printing fee

A fee paying user must pay a fee of 55 cents per page to print at the library.

6. Document delivery fee

(1) To receive a document via the library's document delivery service, a fee paying user must pay, subject to subrules (2), (3), (4) and (5)—

- (a) if the user elects to receive the document by post, \$1.10 per page and the cost of postage;
- (b) if the user elects to receive the document by fax, \$3.30 per page; or
- (c) if the user elects to receive the document by email, \$22.00 per document.

(2) If a regional fee paying user elects to receive a document by post, they must pay, instead of the fee at subrule (1)(a), \$0.55 per page and the cost of postage.

(3) If an interstate user elects to receive a document by fax, they must pay, instead of the fee at subrule (1)(b), \$4.40 per page.

(4) A minimum fee of \$5.50 applies to all document delivery.

(5) A research fee of \$11 will be applied when, in the opinion of the librarian, the research required is likely to take longer than 90 minutes.

(6) If the research fee under subrule (5) applies, the librarian must inform the user before the document delivery service is provided.

7. Interlibrary loan fees

Fees for interlibrary loans will be charged in accordance with the recommended prices under the Australian Interlibrary Resource Sharing Code, published by the Australian Library and Information Association.

8. Payment of fees

(1) To pay the fees prescribed by rules 4 to 7, a fee-paying user is required to open a pre-paid account using the library's electronic payment system.

(2) An administrative fee of \$10 applies to the creation of a pre-paid account.

9. Director General may exempt fee paying users

The Director General may, after considering any advice from the committee, exempt a fee paying user from the requirement to pay fees under rules 4 to 6.

Dr ADAM TOMISON, Director General.

APPENDIX 2

PREMIER'S CIRCULAR 2014/01



Premier's Circular

Number:	2014/01
Issue Date:	15/02/2014
Review Date:	15/02/2017

TITLE

SUBSIDIARY LEGISLATION – EXPLANATORY MEMORANDA

POLICY

The Joint Standing Committee on Delegated Legislation (JSCDL) scrutinises all regulations, by-laws, rules, local laws, major metropolitan region schemes and other subsidiary legislation made by government departments and agencies on behalf of the Parliament of Western Australia.

The JSCDL requires the following documents within **10 working days** of the subsidiary legislation being published in the *Government Gazette* -

- One hard copy (double sided) and one electronic copy of the subsidiary legislation as published in the *Government Gazette*
- One hard copy (double sided) and one electronic copy of the explanatory memorandum, addressed to the JSDCL signed by the CEO and initialled or signed by the relevant Minister¹
- An electronic copy of the principal subsidiary legislation consolidated with all amendments up to the date immediately before the most recent amendments take effect
- An electronic copy of any new material called up (adopted) into regulations, including Australian / New Zealand Standards or other relevant external documents

Hard copies of documents, along with a covering letter, should be addressed to:

Committee Clerk
Joint Standing Committee on Delegated Legislation
GPO Box A11
PERTH WA 6000

Electronic copies of documents, in either Word or pdf format, must be emailed to the JSCDL (delleg@parliament.wa.gov.au). Each instrument must be sent by a separate email and clearly identified in the subject line of each email.

¹ In the event that an Act specifically allows an instrument to be created by a person or entity other than the Minister, relevant information may be provided directly to the Committee and without the Minister's initials. A copy of information provided to the Committee should be forwarded to the Minister for reference.

BACKGROUND

The JSCDL is established by the Parliament of Western Australia to assist with the scrutiny of subsidiary legislation made subject to section 42 of the *Interpretation Act 1984* or other written laws.

The JSCDL cannot properly fulfil its scrutiny role without timely provision of explanatory material for each instrument referred to it upon gazetta. Departments and agencies must be mindful of providing the required material in a timely manner.

Further information regarding the required content of explanatory memoranda is provided in the attached outline.

Colin Barnett MLA
PREMIER

For enquiries contact:	JSCDL Committee Clerk – (08) 9222 7300
Other relevant Circulars:	Nil
Circular/s replaced by this Circular:	2007/14

ATTACHMENT 1 - EXPLANATORY MEMORANDUM REQUIREMENTS

Ministers must ensure the JSCDL receives, within **10 working days** of the subsidiary legislation being published in the *Government Gazette*, the explanatory memorandum signed by the Chief Executive Officer of the Department or Agency and initialled or signed by the responsible Minister. In the event an Act specifically allows an instrument to be created by a person or entity other than the Minister, the explanatory memorandum must be signed by that person or the senior officer of that entity. A copy of information provided to the Committee should be forwarded to the Minister for reference.

AN EXPLANATORY MEMORANDUM MUST CONTAIN THE FOLLOWING -

- Title of the subsidiary legislation
- Date of publication of the instrument in the *Government Gazette*
- Express power(s) in the relevant Act that provides authority to make the subsidiary legislation
- Description of the purpose and effect of, and justification for, the subsidiary legislation (or any amendments to or repeals of it)
- Identification of any unusual or controversial provisions, with particular regard to the JSCDL's terms of reference (see <http://www.parliament.wa.gov.au>)
- Details of consultations undertaken including stakeholders consulted, a summary of their comments and any action taken in response
- Preliminary Impact Assessment lodged with the Department of Finance's Regulatory Gatekeeping Unit (if applicable)
- Rationale for changes in fees (including fee caps), charges and penalties, and details of the amount of the fee, charge or penalty immediately prior to the change (if applicable). This information should be summarised in table form, as shown –

Type of fee charged / fee cap imposed	Date last amended (Increase or Decrease)	Old fee / fee cap (\$)	New fee / fee cap (\$)	Increase / Decrease (%)	Increase / decrease (\$)	% of cost recovery achieved	Cross subsidisation (Yes / No)
Grant or renewal of fishing boat licence for							
• A boat less than 6.5 metres long	10.09.11 (decrease)	550.00	85.00	-84.55	465	25	No
• A boat 6.5 metres or longer	10.09.11 (Increase)	550.00	600.00	9.09	50	100	No

- Costing systems used to set the fee cap or used to achieve cost recovery (if applicable)²
- Any justifications for cross subsidisation, if applicable
- Contact details of relevant officers who may be contacted regarding the subsidiary legislation

Agencies must ensure the Explanatory Memorandum includes the printed names and signatures (or initial) of the responsible Minister and relevant Chief Executive Officer.

Colin Barnett MLA
PREMIER

² See Office of the Auditor General, *Second Public Sector Performance Report 2010*, Report 12, November 2010, page 7.

Joint Standing Committee on Delegated Legislation

Date first appointed:

15 June 2017

Terms of Reference:

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

'10. Joint Standing Committee on Delegated Legislation

- 10.1 A Joint Standing Committee on Delegated Legislation is established.
- 10.2 The Committee consists of 8 Members, 4 of whom are appointed from each House. The Chair must be a Member of the Committee who supports the Government.
- 10.3 A quorum is 4 Members of whom at least one is a Member of the Council and one a Member of the Assembly.
- 10.4 (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.
- 10.5 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.
- 10.6 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.
- 10.7 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.
- 10.8 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*.



Legislative Council of Western Australia
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