



# Cost Order Guidelines for Lawyers Standards Committees

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# Introduction

## The purpose of this guidance

- 1 This guidance has been prepared by the New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) to assist Lawyers Standards Committees (**Standards Committees**) when making **costs orders** following a determination of unsatisfactory conduct against a practitioner<sup>1</sup> or a determination to take no further action on a complaint.<sup>2</sup> All references in this guidance are to the Lawyers and Conveyancers Act 2006. These guidelines only apply to orders relating to costs and expenses- Committee members should refer to the *Penalty Guidelines* in relation to other orders such as fines.
- 2 The purpose of this guidance is to support Standards Committees to achieve consistency and fairness in decision-making when making costs orders by outlining factors to be considered. This will ensure that costs in comparable matters are awarded consistently.
- 3 This guidance is not meant to limit the matters Standards Committees consider. Costs orders will always respond to the facts and circumstances of each individual case. As the Court of Appeal has observed:<sup>3</sup>

*Questions of costs are ultimately a matter of discretion. The exercise often requires assessment of a wide range of factors. The overall objective is to achieve an outcome that best meets the interests of justice in the given case in accordance with any applicable costs rules and consistent with established principles. The trial judge is uniquely placed to make this assessment.*

## Costs orders a Standards Committee may make

- 4 When a Standards Committee has determined there has been unsatisfactory conduct under s 152(2)(b), it may order that the practitioner pay:
  - (a) the Law Society's costs and expenses;<sup>4</sup>
  - (b) the complainant's costs and expenses.<sup>5</sup>
- 5 When a Standards Committee has determined to take no further action under s 152(2)(c), it may order that:
  - (a) the Law Society pay the costs of the person to whom the complaint or matter related;<sup>6</sup>
  - (b) the practitioner pay the Law Society the expenses of the proceeding and investigation.

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1 Lawyers and Conveyancers Act 2006, s 152(2)(b).

2 Lawyers and Conveyancers Act 2005, s 152(2)(c).

3 *Kinney v Pardington* [2021] NZCA 474 at [1].

4 Lawyers and Conveyancers Act 2006, s 156(1)(n).

5 Lawyers and Conveyancers Act 2006, s 156(1)(o).

6 Lawyers and Conveyancers Act 2006, s 157(1)(a).

- 6 Each of these orders is discussed in more detail below.
- 7 Standards Committees do not have a power to make costs orders where they have:
  - (a) Determined that a complaint or matter be considered by the Disciplinary Tribunal under s 152(2)(a).
  - (b) Decided to take no action or no further action on a complaint under s 138.

## Procedure for determining costs orders

- 8 In order to exercise its power to order costs in a way that is consistent with the rules of natural justice,<sup>7</sup> Standards Committees should give parties an opportunity to be heard on costs. There is no one way to achieve this but it will often be practical to include a request for submissions on costs in a notice of hearing (whether separate to or as part of inviting submissions on penalty orders generally).

## General principles governing costs discretion

- 9 Every Standards Committee's power to make a costs order is expressed permissively: Standards Committees "may" make costs orders. Costs are therefore discretionary, but any discretion needs to be exercised on a principled basis.
- 10 Many practitioners and members of Standards Committees will be familiar with costs regimes in other areas of law, for example: costs in Part 14 of the High Court Rules 2016. Unlike other costs regimes, the Lawyers and Conveyancers Act 2006 does not include a statutory presumption that costs "follow the event" (that is, where the party who does not succeed pays costs to the successful party).<sup>8</sup> Indeed, Standards Committees do not have the power to make costs orders against unsuccessful complainants, reflecting the fact the complaints process is in part intended to fulfil the consumer protection purpose of the Act.
- 11 Despite those differences, Standards Committees may still be assisted by their members' familiarity with other costs regimes. However, care should be taken to ensure that the power to order costs reflects the specific nature of the Standards Committee jurisdiction.
- 12 The following list of principles is non-exhaustive but can inform Standards Committees' exercise of their costs powers.

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7 Lawyers and Conveyancers Act 2006, s 142(1).

8 See also *Lagolago v Wellington Standards Committee 2* [2017] NZHC 3038, (2017) 24 PRNZ 753 at [33]. Leave to appeal declined in *Lagolago v Wellington Standards Committee 2* [2018] NZCA 406, (2018) 24 PRNZ 763.

### Costs should be considered in all cases

- 13 A Standards Committee should turn its mind to whether to order costs in every case where there is a legal power to do so. A party can apply for a Legal Complaints Review Officer review of a failure to order costs in the same way as they can apply for review of a decision to order them.

### The purposes of the Lawyers and Conveyancers Act

- 14 Standards Committees' power to order costs should be exercised consistently with the purposes of the Lawyers and Conveyancers Act 2006, which includes the maintenance of public confidence in the provision of legal services.<sup>9</sup> Costs are one way that practitioners can be held to account for the way they have responded to the complaints process. Public confidence is also fostered in the disciplinary machinery of the Act as a whole if costs orders are made on a consistent, predictable and principled basis.

### Costs orders are about steps taken and conduct in the proceeding

- 15 Costs orders are about costs incurred in the course of the Standards Committee investigation. Costs are not intended to compensate for loss incurred outside the investigation. That includes, in the context of complainant costs, the cost to the complainant in making a complaint.<sup>10</sup> Nor should costs be awarded to 'punish' a practitioner or the Law Society for conduct or behaviour that occurred before the proceeding started.

### Costs orders should not exceed actual costs

- 16 Costs should not be a windfall for any party, including the Law Society. Costs orders must not exceed actual costs in the individual case. Any costs order can only be made in respect of the costs and/or expenses incurred in the individual case and cannot go beyond that.

### Costs are case-specific

- 17 While these Guidelines go on to give guidance on typical sums of costs awards, Standards Committees must be prepared to depart from that guidance if a particular feature of the case before it means it is appropriate to do so. In part, that reflects the principle above – that a costs order in any case should not exceed actual costs. It is also a wider principle, reflecting that the overarching principle is that any orders a Standards Committee make must be the right orders for the case in front of it.

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9 Lawyers and Conveyancers Act 2006, s 3(1)(a).

10 Lawyers and Conveyancers Act 2006, s 156(1)(o).

## Standards Committees should give reasons for costs orders

- 18 Both because a costs order imposes a financial liability on a party, and as an incident of good decision-making, a costs order should be supported by reasons. In most cases, the reasons will likely be brief as the justification for the order may be able to be inferred from the rest of the Standards Committee's determination. However, in more complicated cases, or where there is a departure from the guideline bands, more detailed reasons may be required.

## Costs orders against a practitioner following a determination of unsatisfactory conduct

- 19 Following a determination of unsatisfactory conduct, a Standards Committee may make a costs order against the subject of the determination in favour of either or both of:
- (a) The Law Society.
  - (b) The complainant.

### Costs in favour of the Law Society

- 20 Where a Standards Committee makes a determination of unsatisfactory conduct under s 152(2)(b), the Standards Committee may make an order that the subject of the determination pay to the New Zealand Law Society "such sum as the Standards Committee thinks fit in respect of the costs and expenses of and incidental to the inquiry or investigation made, and any hearing conducted, by the Standards Committee".<sup>11</sup>
- 21 The subject of the determination (and therefore any costs order) could be a practitioner, a former practitioner, an incorporated firm or former incorporated firm, any director or shareholder of the incorporated firm or former incorporated firm, or any employee or former employee of the practitioner or incorporated firm.<sup>12</sup>

### Guideline bands

- 22 As stated earlier in these Guidelines, a costs order should not exceed the actual costs incurred. Specific time records are not made for complaint matters. However, the following indicative guideline bands can be used to assist in determining costs to be ordered to the Law Society:

Straightforward investigation and hearing	Moderately complex investigation and hearing	Highly complex investigation and hearing
\$500 - \$2,000	\$2,000 to \$3,500	\$3,500 to \$5,000

11 Lawyers and Conveyancers Act 2006, s 156(n).

12 Lawyers and Conveyancers Act 2006, s 156(n).

- 23 These bands take into account publicly available financial figures from the complaints and disciplinary functions of the Law Society for the previous three years and a review of typical Standards Committee costs orders, as well as consideration of costs orders made by the Legal Complaints Review Officer (recognising the LCRO regime has similarities as well as difference).
- 24 The bands have been set at levels the Law Society considers avoids the risk that costs orders could exceed actual costs.

### Use of the guideline bands

- 25 The costs and expenses incurred by the Law Society in investigating and hearing a matter will vary widely depending on the facts and the nature of each complaint. However, an example of circumstances that may be considered straightforward, moderately or highly complex is provided below:
- (a) *Straightforward investigation and hearing*: facts surrounding the complaint are clear and not overly complex. Parties are responsive and provide clear submissions and supporting material. Most investigations are expected to fall within this category.
  - (b) *Moderately complex investigation and hearing*: several allegations are made against the practitioner, resulting in a large amount of material needing to be reviewed or, due to the practitioner's lack of engagement, an otherwise straightforward investigation becomes more complex. The matter may have had to come before a Standards Committee multiple times.
  - (c) *Complex investigation and hearing*: investigation of matter takes significant time. It is factually complex and document heavy, or the practitioner's document management has been poor and required engagement of an investigator. A practitioner's lack of engagement in the investigation process may also have contributed to the complexity of the investigation.
- 26 The following factors may be relevant to assessing the complexity of a matter:
- (a) the factual complexity of the matter;
  - (b) the period of time taken to inquire into the matter;
  - (c) the amount of material to be reviewed and considered;
  - (d) the practitioner's engagement;
  - (e) whether additional expert investigation is required (for example, an investigator or cost assessor); and
  - (f) whether the hearing is conducted in person or on the papers.
- 27 The guideline bands are intended to be used as a guide only. A Standards Committee maintains the discretion to award costs as it sees fit, including to make no orders as to costs, or to reduce an otherwise appropriate costs award, where mitigating factors apply. Such *mitigating factors* may include where the practitioner's conduct was relatively minor in terms of seriousness, the complexity of the matter investigated and heard

did not reflect the conduct which the practitioner was found to have committed, or an order of costs would impose a disproportionately severe financial burden on the practitioner.

- 28 However, caution should be taken towards reducing a costs awards to reflect a practitioner's financial position. Any such assessment must consider a practitioner's full financial position – not merely their available income – and a persuasive evidentiary basis is required.

### **Additional costs and expenses**

- 29 Although it will not be common, if the investigation incurred an additional external cost or expense that is directly quantifiable (such as external professional services for which the Law Society was invoiced), a Standards Committee may include that sum as part of its costs order. If it does, it should make specific reference to it.

### **Costs in favour of the complainant**

- 30 Where a Standards Committee makes a determination of unsatisfactory conduct under s 152(2)(b), the Standards Committee may make an order that the subject of the determination pay to the complainant “any costs or expenses incurred by the complainant in respect of the inquiry, investigation, or hearing by the Standards Committee”.<sup>13</sup>
- 31 Costs and expenses are separate from compensation, which a Standards Committee may order under s 156(d).
- 32 Standards Committees will need to be satisfied of the evidential basis for making a costs order in favour of a complainant. This will generally require complainants to provide evidence of costs and expenses incurred in the legitimate pursuit of the complaint, during the “inquiry, investigation, or hearing by the Standards Committee”.
- 33 Costs or expenses reflect actual out-of-pocket sums. A complainant's own time spent making or dealing with the complaint will not generally be able to be claimed as a cost or expense.<sup>14</sup>
- 34 The consumer-focused and quasi-inquisitorial nature of the complaints process means that the system proceeds on the basis that complainants do not generally require legal representation. Where a complainant seeks costs in respect of legal fees relating to the making of a complaint, the Standards Committee should have regard to what is fair and reasonable, taking into account the nature of the complaint, the interests of the complainant and the practitioner, and these Guidelines.

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13 Lawyers and Conveyancers Act 2006, s 156(1)(o).

14 See generally *McGuire v Secretary of Justice* [2018] NZSC 116, [2019] 1 NZLR 335.

## Costs orders following a determination to take no further action

- 35 If a Standards Committee determines to take no further action under s 152(2)(c), it can make costs orders:
- (a) Requiring the Law Society to pay costs to any person to whom the complaint related.
  - (b) Requiring the practitioner to pay costs to the Law Society.

### Costs paid by the Law Society to any person to whom the complaint related

- 36 When a Standards Committee has determined to take no further action under s 152(2)(c), it may order the Law Society to pay costs to any person to whom the complaint or matter related, where that person is a “lawyer or former lawyer or an incorporated law firm or former incorporated law firm or an employee or former employee of a lawyer or an incorporated law firm”.<sup>15</sup> In other words, the subject of an unsuccessful complaint or own-motion investigation.
- 37 Case law in the Disciplinary Tribunal context emphasises the need to avoid placing too high of a hurdle in the way of a costs award against a regulator. What is required is an “evaluative exercise of the discretion provided by the Act”.<sup>16</sup> That remains the overall exercise.
- 38 However, the structure of the Standards Committee stage differs somewhat from the Disciplinary Tribunal context, and this will inform the approach to ordering costs against the Law Society. Committees should bear in mind that:
- (a) The complaints function is quasi-inquisitorial and, in terms of complaints, the Law Society and Standards Committees are required by the Act to deal with complaints, regardless of their merit.
  - (b) Receiving and responding to complaints is part of legal practice. Practitioners are required to cooperate with the complaints process.
  - (c) While not determinative, a regulator should not be unduly exposed to the risk of a costs order if unsuccessful when exercising its public function.
  - (d) Any costs ordered to be paid by the Law Society will be borne by the profession.
- 39 Taking these points together, the mere fact of a determination to take no further action is unlikely to amount to a good reason for a Standards Committee to order costs against the Law Society.

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15 Lawyers and Conveyancers Act 2006, s 157(1)(a).

16 *Lagolago v Wellington Standards Committee 2* [2017] NZHC 3038, (2017) 24 PRNZ 753 at [33]. Leave to appeal declined in *Lagolago v Wellington Standards Committee 2* [2018] NZCA 406, (2018) 24 PRNZ 763.



- 40 Without limiting the need for Standards Committees to consider all factors when deciding whether to make a costs order against the Law Society, such an order might take in to account the following factors:
- (a) Whether the proceeding originated from a complaint or an own-motion.
  - (b) Whether there could be grounds for criticism of the process in the course of the investigation (for example, a procedural failure that added to time and cost).
  - (c) There was a feature of the investigation, inquiry or hearing that imposed a cost burden on a practitioner that it is not fair for the practitioner to bear in full.
- 41 Costs reflect actual out-of-pocket sums. A practitioner’s own time spent responding to or dealing with the complaint will not generally be able to be claimed as a cost.<sup>17</sup> In addition, under this costs power, Standards Committees only have the power to make an award for costs, not expenses.<sup>18</sup> Therefore, the award of costs made in favour of the practitioner is not expected to include amounts of salaries or overhead expenses incurred by the practitioner in responding to the complaint.
- 42 Where a costs order is made, the range provided by the lowest guidance bands outlined above, will typically be adequate.

### **Costs paid by the practitioner to the Law Society despite a determination not to take further action**

- 43 When a Standards Committee has determined not to take further action under s 152(2) (c) and has not made a finding of unsatisfactory conduct, the Standards Committee may “if it considers that the proceedings were justified and that it is just to do so”, order the subject of the complaint or investigation to pay to the Law Society “such sums as the Standards Committee thinks fit in respect of the expenses of and incidental to the proceedings and any investigation of that person’s conduct or of that person’s affairs or trust account carried out by, or on behalf of, the Standards Committee”.<sup>19</sup>
- 44 The subject of the costs order could be a practitioner, a former practitioner, an incorporated firm or former incorporated firm, or any employee or former employee of the practitioner or incorporated firm.<sup>20</sup> Unlike in ss 156(1)(n) and (o), there is no power to make this type of costs order against directors or shareholders of incorporated firms or former incorporated firms.
- 45 In other words, Standards Committees can make orders against practitioners even where they have determined to take no further action.
- 46 When considering whether the proceedings were “justified”, a Standards Committee should look to both the basis for the original complaint or own-motion, and the

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17 See generally *McGuire v Secretary of Justice* [2018] NZSC 116, [2019] 1 NZLR 335.

18 Compare ss 156(1)(n) and (o) and 157(2).

19 Lawyers and Conveyancers Act 2006, s 157(2).

20 Lawyers and Conveyancers Act 2006, s 157(2).

subsequent responses from the practitioner, and consider whether there were was a reasonable basis for conducting an investigation, inquiry and hearing. This consideration is separate from the Committee's ultimate determination to take no further action.

- 47** When considering whether it is “just to [order costs]”, a Standards Committee should take into account all factors relating to the proceeding. Without limiting Standards Committees’ discretion, situations where a Standards Committee might make an order for costs under s 157(2) include:
- (a) Where a technical breach of standards has been established but the Standards Committee has elected not to make a finding of unsatisfactory conduct.<sup>21</sup>
  - (b) Where the lawyer has been dilatory or obstructive in the course of proceedings.
- 48** Since costs orders relate to the costs of, and conduct in, a proceeding, Standards Committees should take care to ensure that costs orders are not imposed as a form of substitute penalty. Costs orders under s 157(2) should not be used to mark disapproval of pre-proceeding conduct in circumstances where no finding of unsatisfactory conduct could be made.
- 49** The guidance bands outlined above also apply to sums of potential costs orders under s 157(2). Standards Committees should also have regard to the explanation of the guideline bands earlier in these guidelines.

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21 In reliance on the principle in *Keene v Legal Complaints Review Officer* [2019] NZCA 559, [2020] NZAR 105 at [23].