

Report on costs disclosure thresholds

September 2023

Table of Contents

ABOUT THIS REPORT	4
RECOMMENDATIONS.....	4
CONCLUSIONS.....	5
INTRODUCTION AND BACKGROUND	7
Costs disclosure thresholds	7
The Review's task.....	8
DESIGN AND OBJECTIVES OF THE REGULATORY SYSTEM	9
The problem of limited (asymmetric) information.....	9
What costs disclosure information do consumers need?	10
Costs disclosure regulatory regimes	12
Progressive costs disclosure requirements.....	13
The impact of cost and price movements on the disclosure regime.....	14
Costs disclosure thresholds in other jurisdictions.....	14
WORK UNDERTAKEN BY THE REVIEW.....	15
STANDARD COSTS DISCLOSURE FORMS AND INFORMATION SHEETS	17
COSTS DISCLOSURE THRESHOLDS.....	19
THE LOWER THRESHOLD	19
Adjust the lower threshold for the changing cost of legal services	19
Communication with clients	22
Stakeholder views on other options for the lower threshold in the consultation paper.....	23
THE UPPER THRESHOLD	25
Adjust the upper threshold to increase the use of the standard costs disclosure forms	25
Stakeholder views on other options for the upper threshold in the consultation paper	28
FUTURE ADJUSTMENT OF THE THRESHOLDS	29
COMMERCIAL AND GOVERNMENT CLIENTS.....	31
Entities that meet the tests for specification as a commercial or government client.....	31

Expansions of commercial and government client list not supported 33

GUIDELINES AND DIRECTIONS ON COSTS ESTIMATES 37

Guidelines on costs estimates 38

Directions on costs estimates..... 38

RECORD KEEPING 39

Improve guidance on record keeping..... 39

Stakeholder views on other options for record keeping in the consultation paper 40

ATTACHMENTS..... 41

About this report

This is the report of the costs disclosure thresholds review (**Review**), submitted to the Legal Services Council (**Council**) in September 2023. The Review was led by Dr Matthew Butlin AM, appointed by the Council as the independent expert and leader of the Review. Dr Butlin was assisted in the conduct of the Review by the Chief Executive Officer and staff of the Council. The Council also appointed a working group of its members to provide additional guidance to the Review.

The report sets out the evidence gathered by the Review and its recommendations for consideration by the Council.

This report does not address suggestions made by stakeholders which are outside the Review's terms of reference, which will be considered separately. The Review acknowledges the time and effort that stakeholders have put into this work.

Recommendations

The Review recommends that the Council:

1. Updates the standard costs disclosure forms and associated guidance materials, using consumer and lawyer input to increase the utility of the forms to lawyers and improve the clarity for consumers of legal services.
2. Amends the standard costs disclosure forms and associated guidance materials so that a range of legal costs may be included in addition to the single figure estimate required by the Legal Profession Uniform Law (**Uniform Law**).
3. Amends the Legal Profession Uniform General Rules 2015 (**Uniform General Rules**) to set the lower threshold at \$1,500.
4. Consults with regulatory authorities and professional associations about whether the Council's information sheet for legal practitioners on legal costs and costs disclosure obligations should be amended to encourage lawyers to consider what information should be provided to clients when statutory written disclosure is not required.
5. Amends the Uniform General Rules to set the upper threshold at \$10,000.
6. Periodically reviews the lower and upper thresholds with a frequency of not less than five years, adjusting them as appropriate by reference to:
 - (a) movements in the cost of common legal services
 - (b) the usage of the standard costs disclosure forms to ensure a practical, useful range exists between the lower and upper thresholds
 - (c) the impact on consumers, and
 - (d) changes to the disclosure thresholds in non-participating jurisdictions.

7. Expands the list of commercial and government clients by specifying the following persons or classes of persons in the Uniform General Rules:
 - (a) trustees within the meaning of the *Bankruptcy Act 1996* (Cth)
 - (b) overseas-registered foreign law practices, and
 - (c) corporations that have a share capital and whose shares, or the majority of whose shares, are held beneficially for the Commonwealth or a State or Territory.
8. Incorporates the guidelines on costs estimates into the information sheet for legal practitioners on legal costs and costs disclosure obligations.
9. Amends the information sheet for legal practitioners on legal costs and costs disclosure obligations to clarify that a range may be included in an estimate of the total legal costs as long as a single figure estimate is provided.
10. Working with regulatory authorities, streamlines data requests in relation to costs complaints and considers how the Uniform Law database could be updated to include this information.
11. Revokes the guidelines and directions on costs estimates issued by the Council and Commissioner for Uniform Legal Services Regulation (**Commissioner**).
12. Amends the information sheet for legal practitioners on legal costs and costs disclosure obligations to state that records of compliance with the costs disclosure requirements should be kept.
13. Recommends to regulatory authorities and professional associations that they issue guidance on the importance of keeping records of compliance with the costs disclosure requirements.

The Review considers that any changes proposed in response to recommendations 1 to 5 should be progressed as a package for the purposes of statutory consultation and implementation. The Review sees merit in developing the updated standard costs disclosure forms so that they can be subject to consultation alongside any proposed change to the upper threshold. There would also be benefit in the Council's information sheet being subject to consultation, as well as discussion with regulatory authorities and professional associations about any other proposed guidance for lawyers. A common implementation timeframe, along with continued consultation, would also make it easier to create awareness of the changes and reduce disruption to the legal profession and regulatory authorities.

Conclusions

The key elements of the Uniform Law's costs disclosure regime which fall within the terms of reference for this Review are:

- the lower and upper costs disclosure thresholds
- the standard costs disclosure forms
- the associated information sheets
- the guidelines and directions issued by the Council and Commissioner, and
- the exemptions from costs disclosure for "commercial and government clients".

The Review concludes on the evidence available to it that there are sound reasons to adjust each of these elements of the regime. The following conclusions are presented for the Council's consideration:

1. The current thresholds were set in nominal (i.e. current price) terms that have not been adjusted since the Uniform Law was implemented. The lower threshold was intended to exempt low value, straightforward legal services from the costs disclosure requirements. Measured relative to the date of introduction of the Uniform Law, cost and inflationary increases have meant progressively fewer legal services fall below the current lower threshold. Over the same period, consumers have gained additional costs disclosure for legal services in relation to which the cost has risen above the lower threshold. The same cost increases and inflationary pressures have led to a higher proportion of legal services requiring full costs disclosure. This means the regulatory regime has become less proportionate and less targeted for lawyers, especially at the lower end of services and practice size.
2. The Review notes that input from those who work with consumers of legal services has been limited, despite efforts by the Review before and after publishing the consultation paper to obtain that input. On the evidence available to the Review, it is apparent that most consumers have an expectation that they will be informed of fees for legal services.
3. Full disclosure adds more information to that provided in the standard costs disclosure forms, including additional detail about litigious matters, administrative matters and uplift fees where relevant. However, the difference in information between the standard costs disclosure forms and full disclosure appears small.
4. The graduated thresholds are intended to require higher levels of costs disclosure (i.e. more information) as the costs of legal services rise. The option for lawyers to use the standard costs disclosure forms for legal services between the lower and upper thresholds provides the opportunity for lawyers to meet the regulatory requirements for costs disclosure at lower cost compared with providing full disclosure. Suggestions, evidence and observations about the graduated thresholds were provided by stakeholders during the consultation process including:
 - the suggestion based on anecdotal evidence that the extent of awareness and usage of the standard costs disclosure forms among lawyers is low
 - areas to improve the forms and associated information sheets, and
 - that a wider range between the lower and upper lower thresholds would increase the utility of the forms to lawyers. The higher utility comes from lawyers being less likely to need to move from standard costs disclosure to full disclosure when a costs estimate needs to be revised.
5. A key question is how useful the standard costs disclosure forms are in practice. The Council's 2023 survey of solicitors indicated that a significant number of solicitors use the standard form and find it useful. The Review is more persuaded by this direct evidence than the anecdotal evidence that the form is infrequently used, and considers that the forms are useful regulatory instruments available to the Council. The standard forms satisfy the costs disclosure requirements and reduce compliance costs for lawyers. The Review concludes that an opportunity exists to lift the usage rate further by:
 - broadening the range between the thresholds (and hence the range of legal services captured)
 - raising awareness among lawyers, and
 - updating the forms and information sheets to improve their utility to consumers and lawyers.

6. The standard costs disclosure forms and associated information sheets for legal practitioners and consumers have not been reviewed since first introduced. An opportunity arises to check learning since that time and make improvements in the light of user experience of both consumers and lawyers. Some opportunities were suggested during consultation to improve the information sheets and the standard forms, for example, in relation to ranges of legal costs and the single figure estimate.
7. There is an opportunity to establish consistency on the lower threshold between jurisdictions that have adopted the Uniform Law and those that have not.
8. There is an opportunity to improve the operation of the exemption for “commercial and government clients” so that it better targets entities that are well-informed or experienced consumers of legal services. This would also reduce, but not eliminate, inconsistencies between jurisdictions that have adopted the Uniform Law and those that have not.

Introduction and background

Lawyers in New South Wales, Victoria and Western Australia are regulated under the Uniform Law. It commenced in New South Wales and Victoria on 1 July 2015 and in Western Australia on 1 July 2022.

Part 4.3 of the Uniform Law deals with legal costs. One of the objectives of Part 4.3 is “to ensure that clients of law practices are able to make informed choices about their legal options and the costs associated with pursuing those options.” Part 4.3 also says that lawyers must not charge more than fair and reasonable legal costs and sets out what lawyers need to include in their bills.

Lawyers must give their clients written information about legal costs as set out in s 174 of the Uniform Law (costs disclosure). At the beginning of the matter, the lawyer must give their client written information about how the legal costs will be calculated and give an estimate of the total legal costs. The lawyer must also update the information given to the client if there is any significant change to the legal costs throughout the matter. There are some situations where the requirements for costs disclosure do not apply. Section 174 is included at Attachment A.

Costs disclosure thresholds

One of the situations where full costs disclosure is not required is where the legal costs are likely to be less than a set dollar amount. There are two set dollar amounts which are called the lower and upper costs disclosure thresholds in this report.

The lower costs disclosure threshold is set at \$750. Costs disclosure is not required where the total legal costs in a matter are not likely to be more than the lower threshold of \$750. The higher threshold is set at \$3,000. The lawyer can use a standard form for costs disclosure if the total legal costs are not likely to be more than the upper threshold of \$3,000 instead of providing full disclosure. Both the standard forms and full disclosure comply with the Uniform Law when the matter is \$3,000 or less. There are two standard forms which are almost the same except that one is designed to be used by solicitors and one is designed to be used by barristers. As noted above, if the total legal costs are likely to exceed the upper threshold of \$3,000, lawyers are required to comply with the requirements of costs disclosure set out in s 174, often referred to as full disclosure.

For the purpose of the thresholds, the total legal costs only include the lawyer's fees. They do not include goods and services tax (GST) and extra costs to be paid by the client, for example for a property search or court application (known as disbursements).

The amounts of \$750 and \$3,000 were set by transitional provisions when the Uniform Law commenced in 2015.¹ Section 174 provides for the thresholds to be set in the Uniform General Rules, although no rules have been made yet to change the thresholds. Section 174 also provides for the standard costs disclosure forms to be prescribed by the Uniform General Rules. The standard forms were included in the Uniform General Rules when they commenced in 2015. The Uniform General Rules are developed and made by the Council under a process set out in the Uniform Law.

Exceptions to costs disclosure based on dollar amounts were also in place before the Uniform Law. An exemption for matters of \$750 or less has applied in Victoria since 1 January 1997² and in New South Wales since 1 October 2005³. Western Australia effectively reduced the non-disclosure threshold by 50 per cent when it joined the Uniform Law scheme on 1 July 2022. Before joining the Uniform Law scheme and since 1 March 2009, Western Australia had an exception to costs disclosure for matters of \$1,500 or less.⁴

The Review's task

The terms of reference set out the scope of the Review (Attachment B).

The Review was asked to consider and report on the effectiveness and regulatory impact of the cost disclosure thresholds, including whether they meet the objectives of:

1. Providing and promoting interjurisdictional consistency in the law applying to the Australian legal profession.
2. Enhancing the protection of clients of law practices and the protection of the public generally.
3. Empowering clients of law practices to make informed choices about the services they access and the costs involved.
4. Promoting regulation of the legal profession that is efficient, effective, targeted and proportionate.

Objectives 2, 3 and 4 focus attention on the regulatory arrangements as they apply among the three jurisdictions governed by the Uniform Law. Participating jurisdictions have common cost disclosure arrangements, which means objective 1 includes considering the disclosure thresholds in the non-participating jurisdictions, noting this is listed in the terms of reference as a matter to which the Review will have particular regard. It also includes considering the exemptions from costs disclosure in non-participating jurisdictions that are the counterpart to the Uniform Law's "commercial and government client".

There are clearly trade-offs between the four objectives. The benefits and costs of the various options need to be weighed and, desirably, quantified where possible. There are limitations to this discussed below and in Attachment C. Taken as a package, the Review considers the likely impact of the recommendations in relation to the objectives to be as set out in Figure 1 below.

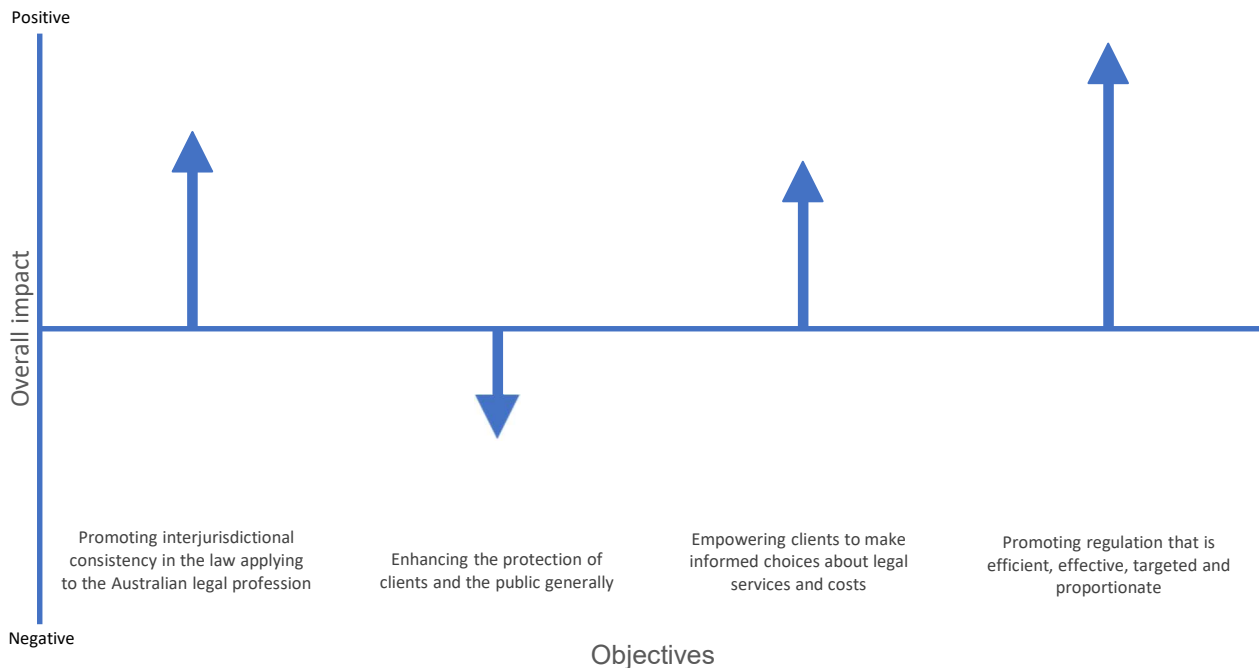
¹ Clause 18(3) and (4), Schedule 4, Uniform Law.

² Commencement date for s 90(1)(a) of the *Legal Practice Act 1996* (Vic) which had a non-disclosure threshold of \$750.

³ Commencement date for s 312(1)(a) of the *Legal Profession Act 2004* (NSW) which had a non-disclosure threshold of \$750.

⁴ Commencement date for s 263(2)(a) of the *Legal Profession Act 2008* (WA) which had a non-disclosure threshold of \$1,500.

Figure 1: Impact of recommendations in relation to objectives



Notes to Figure 1:

The following factors are relevant in considering the impact of the recommendations on the objectives (noting this is not an exhaustive list of factors):

1. The improvement in interjurisdictional consistency is limited by the legislative frameworks which apply in the non-participating jurisdictions (providing for a single \$1,500 threshold) and by the variation in the exceptions available in relation to commercial and government clients.
2. The net reduction in relation to consumer protection takes into account the proposed increase in the lower threshold together with suggested guidance for lawyers on communication with clients, as well as the factors in note 3 below.
3. The net gain in relation to informed choice takes into account the greater use of an updated standard costs disclosure form under an increased upper threshold, as well as the factors in note 2 above.
4. The increase in efficient, effective, targeted and proportionate regulation reflects the adjustment of the lower and upper thresholds, together with an updated standard costs disclosure form, and the additions to the definition of commercial and government client.

The Review was tasked with taking an evidenced-based approach and making any necessary recommendations for amendments to the Uniform General Rules, the standard cost disclosure forms, the cost disclosure form information sheets and the guidelines and directions for cost estimates. The Uniform Law itself is outside the terms of reference.

A key challenge in the Review has been obtaining input from consumers of legal services, despite efforts by the Review to engage with organisations that work with consumers both before and after the publication of the consultation paper. The Review drew on information and views from a number of sources, including complaints data and the Council's work in 2016 through the Consultative Forum and consumer survey.

Design and objectives of the regulatory system

The problem of limited (asymmetric) information

In competitive, well-informed markets for services price information is readily available. A consumer can obtain information, compare prices and make informed decisions on purchases. Prices are information-rich, that is they convey reliable information to the consumer about the cost of a service and

its quality compared with competitors, and they enable a consumer to make informed decisions on value for money. Where things go wrong, for example when a delivered service was of poor quality or led to adverse and unintended consequences, the consumer can seek redress through the applicable consumer protection regime.

In some markets, including the market for legal services, comparative price information is limited. This may be because:

- Consumers are unfamiliar with, or infrequent consumers of, legal services.
- As a matter of convention in the legal profession, there is limited (or no) published price information for legal services in the market.
- Consumers are unfamiliar with what is required to deliver the service and its cost.
- The services may be complex and subject to a range of uncertainties that affect the service and its cost.

Information asymmetry may be significant when, relative to the potential consumer, the service provider has a much better understanding of the service, what is provided (and how it is provided) and what contingencies may be likely. This places a consumer at a disadvantage in the marketplace, potentially leading to poor outcomes such as:

- Consumers may make poor decisions based on incomplete information regarding the cost and appropriateness of the service, especially compared with markets for other goods or services where information about price may be more available (such as food and power).
- A lawyer may exploit the consumer's lack of information about how services are provided, for example by charging more than is fair and reasonable.
- Consumers, especially more vulnerable consumers, experience "bill shock" due to financial pressures and may need to decide not to pursue their rights or engage legal services due to competing priority budget items.⁵

Consumers may turn to alternative service providers such as DIY legal kits or AI-enabled services which provide more cost certainty but potentially inferior legal outcomes.

The possible risk of overcharging is influenced by factors including the likelihood of exposure (and its consequences including reputational damage), accepted professional standards in the industry and the effectiveness of consumer protection.

What costs disclosure information do consumers need?

A key question is "what information do consumers need from costs disclosure?"

Hearing the voice of the consumer has been a challenging issue throughout this Review. During initial consultation, the Review heard that disclosure is not effective when it is too long or too complex and does

⁵ See also the Public Understanding of Law Survey, Volume 1 which examined demographic and other factors associated with the presence of legal need and whether or not it was met. The Public Understanding of Law Survey, Volume 1 is available at: <https://puls.victorialawfoundation.org.au/publications/everyday-problems-and-legal-need>.

not help consumers to “shop around” for legal services, especially in regional or remote areas. It also needs to be “fit-for-purpose” in providing the consumer with sufficient information to assist decision making, noting the diversity and varying complexity of legal services. Justice Connect noted the importance of plain language in consumers understanding costs disclosure obligations of lawyers and the standard forms and submitted that the information needs of consumers ought to be prioritised. The Review also heard during initial consultation that it is effective client communication for lawyers to discuss costs disclosure with consumers.

In 2016 the Council held a Consultative Forum that brought together representatives from a range of legal and community stakeholders. It also undertook a consumer survey of 2,070 participating consumers (or potential consumers) of legal services. Key findings from the consumer survey are summarised below.

2016 consumer survey key findings on information the consumer needs

- When asked to select the monetary amount over which lawyers should be required to provide written estimates of total legal costs, 51 per cent of survey respondents selected “Always regardless of the level of professional fees involved” and 37 per cent selected “More than \$750”.
- The majority of survey respondents (51 per cent) agreed that their lawyer had informed them of the cost of services prior to commencing work, 30 per cent disagreed that they had been informed and 19 per cent were unsure. Of those who were informed, 60 per cent were told verbally, 14 per cent using a costs agreement or costs disclosure document, 23 per cent by either letter or email.
- When asked how well they understood the likely costs, 54 per cent reported understanding the likely cost of their legal services well or adequately, 34 per cent reported understanding a little and 12 per cent did not understand the likely costs.
- The majority of respondents (62 per cent) believed they were charged the same or about the same as their lawyer had estimated for the legal services. Twenty-two per cent believed they had been charged a lot or a little more than what was estimated.
- When shown and asked about the standard costs disclosure form, the majority of respondents (56 per cent) believed it was detailed enough to give the information needed to make an informed decision about costs. Those who answered “no” explained their answer and this may be of assistance to the Council in updating the standard costs disclosure forms.
- After being shown the form, a high proportion of respondents recognised that there was a regulatory authority for costs complaints (70 per cent), knew they could request an itemised bill (81 per cent) and could ask their lawyer for an explanation of the standard costs disclosure form (88 per cent). Fifty-six per cent of respondents were aware they could negotiate a costs agreement.

Participants in the Consultative Forum considered that the standard costs disclosure form was a useful tool to capture and communicate costs information efficiently, was clear, easy to follow and provided a good summary.

Consultative Forum participants indicated that consumers value disclosure that provides reliable information on:

- costs, including the basis of estimated costs, hourly rate, fees vs estimates, detail about disbursements and recommended/standard rates for the type of work
- payment, including payment terms and consequences if bills are not paid
- consumer rights, including the right to negotiate and to complain, and
- the nature of the work and how it impacts costs, including options for packaging work, timelines, exclusions, expertise and experience and how consumer decisions can impact costs.

All of these elements which inform the consumer can be addressed at different levels of detail, with the level of detail being a key difference between the current standard form costs disclosure and full disclosure.

Costs disclosure regulatory regimes

Cost disclosure requirements are a regulatory response to information asymmetry in the market for legal services. Costs disclosure enhances, but is not a substitute for, consumer protection regimes. Its purpose is to inform the consumer about costs before engaging a lawyer. Costs disclosure regimes strike a balance between the consumer interest of having more information with the cost to lawyers of increased disclosure. As observed in the Council's 2016 Consultative Forum, costs disclosure provides benefits for both consumers and lawyers including informed decisions, "no surprises", avoiding disputes and complaints and building the relationship between client and lawyer.

A well-designed system has regard to both the efficient cost to a lawyer of costs disclosure and the value to a consumer of that information.

Full disclosure is in the interests of lawyers and consumers where the monetary value of the disclosure is high to the consumer, the cost of the service is high and the cost of full costs disclosure is small relative to the value of the service. Competition between lawyers may also drive disclosure in these circumstances.

Consumers of legal services who are familiar with purchasing legal services and understand the basis of legal costs obtain less benefit from costs disclosure. In their case it simply increases the cost to the lawyer while providing no additional benefit to the consumer. An efficiently designed regime will exclude them, noting there may be difficulties in defining these types of consumers. Several submissions addressed this point and the matter is discussed on page 31 below.

The design of a costs disclosure regime also needs to consider the possibility of a perverse outcome for lower-cost services where disclosure costs to lawyers are high relative to the cost of the service. Disclosure costs are based on each transaction: high disclosure costs relative to the value of the service discourages the supply of those services by making them uneconomic for the lawyer to provide. Consequently, high (relative to the value of the service) or disproportionate disclosure costs may have the perverse effect of making those legal services unviable and reducing their supply by lawyers. This would make consumers worse off in the absence of substitutes for the services.

An optimised design:

- Exempts well-informed and experienced consumers who are familiar with legal services and their costs, such as commercial and government clients.
- Discloses information about costs to less informed and inexperienced consumers while striking a balance between:
 - the scope, detail and form of information needed to inform consumer choices, and
 - the cost to the lawyer of disclosing that information at different levels of detail.
- Has regard to the structure of the legal profession, particularly to small practices, their geographic distribution and customer base and the breadth of their legal service offerings. In the Uniform Law jurisdictions, more than half (59.6 per cent) of lawyers in private practice work in practices with one to four lawyers.⁶ These practices supply a significant volume of lower-cost services, particularly in non-metropolitan areas.
- Limits the risk of perverse outcomes where the administrative cost of disclosure to lawyers is high relative to the costs of the service, which may discourage supply or decrease competitiveness in relation to legal costs.
- Provides options for compliance which are clear for smaller practices delivering lower-cost services and provide sufficient information to meet consumer needs.
- Provides guidance to consumers and lawyers on how the regime operates and their respective roles within it.

Depending on the trade-off between the level of detail valued by consumers and the cost of delivering it, the design may have thresholds that trigger increasing requirements for more detailed, and possibly additional, costs information to be disclosed. In these circumstances it is important that the thresholds are adjusted for cost and price movements to maintain the integrity of the design. Costs disclosure thresholds should remain proportionate and appropriately targeted to enable simpler costs disclosure.

Progressive costs disclosure requirements

The information disclosed through costs disclosure increases progressively (that is, provides greater detail) as the cost of legal services increases through the three steps:

- no disclosure where the total legal costs in a matter are not likely to be more than the lower threshold of \$750
- the option of using the standard cost disclosure forms instead of full disclosure if the total legal costs are not likely to be more than the upper threshold of \$3,000, and
- full disclosure above the upper threshold.

While lawyers are not required to make disclosure below the lower threshold, the evidence available to the Review suggests it is not uncommon for lawyers to inform their clients of the costs (with less information than is required by the standard forms). First-hand evidence from the Review's workshops, for example, indicated this was regarded as good practice.

⁶ Sourced from the 2022 National Profile of Solicitors prepared by Urbis for the Law Society of New South Wales.

The Review was advised in its initial consultations that the standard costs disclosure forms were not often used by lawyers and that there was a low level of awareness of them. These views were reported to have been based on anecdotal evidence. By contrast, the direct evidence gathered by the Review's solicitor survey showed both a relatively high level of awareness of the form and a significant level of use by solicitors. The Review considers the solicitor survey results to be authoritative.

The Council's consumer survey in 2016 reported that just over half of the respondents (actual and potential consumers of legal services) found the standard costs disclosure forms sufficiently detailed to make an informed decision about costs. Ten per cent of respondents disagreed and around one third were unsure. Survey participants also identified opportunities to improve the forms. No current direct information on consumer views about the forms was provided in submissions to the Review.

The impact of cost and price movements on the disclosure regime

When the Uniform Law was introduced to the Victorian Parliament in 2013, the then Attorney-General stated that the Uniform Law "...recognises that for many inexpensive or routine matters, extensive or detailed disclosure would not be justified. For matters that are likely to cost less than a prescribed 'lower threshold' a law practice will not be required to comply with a specified form of disclosure requirement." The lower threshold of \$750 now has less application compared to when the Uniform Law was introduced. The evidence available to the Review from initial consultations, submissions, and the solicitor survey and workshops suggests that the passage of time has had the effect that some routine or lower-cost matters that would have been exempt, now require disclosure.

An example of the increasing cost of legal practice was provided by the Law Society of New South Wales submission which noted that "[a] typical conveyance now involves dealing with issues including the operation of the Foreign Residents Capital Gains Withholding regime, the GST at settlement regime, compliance with the requirements of electronic conveyancing and the increased complexity of NSW state taxes such as foreign surcharge duty – all of which have collectively increased conveyancing costs." The Council's 2023 solicitor survey showed that the services provided for \$750 or less were principally wills/power of attorney (77 per cent of respondents), followed by other civil (27 per cent) and conveyancing (21 per cent).

The Review's consultation paper set out data pointing to substantial increases in the cost of providing legal services since the lower and upper thresholds were set. Various measures of costs were considered including movements in the consumer price index (**CPI**) and movements in the scales of costs. This is discussed in more detail below at page 19.

In the absence of substantial offsetting improvements in productivity, these cost increases mean a decreasing proportion of legal services remain below the lower threshold and that an increasing proportion of legal services are above the upper threshold. Without offsetting and ameliorating influences that lower the costs to lawyers of disclosing this additional information, the conclusion is that the overall costs to the legal profession have increased as a result of not adjusting the thresholds.

Costs disclosure thresholds in other jurisdictions

The Review was asked to have particular regard to the relevant costs disclosure thresholds in other Australian jurisdictions that have not adopted the Uniform Law.

Table 1 below sets out the current costs disclosure requirements for all Australian jurisdictions. It shows that all non-participating jurisdictions have a single threshold set at \$1,500 (excluding GST and disbursements) below which disclosure of costs is not required. The non-disclosure threshold of \$1,500 was introduced in the Australian Capital Territory on 1 July 2006, the Northern Territory on 31 March 2007, Queensland on 18 July 2008, Tasmania on 31 December 2008, Western Australia on 1 March 2009 and South Australia on 1 July 2014.

The difference between the Uniform Law lower threshold and the prevailing common threshold in other jurisdictions is an apparent impediment to the Uniform Law objective of “providing and promoting interjurisdictional consistency in the law applying to the Australian legal profession.”

Table 1: Costs disclosure requirements in Australian jurisdictions

Jurisdiction	Legislation	Costs disclosure thresholds
Australian Capital Territory	<i>Legal Profession Act 2006</i> s 272(1)(a)	\$1,500
New South Wales	Uniform Law s 174(4) and (5) and Sch 4, cl 18(3) and (4); Uniform General Rules	Lower threshold: \$750 Upper threshold: \$3,000
Northern Territory	<i>Legal Profession Act 2006</i> s 306(1)(a)	\$1,500
Queensland ⁷	<i>Legal Profession Act 2007</i> s 311(1)(a); Legal Profession Regulations 2017 s 70(1)	\$1,500
South Australia	<i>Legal Practitioners Act 1981</i> , Sch 3, cl 13(1)(a)	\$1,500
Tasmania	<i>Legal Profession Act 2007</i> s 295(1)(a)	\$1,500
Victoria	Uniform Law s 174(4) and (5) and Sch 4, cl 18(3) and (4); Uniform General Rules	Lower threshold: \$750 Upper threshold: \$3,000
Western Australia	Uniform Law s 174(4) and (5) and Sch 4, cl 18(3) and (4); Uniform General Rules	Lower threshold: \$750 Upper threshold: \$3,000

Work undertaken by the Review

The Review wrote to 43 organisations in September and December 2022 to invite them to an initial consultation meeting. This included 14 organisations that work with consumers. Twenty-two initial consultation meetings were held between November 2022 and January 2023 with the following organisations:

- The New South Wales Department of Communities and Justice

⁷ On 13 September 2023, the Queensland Parliament passed the *Justice and Other Legislation Amendment Bill 2023*. The Bill provides for two thresholds of \$1,500 and \$3,000 in place of the single non-disclosure threshold in the *Legal Profession Act 2007* (Qld). The Bill provides for “abbreviated disclosure” for matters not likely to exceed \$3,000, with no statutory disclosure required for matters not likely to exceed \$1,500. The thresholds can be varied by regulation and the Queensland Attorney-General stated that the threshold of \$3,000 will be kept under review. The relevant sections of the Bill will commence on a day to be fixed by proclamation.

- The Victorian Department of Justice and Community Safety
- The Western Australian Department of Justice
- The Federation of Community Legal Centres (Vic)
- Consumer Action Law Centre, Victoria
- Welfare Rights and Advocacy Service, Western Australia who were nominated to attend on behalf of Community Legal Western Australia
- The Office of the Legal Services Commissioner (**OLSC**)
- The Law Society of New South Wales (**LSNSW**)
- The New South Wales Bar Association (**NSW Bar**)
- The Victorian Legal Services Board and Commissioner (**VLSB+C**)
- The Law Institute of Victoria (**LIV**)
- The Victorian Bar (**Vic Bar**)
- The Legal Practice Board in Western Australia (**LPBWA**)
- The Law Society of Western Australia (**LSWA**)
- The Western Australian Bar Association
- The Family Law Practitioners Association of Western Australia
- The Law Council of Australia (**LCA**)
- Law Firms Australia (**LFA**)
- The Queensland Law Society
- The Law Society of South Australia
- The Legal Profession Board of Tasmania
- The Law Society of Tasmania

These meetings spanned Uniform Law jurisdictions as well as jurisdictions outside the Uniform Law scheme. The Review valued the opportunity to speak with key stakeholders including government agencies, regulatory authorities, legal professional associations and those who work with consumers, and the range of views they expressed.

The Review developed a survey for private practice solicitors to find out about the types of legal services that may cost \$3,000 or less. The survey also asked solicitors about the standard costs disclosure form and the time taken to complete costs disclosure. The survey was distributed in New South Wales, Victoria and Western Australia between February and April 2023. The questions asked in the survey are at Attachment D. The survey had a total of 782 respondents, around 90 per cent of whom reported working in law practices with four principals or less.

In March 2023, the Review held two workshops with 13 private practice solicitors from New South Wales, Victoria and Western Australia. Participants were sole practitioners or worked in law practices with four principals or less. The workshops focused on the time and steps required for costs disclosure and the range of costs for legal services.

The Review also analysed complaints data provided by regulatory authorities and published sources of information relating to legal costs such as advertised prices. Some of this data has been used in an attempt to weigh the costs and benefits of key options. However, most of the information proposed for a detailed costs benefit analysis does not exist, is unobtainable or is not available to the Review. This is discussed further in Attachment C.

The Review drew on these sources of information to develop the options set out in the public consultation paper which was published on the Council's website on 5 May 2023 (Attachment E without attachments) and sent to 48 organisations. The Review sought feedback from stakeholders on both the advantages and disadvantages of each option, along with additional evidence where possible.

The Review received 11 submissions in response to the consultation paper from the following organisations:

- OLSC
- LSNSW
- NSW Bar
- VLSB+C
- LIV
- Vic Bar
- LSWA
- LCA
- LFA
- The Supreme Court of Western Australia
- The Supreme Court of Victoria.

Justice Connect also wrote to the Review prior to the release of the consultation paper and agreed to its letter being published with the other submissions.

The LPBWA requested that the information provided during initial consultation be referred to in this Report. The OLSC advised that its submission should be considered in addition to the information provided during initial consultation.

The Review is grateful for all submissions received. Feedback and evidence provided by stakeholders has helped to shape the Review's conclusions and recommendations.

Standard costs disclosure forms and information sheets

Recommendation 1

Update the standard costs disclosure forms and associated guidance materials, using consumer and lawyer input to increase the utility of the forms to lawyers and improve the clarity for consumers of legal services.

Recommendation 2

Amend the standard costs disclosure forms and associated guidance material so that a range of legal costs can be included in addition to the single figure estimate required by the Uniform Law.

The standard costs disclosure forms are set out in Schedule 1 to the Uniform General Rules (Attachment F). The Council has also developed costs disclosure information sheets for lawyers and consumers which sit alongside the standard disclosure forms (Attachment G).

As previously noted, feedback from professional associations and solicitor workshops suggested that lawyers may not use the standard costs disclosure forms. However, the results from the survey of private practice solicitors suggest that there is significant usage of these forms by lawyers working in small practices. Almost three quarters of respondents who answered the question reported that they were aware of the standard costs disclosure form. Of those respondents, almost three quarters (which is around half of the total sample) had used the standard form. When the respondents who had used the standard form were asked about frequency, around 80 per cent said they use it for all or some matters under \$3,000. Using a weighted average derived from the survey results, around half of the legal services (51.7 per cent) provided by the solicitor respondents were at a cost of \$3,000 or less and had the option of using the standard costs disclosure form.

The Council's 2016 consumer survey found just over half of the respondents (actual and potential consumers of legal services) found the standard costs disclosure forms sufficiently detailed to make an informed decision about costs. Ten per cent of respondents disagreed and around one third were unsure.

The Review heard during initial consultations that the standard forms could be improved for both clients and lawyers:

- The forms could be made more user friendly and targeted to clients by simplifying the language, including by avoiding or explaining terms which are not familiar to consumers (e.g. disbursements).
- The forms also have aspects which may be confusing to lawyers and should be amended to allow a range of legal costs to be provided in addition to the single figure estimate.
- Changes to the forms should be user tested with both consumers and lawyers.

The Review also compared the standard costs disclosure forms with the cost disclosure precedents prepared by the LSNSW, the Vic Bar and the LSWA. Viewed from the perspective of information provided, the relevant parts of these precedents are longer than the standard forms, more complex and allow greater detail to be provided.

Submissions from stakeholders were mixed on whether the forms and information sheets could be improved. The NSW Bar did not consider that improvement was needed. The LIV considered that the forms were efficient and generally well understood by lawyers and consumers but could include additional, possibly optional content, allowing greater certainty regarding costs disclosure and basis for the payment of costs. The VLSB+C considered that the forms could be improved and should reflect a project management approach to the provision of legal services. The VLSB+C also submitted that the forms could take a user-centred design approach focusing on the recipient of the information, that is the client. The LCA submitted improvements to the forms and information sheets should be identified through user testing with law practices and consumers.

The Review concludes there is an opportunity to improve the standard costs disclosure forms to make them more effective and user friendly to both consumers and lawyers. This is central to the proposed approach along with setting the lower threshold appropriately and ensuring the upper threshold is at a level that encourages a wider and more extensive adoption of standard form disclosure.

Changes to the forms should be user tested by both consumers and lawyers, noting any areas for improvement identified during consultation and in the 2016 consumer survey. The Review also

recommends that the standard costs disclosure forms and associated guidance materials should include the option of providing a range of legal costs in addition to the single figure estimate required by the Uniform Law.

Costs disclosure thresholds

The Review's approach to adjusting the two thresholds was first to consider the appropriate level for the lower threshold with reference to the evidence and the objectives set out in the terms of reference. Having done that, the Review aimed to determine a level for the upper threshold that provides an appropriate range between the thresholds. This approach is in the context of, and connects with, the recommendation to optimise the standard disclosure forms and associated information and guidance materials for consumers and lawyers.

The lower threshold

Recommendation 3

Amend the Uniform General Rules to set the lower threshold at \$1,500.

Recommendation 4

Consult with regulatory authorities and professional associations about whether the Council's information sheet for legal practitioners on legal costs and costs disclosure obligations should be amended to encourage lawyers to consider what information should be provided to clients when statutory written disclosure is not required.

Adjust the lower threshold for the changing cost of legal services

The lower threshold now has less application compared to when it was introduced and the passage of time has had the effect that some routine or lower-cost matters that would have been exempt, now require disclosure. Compared with the date of introduction of the Uniform Law, the regulatory regime has become less proportionate by imposing higher regulatory compliance burdens for lower-cost services, particularly for small law practices. Relative to that date, consumers have gained additional costs disclosure from some lower-cost legal services having risen above the lower threshold.

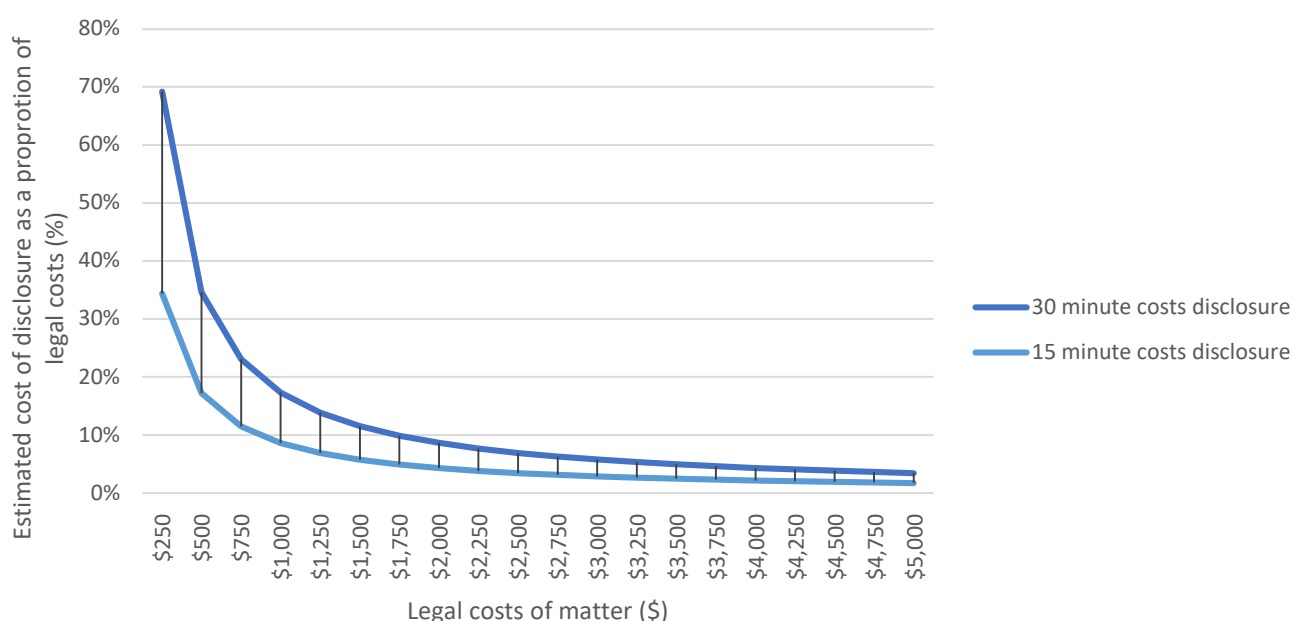
The NSW Bar supported increasing the lower threshold to \$1,500 and submitted that the lower threshold is so out of date that, in its view, every lawyer is now required to make full disclosure at the commencement of the matter which undermines the objective of the lower threshold. The LCA and Supreme Court of Western Australia also supported this option. The LCA submitted that the incongruity between the lower threshold and the non-disclosure thresholds in the non-participating jurisdictions has not been properly explained where the underlying policy is that there is a price point where disclosure cannot be justified. The LCA submitted that it was doubtful that consumers in non-participating jurisdictions where the non-disclosure threshold is \$1,500 are at a "particular disadvantage" compared to consumers in Uniform Law jurisdictions where the lower threshold is \$750.

The OLSC acknowledged that a lower threshold of \$1,500 could be a pragmatic option for the Council. While \$750 may be a significant amount for some consumers, the OLSC noted in initial consultation that costs complaints for matters below \$750 were low in New South Wales and that all non-participating jurisdictions have a higher non-disclosure threshold. In the second reading of the *Justice and Other Legislation Amendment Bill 2023* the Queensland Attorney General stated “[t]he Legal Services Commission has been consulted and advised that the absence of a disclosure regime for matters under the current full disclosure threshold of \$1,500 has not been an issue in practice.”⁸

The time and cost of completing disclosure are high relative to the legal fees charged, especially where the lawyer provides a high volume of lower-cost services. Taking into account information from the solicitor survey and workshops regarding the time taken to complete costs disclosure using either the standard costs disclosure form or drafting a costs agreement, the indicative cost of disclosure in a simple matter is estimated at between \$86 and \$173 for 15 to 30 minutes. This estimate applies the rates in the Practitioner Remuneration Order for 2023 made by the Victorian Legal Costs Committee for attendance by a solicitor and a clerk and assuming the work is split equally between them.⁹ Figure 2 below depicts the estimated costs of disclosure as a proportion of legal costs.

By way of example, Figure 2 shows that a costs disclosure that takes 15 minutes and costs \$86 is equivalent to 17.8 per cent of a matter costing \$500 (but 4.3 per cent of a matter costing \$2,000).

Figure 2: Estimated costs of disclosure as a proportion of legal costs



In considering the monetary amount that would best adjust for the changing costs of legal services, the Review considered the following factors in recommending that the lower threshold be set at \$1,500:

⁸ The second reading speech is available at: https://documents.parliament.qld.gov.au/events/han/2023/2023_09_12_DAILY.pdf

⁹ The Practitioner Remuneration Order for 2023 provides that attendance by a legal practitioner is \$112 for each quarter hour or part thereof and attendance by a clerk is \$60.60 for each quarter hour or part thereof (First Schedule, items 17 and 18). Calculations rounded to the nearest full dollar amount.

- The \$750 threshold has applied in Victoria since 1 January 1997 and in New South Wales since 1 October 2005. A \$1,500 threshold had been in place in Western Australia since 1 March 2009 and up to 30 June 2022. Applying the CPI means that in March 2023:
 - the value of \$750 had increased to \$1,484 compared with January 1997 (for Victoria)
 - the value of \$750 had increased to \$1,192 compared with October 2005 (for New South Wales), and
 - the value of \$1,500 had increased to \$2,150 compared with March 2009 (for Western Australia).

On this point, the NSW Bar submitted that, at a minimum, the lower threshold should be adjusted in line with CPI increases. The VLSB+C submitted the alternative view that it is quite possible that costs can and should have fallen since 1997 given the use of technology in realising productive gains and that CPI is not the only measure that should be considered in determining how the cost of providing legal services have changed. The Review notes the potential productivity gains associated with technology, as well as the associated costs for law practices such as the storage of data, protection against cyber-attacks and licencing costs for new products. Other contributors to increased costs to law practices include increased compliance obligations, case management requirements and delays in litigation.

- It is difficult to quantify increases in the costs of providing legal services and running a law practice (e.g. rent, salaries, technology and compliance) as these costs are generally not publicly available. The consultation paper considered the scales of legal costs in the Supreme Court of Victoria between 1997 and 2022 which indicated that the scales have increased by around a third more than inflation. These scales are determined following consideration of inflation and submissions made by the legal profession. In its submission, the Supreme Court of Victoria noted significant caution should be used when comparing figures in the Supreme Court of Victoria scale of costs over time and using the scale as a basis to assess increases in the costs of providing legal services. A recent review by the Supreme Court of Victoria and the County Court of Victoria relevantly concluded that the scales of costs do not reflect the charging practices of almost all law practices in every area of practice. While acknowledging these issues, the Review considers the increase in the scales of costs over time to be one indicator of the increasing costs to law practices.

The Review concluded from the available evidence and the submissions that the increase in costs over the relevant period has been significant and would have shifted services above the lower threshold.

The Review also considered complaints data,¹⁰ set out more completely in the consultation paper, which shows that complaints involving a costs issue where the amount of legal costs is \$750 or less and the amount of legal costs is \$1,500 or less are low.

Complaints involving a costs issue where the amount of the legal costs is \$750 or less represented:

- around 1.5 per cent of total complaints opened in New South Wales in the 2021/22 and 2020/21 financial years, and
- less than 2 per cent of total complaints closed in Victoria in the 2021/22 financial year and around 8 per cent in 2020/21.

Complaints involving a costs issue where the amount of the legal costs is \$1,500 or less, with about half of these involving an amount of \$750 or less, represented:

- three per cent or less of total complaints opened in New South Wales in the 2021/22 and 2020/21

¹⁰ The Review notes that there are differences in the wider complaints data that are beyond the scope of the Review to investigate.

financial years, and

- less than 12 per cent of total complaints closed in Victoria in the 2021/22 financial year and around 14 per cent in 2020/21.

Not all complaints that involve a costs issue are about costs disclosure. A costs complaint might also be about billing, overcharging or another costs issue. Data provided to the Council's database suggests that disclosure is identified as an issue in around 10 to 20 per cent of complaints involving a costs issue for the 2021/22 and 2020/21 financial years. Complaints data does not capture costs issues that are resolved by costs assessment or where the client does not complain to the regulatory authority. The Review did not have access to complaints data for Western Australia, which joined the scheme in the 2022/23 financial year.

In all non-participating jurisdictions, costs disclosure is not required if the total legal costs are not likely to exceed \$1,500. Increasing the lower threshold to \$1,500 may promote interjurisdictional consistency, reduce costs to law practices operating across jurisdictions and remove a barrier to other jurisdictions joining the Uniform Law scheme. The LFA submitted that it is generally supportive of amendments to the thresholds that support interjurisdictional consistency despite the types of matters in which the LFA's member firms act typically having little relevance to the thresholds. The LCA submitted that the inconsistency between the lower threshold in the Uniform Law and the non-disclosure thresholds in other jurisdictions adds to compliance burdens with no consumer benefit.

The Review's approach to considering costs and benefits produced ambiguous results for this option that depend on the sensitivity of the calculation to its underpinning assumptions. The available information is insufficient to provide a clear conclusion on whether the value of the reduced compliance costs for lawyers outweighs the loss of benefit to consumers (or vice versa). A key assumption in estimating the benefit to lawyers is what proportion choose to stop disclosing either the information in the standard forms or full costs disclosure once they are no longer required to do so. The loss to consumers has been calculated by reference to complaints data. Encouraging lawyers to consider what information should be provided to clients when written statutory disclosure is not required may also reduce the loss to consumers (discussed in more detail below).

In comparison, the option of reducing the lower threshold to zero (option L1 in the consultation paper) almost certainly would result in the benefit to consumers from more information being greatly outweighed by the additional costs to lawyers. This is a result of the relatively high cost of disclosure for low value legal services and the volume of these disclosures greatly outweighing the value of cost complaints to consumers, even where they are increased by a factor of 100 as a sensitivity test.

More detail on costs and benefits is set out in Attachment C.

The Review recommends that the lower threshold is adjusted for the changing cost of legal services (option L3 in the consultation paper). Considering the impact of inflation, the changing costs of providing legal services over time and taking into account the non-disclosure thresholds in non-participating jurisdictions, this would see the lower threshold set at \$1,500.

Communication with clients

Some stakeholders made submissions about communication with clients when no written statutory disclosure is required. While the submissions supported different lower threshold amounts, the common

contention was that discussing legal costs with clients in matters which fall below the lower threshold has benefits for lawyers and consumers.

The LIV submitted that lawyers should be encouraged to confirm the anticipated costs in writing prior to the client incurring costs even though no general disclosure obligations should arise below the lower threshold as “[t]his would be in the interests of clients, cause minimal impost to lawyers and assist in further reducing or containing the number of low quantum consumer (costs) complaints. It would further align with expected practice.” The LPBWA expressed the view during initial consultation that lawyers should always be required to make it clear that they are charging for their services and the rate, if applicable. The LPBWA considered this was more crucial if the lower threshold was raised as the clients at this level are the most vulnerable and uninformed. This is consistent with indications from the OLSC that discussion with clients can reduce complaints and misunderstanding about legal costs including where written statutory disclosure is not required. Justice Connect recommended that “the information needs of clients be prioritised in any consideration to increase the ‘lower threshold’, alongside acknowledgement that the current cost-of-living crisis is causing additional financial pressures for many clients.” This is also consistent with the conclusions of the Council’s 2016 Consultative Forum about the benefits of cost disclosure.

As noted above at page 13 the evidence available to the Review suggests that it is not uncommon for lawyers to inform their clients of the costs for matters below the lower threshold (possibly with less information than is required by the standard forms) and the Review heard from some stakeholders and lawyers that this is considered good practice. The Review also notes rule 7 of the Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015 (**Australian Solicitors’ Conduct Rules**) and rule 37 of the Legal Profession Uniform Conduct (Barristers) Rules 2015 (**Barristers’ Conduct Rules**).

The Review sees merit in these submissions and recommends that the Council consults with regulatory authorities and professional associations about whether the Council’s information sheet for legal practitioners on legal costs and costs disclosure obligations should be amended to encourage lawyers to consider what information should be provided to clients when statutory written disclosure is not required. Options for communicating with clients about legal costs below the lower threshold could include discussion, email and the (optional use of the) revised standard disclosure forms.

Stakeholder views on other options for the lower threshold in the consultation paper

Submissions in support of reducing the lower threshold to \$0

Option L1 was for lawyers to provide costs disclosure regardless of the likely dollar amount of the legal services. During initial consultation it was suggested that this option could be implemented without amending the Uniform Law by setting the lower threshold at \$0. In considering these submissions, the Council should have regard to the explicit provision in the Uniform Law for a monetary threshold under which disclosure is not required.

Option L1 was supported by the VLSB+C and the Vic Bar.

The VLSB+C submitted that they would support this option with one simple, short and accessible disclosure form for most matters which outlined potential legal costs and other matters of critical importance to consumers. The VLSB+C submitted that disclosure was an important consumer protection

mechanism and should focus on what consumers need to know rather than no disclosure under certain monetary limits. The VLSB+C also submitted that:

- An accessible regulator and resolution processes exist in legislation for different reasons, and it is preferable that no disputes occur over costs than for consumers to have dispute resolution mechanisms they may not be equipped to utilise.
- There is information asymmetry where a lawyer does not disclose costs before providing the service and this creates potential for lawyers to charge more than is fair or transfer work to more junior staff where the original agreed price is not viable. This potential is increased as matter complexity increases. It may also result in increased costs complaints and consumers reluctant to engage lawyers.
- Although they agree that not all complaints involving a costs issue are about disclosure, the VLSB+C's analysis of the root causes of costs complaints suggests that often it is not clear what the consumer is getting for the estimated costs.¹¹ While there might have been "technical compliance" with disclosure obligations the consumer does not have a reasonable idea of what they are paying for. There have been 60 costs complaints for matters under the lower threshold in Victoria in the last two financial years which suggests that disclosure would contribute at least to some reduction in costs complaints for more expensive matters.

While there has been an average of 30 cost complaints annually in Victoria over the last two years, even if all were attributed to the absence of costs disclosure (as has been assumed in the cost benefit analysis in Attachment C), the costs to legal practices of reducing the lower threshold to zero would still almost certainly greatly exceed the potential benefits to consumers. The VLSB+C's submissions which relate to cost benefit analysis are also addressed at Attachment C.

The Vic Bar submitted that consumers and lawyers may have different expectations about what a minimal cost matter is and that disclosure regardless of the likely dollar amount promotes transparency and manages client expectations. The Vic Bar submitted that the complaint figures in the consultation paper support this.

Submissions in support of maintaining the existing threshold

Option L2 was to maintain the lower threshold at \$750. The LPBWA noted during initial consultation that \$750 could be significant for some consumers such as pensioners and that complaints are sometimes made in relation to matters where the costs are \$750 or less, where it is unclear costs are being charged. The LPBWA indicated that it does not support an increase to the lower threshold in the absence of a clear evidence base, including consumer consultation.

Submissions in support of increasing the lower threshold to \$3,000 or \$5,000

Option L4 considered the application of the lower threshold in relation to commonly provided legal services and would see the lower threshold increased to \$3,000 or \$5,000.

¹¹ See also the Public Understanding of Law Survey, Volume 1 which reported that of respondents who sought help from one or more legal services, 35 per cent indicated they had not obtained all the expert help they needed. The Public Understanding of Law Survey, Volume 1 is available at: <https://puls.victorialawfoundation.org.au/publications/everyday-problems-and-legal-need>.

In submissions the NSW Bar and the LIV noted inexpensive and routine matters that would likely exceed \$1,500 but cost the client up to \$3,000. These accord with the Review's survey of solicitors and included:

- initial conference and general advice
- preparation of a standard and uncomplicated will
- preparation of an ordinary power of attorney and appointment of an enduring guardian, together with advance care directives if required
- a high level preliminary review of a matter and general conference with client advising on key issues
- standard advice on a caveat and whether there is a caveatable interest or application for lodgement/registration or administrative removal
- attending on a relative and sending some basic letters to see if a copy of a will can be provided
- review and provision of oral advice on a small commercial matter
- simple conveyance of a residential property or tenancy
- advice on basic contracts/terms in letters of offer for an employment contract review, and
- pre-litigation letters of demand in straightforward debt-recovery matters.

The LSNSW submitted that option L4 was preferable as a non-disclosure threshold of \$1,500, which has been in place for some time in the non-participating jurisdictions, is substantially too low and would not achieve the policy objective of excluding disclosure requirements for routine matters. The LSNSW considered that a lower threshold of \$5,000 would capture the provision of straightforward legal advice such as advice regarding contract terms and also take into account the marked changes that have occurred to conveyancing which are discussed above. The LSNSW submitted that \$5,000 would be an appropriate lower threshold, as it would release lawyers from burdensome disclosure obligations for simple and day-to-day matters across a broader cross section of legal practices due to the rising costs for lawyers and inflation increases overall.

The LIV and the LSWA also supported option 4 and submitted that the lower threshold should be set at \$3,000 at a minimum to improve the utility of the lower threshold and better reflect the realistic cost of routine work, one-off matters and standard matters without the risk of costs orders. The LSWA submitted that the lower threshold being set too low could discourage consumers from seeking legal assistance as they were then provided with voluminous costs disclosure that would overwhelm them. The LSWA considered this would have access to justice implications.

The upper threshold

Recommendation 5

Amend the Uniform General Rules to set the upper threshold at \$10,000.

Adjust the upper threshold to increase the use of the standard costs disclosure forms

The Review recommends that the upper threshold should be adjusted to increase the use of the standard costs disclosure forms for the following reasons:

- The direct survey evidence indicates that a significant number of solicitors use the standard form and find it useful. The Review is persuaded that the forms are useful regulatory instruments available to the Council.

- Increases in inflation and the costs of providing legal services have reduced the real value of the higher threshold over time so that the standard costs disclosure forms are available in fewer matters, which undermines the intention of the upper threshold. Inflation from July 2015 would increase the higher threshold to approximately \$3,700 as at March 2023.¹²
- The current range of \$2,250 between the lower and upper thresholds is relatively narrow, especially where there may be significant risk of going over the upper threshold as the matter progresses and requiring full disclosure. Failing to disclose triggers consequences for non-compliance and it has been submitted by the LCA that the requirements of full disclosure are unclear. Significantly widening the range would increase the utility and usage of the standard forms, which satisfy the requirements of the Uniform Law.
- The costs of providing full disclosure may be disproportionate for lawyers who provide a high volume of services that are close in value to the upper threshold. These costs may, at the margin, affect the range of services provided by a law practice.
- Full disclosure is more complex and includes information that is more concerned with the lawyer than the client. As such, full disclosure may be less effective in helping some clients understand the cost of legal services and their rights compared with standard form disclosure.

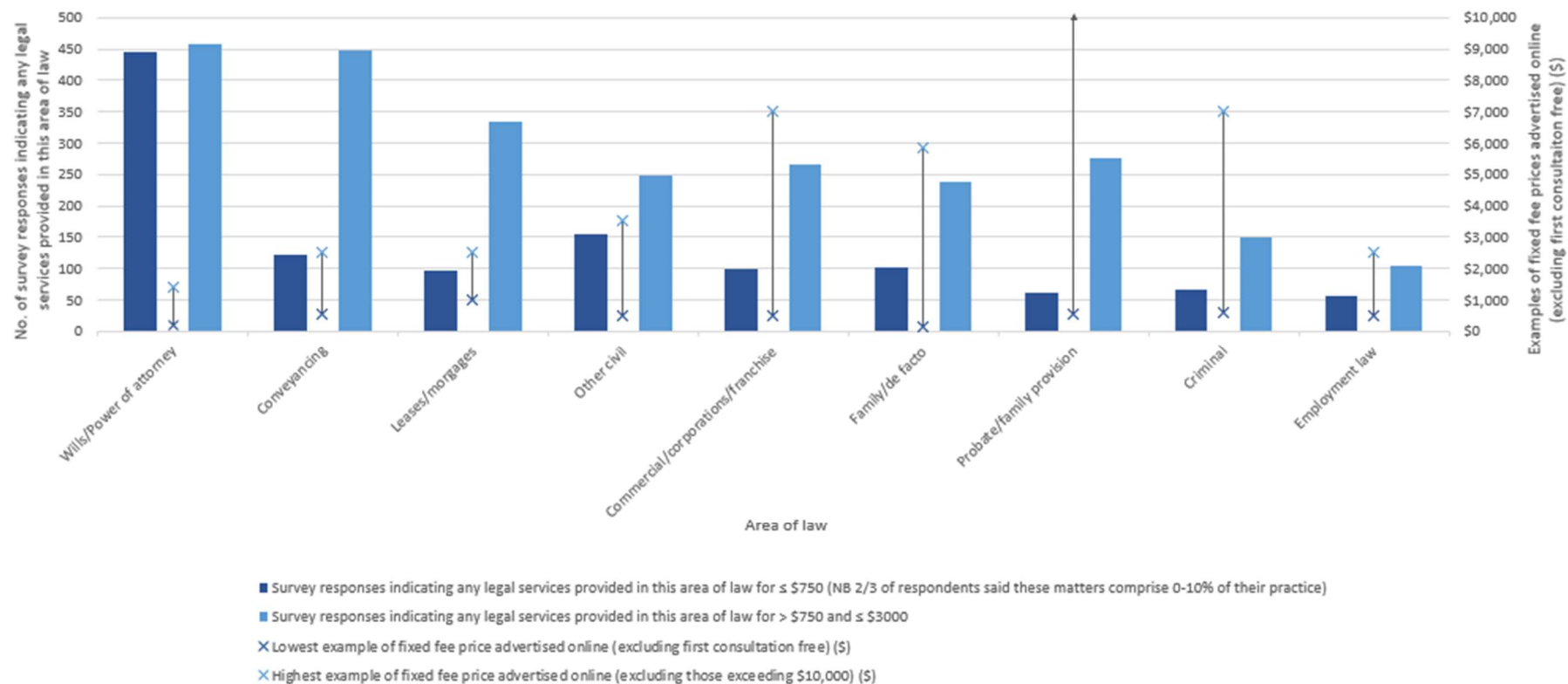
The VLSB+C advised that it would support one simple, short and accessible disclosure form for most matters. The LPBWA in initial consultation supported increasing the upper threshold to allow the use of the standard forms in a significantly wider range of matters. The Vic Bar, in the alternative that abolishing standard form disclosure was not supported, submitted that in the interests of simplicity and to reduce the burden on lawyers the upper threshold should be increased to allow the standard form to be used in as many cases as possible. The LCA submitted that the upper threshold should be increased to \$10,000 to reflect movements in the CPI and other indices since 1 July 2015, and that \$3,000 is too low to be of practical use. The LCA submitted that the higher threshold should capture common or standard retail services such as wills or standard conveyances which do not involve contested matters, have settled costs due to competition, are unlikely to have significant variables in the course of the matter and where full disclosure would be an increased compliance burden with no additional benefit to the consumer.

However, the LIV submitted that the likely complexity of matters between \$5,001 and \$10,000 may warrant full disclosure and that full disclosure is better able to deal with complex matters which require a lawyer to specifically turn their mind to matters their client needs to understand in relation to the proposed conduct of the matter and the proposed costs.

In considering the monetary amount of the upper threshold, the Review examined some limited examples of fixed fee rates advertised online and the responses to the solicitor survey about types of legal services that are provided under \$750 and between \$751 and \$3,000. These are shown in Figure 3 below. The online advertised fixed fee rates suggest an increased upper threshold of \$10,000 would capture a range of legal services in commonly delivered practice areas, noting these rates are likely to represent the lower bound in the range of costs for these matters.

¹² CPI (all capitals), results rounded to the nearest full dollar amount.

Figure 3: Solicitor survey responses relating to legal services provided for \$750 or under and between \$751 and \$3,000 and examples of fixed fee prices advertised online



The Review also took into account the dollar range for the use of the standard forms, that is, the range between the lower and upper thresholds. The current difference between the thresholds is \$2,250. Quadrupling the range between the lower and upper thresholds is likely to significantly increase the utility of the standard costs disclosure forms by covering a wider range of legal services and also by reducing the risk of needing to move from standard form to full disclosure when circumstances change. This equates to \$10,500 if the lower threshold were set at \$1,500.

The Review's approach to considering costs and benefits suggested that an increased adoption of the standard costs disclosure forms by lawyers would have overall benefits. Consumers obtain the necessary information in a succinct form that is less costly for lawyers to provide compared with full disclosure. More detail is set out in Attachment C.

Accordingly, the Review recommends that the upper threshold be adjusted so that the standard costs disclosure forms can be used in more matters (option U3 in the consultation paper). The Review considers an upper threshold of \$10,000 is a reasonable point in a range of values that would encourage the use of the standard disclosure forms.

Stakeholder views on other options for the upper threshold in the consultation paper

Submissions in support of maintaining the existing threshold

Option U1 was to maintain the upper threshold at \$3,000. The Supreme Court of Western Australia submitted that an upper threshold of \$3,000 appears to remain appropriate. The LSWA also supported this option but on the basis that if the lower threshold was increased to \$3,000 this would effectively abolish the standard costs disclosure forms, which is addressed below under submissions in favour of abolishing standard form disclosure.

The Review notes that if the upper threshold were maintained at \$3,000 then adopting a lower threshold of \$1,500 would cut the range between the thresholds by one-third (from \$2,250 to \$1,500), reducing the utility of the standard forms.

Submissions in support of increasing the upper threshold to \$5,000

Option U2 considers the impact of inflation and increases in the costs of providing legal services over time, as well as the dollar amount which would capture most common legal services. Option U2 would see the upper threshold increased to \$5,000. Assuming an increase in the lower threshold to \$1,500, this option would provide a smaller increase in the range from \$2,250 to \$3,500.

The Review considers that the changing cost of legal services should be a factor in setting the upper threshold. In addition, it should be set at a level that provides an incentive to encourage greater use of the standard forms by encompassing a broader range of legal services (option U3 in the consultation paper).

Option U2 was supported by the NSW Bar for the reasons outlined in the consultation paper. The LIV also supported option U2 and submitted that increasing the upper threshold to \$5,000 balanced the benefit of full disclosure with the compliance burden to lawyers. The LIV noted that consumers' requirements for and benefits from full disclosure in these matters may be lower than for higher costs matters.

The OLSC provided information in its submission about the use of the standard costs disclosure form, noting that in its experience the standard form “is utilised by small practices and sole practitioners, and has been positively received (and adopted in some cases) by those solicitors who were previously unaware of its existence and were notified of it by the OLSC during an audit.” The OLSC did not express a view on the value of the upper threshold, but noted during initial consultation that \$5,000 may be too material an increase based on the existing form.

Submissions in favour of abolishing standard form disclosure

Option U4 considered abolishing the upper threshold so that standard costs disclosure forms are no longer available. It was suggested during the initial consultation meetings that this option could be implemented without amending the Uniform Law by setting the lower and upper thresholds at the same level. In considering these submissions, the Council should have regard to the explicit provision in the Uniform Law for a monetary threshold under which standard form disclosure is permitted.

Option U4 was supported by the LSNSW, the LSWA and the Vic Bar. The LSWA supported abolishing standard form disclosure but with the upper threshold set at \$3,000 to achieve this. The Vic Bar and the LSWA submitted that it would make disclosure simpler and reduce the burden on lawyers.

The LSNSW considered that:

- Standard form disclosure is used infrequently and regarded by most lawyers as inadequate due to the complexity of most matters.
- Full disclosure is the same amount of work for lawyers as standard form disclosure.
- A single threshold for costs disclosure would increase consistency with the non-participating jurisdictions.

However, the OLSC submitted that abolishing the upper threshold so that standard form disclosure was unavailable could result in an increase in the number of costs disputes.

Future adjustment of the thresholds

Recommendation 6

Periodically review the lower and upper thresholds with a frequency of not less than five years, and adjust them as appropriate by reference to:

- (a) movements in the costs of common legal services
- (b) the usage of the standard costs disclosure forms to ensure a practical, useful range exists between the lower and upper thresholds
- (c) the impact on consumers, and
- (d) changes to the disclosure thresholds in non-participating jurisdictions.

Consistent with the reasoning underpinning recommendations 3 and 5, the Review also recommends that the Council should periodically review both thresholds and adjust them as appropriate by reference to:

- movements in the costs of common legal services
- the usage of the standard costs disclosure forms to ensure an appropriate range between the lower and upper thresholds
- the impact on consumers, and
- changes to the disclosure thresholds in non-participating jurisdictions.

Other factors the Council may wish to consider in determining an appropriate level for the thresholds would include:

- inflation since the thresholds were set
- any available information on the cost of common legal services
- any available information on changes in the cost of providing legal services
- the difference between the lower and upper thresholds
- the usage of the standard costs disclosure forms
- information provided by the designated local regulatory authorities and relevant stakeholders
- complaints data in relation to costs disclosure
- other sources of information in relation to the impact on consumers including any relevant applied research
- the costs to law practices operating across jurisdictions that have different non-disclosure thresholds, and
- the impact that different non-disclosure thresholds may have on other jurisdictions joining the Uniform Law scheme.

The Review suggests that a reasonable timeframe for periodic review of the thresholds is not less than every five years and not more frequently than every three years. The Review sees merit in the Council repeating the solicitor survey regularly and monitoring the use of the costs disclosure forms. Two or three years would be an appropriate cycle for repeating the survey, noting that it is a relatively inexpensive exercise owing to the assistance of the legal professional associations who distributed the survey for the Review.

During initial consultation the Review heard from some stakeholders that there should be an automatic mechanism to adjust the thresholds such as indexation. In its submission, the LIV advocated that the lower and upper threshold be indexed based on CPI (or similar indexation measure) and adjusted annually.

A similar approach is already in place for ensuring that the regulatory authorities and the Victorian Civil and Administrative Tribunal maintain their jurisdiction to determine costs disputes in line with inflation. Section 471 of the Uniform Law provides for the indexation of amounts referred to in the Uniform Law or Uniform Rules. Rule 111A of the Uniform General Rules adjusts the amounts specified in ss 291 to 293 of the Uniform Law and section 99 of the *Legal Profession Uniform Law Application Act 2014* (Vic) in accordance with CPI.

The Review does not consider the thresholds should be indexed annually based on CPI. This adjustment may not reflect the movement in the cost of legal services and especially those services falling between the thresholds. The solicitor survey provides more appropriate, targeted information. Overly frequent adjustment of the thresholds may also result in confusion and increased compliance costs.

Commercial and government clients

Recommendation 7

Expand the list of commercial and government clients by specifying the following persons or classes of persons in the Uniform General Rules:

- (a) trustees within the meaning of the *Bankruptcy Act 1996* (Cth)
- (b) overseas-registered foreign law practices, and
- (c) corporations that have a share capital and whose shares, or the majority of whose shares, are held beneficially for the Commonwealth or a State or Territory.

At a conceptual level, an efficient disclosure regime should exempt disclosure to consumers who are familiar with how legal services are supplied and costed and are experienced in contracting with lawyers. Translating this concept into legal definitions that are clear and practical is not straightforward.

The available avenue for exemption under the Uniform Law is by specifying a person or class in the Uniform General Rules for the purposes of the definition of “commercial and government client” set out in section 170(2) of the Uniform Law. Section 170 is included at Attachment H.

The Review has applied three tests to this matter. The person or class in question must be:

- either a commercial or government client, and
- a well-informed or experienced user of legal services relevant to its activities, and
- capable of being defined with clarity to avoid doubt and the unintended inclusion of inexperienced consumers.

The Review notes this part of the terms of reference provides an opportunity to reduce inconsistency between Uniform Law jurisdictions and those jurisdictions that have not adopted the Uniform Law.

The following sections set out the proposals in two groups: those that the Review considers meet the tests above; and those that do not.

The Review also notes that the NSW Bar and the LIV expressed general concerns about expanding the list of commercial and government clients by making a rule under s 170(2) of the Uniform Law.

Entities that meet the tests for specification as a commercial or government client

Trustees within the meaning of the *Bankruptcy Act 1996* (Cth)

The Review considers that there is no practical reason to distinguish between a trustee in bankruptcy and a liquidator, administrator or receiver which are already listed as commercial or government clients under the Uniform Law. Additionally, as submitted by the LSNSW and the Vic Bar, trustees are often highly experienced in instructing lawyers and regularly engage in litigation. Accordingly, the Review recommends that the list of commercial and government clients in the Uniform General Rules be expanded to include trustees within the meaning of the *Bankruptcy Act 1996* (Cth).

The LFA, the LSNSW, the LSWA, the LCA and the Vic Bar supported this exception. The LSNSW submitted that trustees in bankruptcy have a similar skill set as a corporate insolvency practitioner such as a liquidator, administrator and receiver. The LSNSW also noted that “such trustees are usually

experienced in instructing lawyers and engaging in litigation and operate under a similar regime of recording their own time costs. It is also quite common for a trustee in bankruptcy to also be a registered liquidator.”

The VLSB+C did not oppose this exception but considered that further rationale for such a change was required before they formed a final position.

This exception applies in Queensland.

Overseas-registered foreign law practices

The definition of commercial and government clients in the Uniform Law includes a government authority in Australia *or in a foreign country* (emphasis added), but only a law practice in Australia (not a law practice in a foreign country). The Review considers that this distinction is anomalous. Accordingly, the Review recommends that the list of commercial and government clients in the Uniform General Rules be expanded to include overseas-registered foreign law practices.

The LFA, the LSNSW, the LSWA, the LCA and the Vic Bar supported this exception. The VLSB+C did not oppose this exception but considered that further rationale for such a change was required before they formed a final position.

An exemption for overseas-registered foreign law practices applies in the Australian Capital Territory, Northern Territory, Queensland and Tasmania. It also applied in New South Wales, Victoria and Western Australia before the Uniform Law commenced.

Corporations that have a share capital and whose shares, or the majority of whose shares, are held beneficially for the Commonwealth or a State or Territory

The Review considers that such corporations represent an extension of the government authority exception already included in s 170 of the Uniform Law. Accordingly, the Review recommends that the list of commercial and government clients in the Uniform General Rules be expanded to include corporations that have a share capital and whose shares, or the majority of whose shares, are held beneficially for the Commonwealth or a State or Territory.

The LFA, the LSWA, the LCA and the Vic Bar supported this exception. The VLSB+C did not oppose this exception but considered that further rationale for such a change was required before they formed a final position.

This exception applies in the Australian Capital Territory, Northern Territory, Queensland, South Australia and Tasmania. It also applied in New South Wales, Victoria and Western Australia before the Uniform Law commenced.

Expansions of commercial and government client list not supported

Licensees under the *National Consumer Credit Protection Act 2009* (Cth)

This exception was supported by the LFA, the LSNSW, the LSWA, the LCA and the Vic Bar. The LFA submitted that there is no practical reason to distinguish between a person who holds an Australian credit licence to engage in financial services and a licensee which is a commercial or government client under s 170(2)(b)(iii) of the Uniform Law.

However, the VLSB+C submitted that credit licensees can include small business owners, such as mortgage brokers, and that those individuals should benefit from disclosure.

On balance, given the potential impact on small businesses, the Review does not recommend that the list of commercial and government clients in the Uniform General Rules be expanded to include licensees under the *National Consumer Credit Protection Act 2009* (Cth).

Large charitable and not-for-profit organisations

The LFA, the LSWA and the Vic Bar supported this exception. The LFA submitted that not-for-profit organisations that satisfy the same conditions as large proprietary companies under the *Corporations Act 2001* (Cth) are arguably of a similar level of sophistication as those companies. Under the *Corporations Act 2001* (Cth) a large proprietary company is one that satisfies any two of the following conditions for a financial year:

- the consolidated revenue for the financial year of the company and any entities it controls is \$50 million or more
- the value of the consolidated gross assets at the end of the financial year of the company and any entities it controls is \$25 million or more, and
- the company and any entities it controls have 100 or more employees at the end of the financial year.

The Vic Bar noted that the sophistication of organisations this size was not affected by their not-for-profit status.

The VLSB+C did not oppose this exception but considered that further rationale for such a change was required before they formed a final position.

The LCA questioned whether every charitable and not-for-profit organisation would meet the descriptor of commercial due to the large variation in size, governance, structure and fundraising means. The LCA suggested further research and analysis was necessary to distinguish those which did not need or want costs disclosure.

The LFA also submitted that alternative criteria to capture charitable and not-for-profit organisations are those that define a medium registered entity and a large registered entity under s 205-25 of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth). Those definitions are set out below.

205-25 Small, medium and large registered entities

- (1) A registered entity is a small registered entity for a particular financial year if the revenue of the registered entity for the financial year is less than \$250,000, or any other amount prescribed by the regulations for the purposes of this subsection.
- (2) A registered entity is a medium registered entity for a particular financial year if:
 - (a) it is not a small registered entity for the financial year; and
 - (b) the revenue of the registered entity for the financial year is less than \$1,000,000, or any other amount prescribed by the regulations for the purposes of this paragraph.
- (3) A registered entity is a large registered entity for a particular financial year if it is not a small registered entity or a medium registered entity for the financial year.

The Review notes that the definition of a medium registered entity and a large registered entity under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) would capture significantly more charitable and not-for-profit organisations than those that satisfy the same conditions as large proprietary companies under the *Corporations Act 2001* (Cth), and which may have the same level of experience with legal matters.

The potential for capturing less experienced consumers of legal services is a matter on which the Review did not receive any evidence. While the proposal may have merit, it needs to be investigated further and the Council may wish to return to this question if additional evidence is provided. Accordingly, the Review does not recommend that the list of commercial and government clients in the Uniform General Rules be expanded to include large charitable and not-for-profit organisations.

High net worth individuals

There was a range of views on expanding the list of commercial clients in the Uniform General Rules to include high net worth individuals.

The LCA and the LFA supported this exception. The LCA submitted that high net worth individuals were sophisticated, had economic bargaining power and were repeat users of legal services. However, the LCA cautioned against relying solely on the financial disclosure provisions under Chapter 6D and Part 7.9 of the *Corporations Act 2001* (Cth) as these definitions change for reasons that have nothing to do with the sophistication of high net worth individuals or the frequency of their use of legal services.

The LFA submitted that “the failure of the s 170 definition to distinguish between individuals based on assets, income, or sophistication (or some combination of those factors), in contrast to the treatment of companies within such definition, is anomalous.” The LFA noted other legislation has drawn such distinctions including the *Corporations Act 2001* (Cth). The Review considers that there is a difference between companies and individuals based on assets or income which reflects the organisational infrastructure and experience of companies compared to individuals.

The LFA disagreed with the suggestion in the consultation paper that high net worth individuals may be outside the Council’s rule making power under s 170, as they do not fall within the category of commercial and government clients. The LFA submitted that the relevant question is whether costs disclosure to the person or entity serves a useful regulatory purpose rather than the label given the person.

Submissions arguing against the inclusion of high net worth individuals expressed the following views:

- As submitted by VLSB+C, a person with a high net worth may have a specific vulnerability which would justify the protection of costs disclosure (e.g. poor physical or mental health, cognitive incapacity or age).
- As submitted by the VLSB+C and the LSWA, financial assets are not necessarily correlated with a level of sophistication or legal knowledge that would justify the exception and as submitted by the Vic Bar, an individual's ability to better absorb legal costs should not mean they do not receive disclosure.
- As submitted by the VLSB+C and the LSWA, it can no longer be assumed that a client with net assets of at least \$2.5 million (being the monetary threshold set out in the *Corporations Act 2001* (Cth)) is sophisticated, noting that such assets may include the family home and superannuation or could be a result of inheritance or accumulated savings. As submitted by the Vic Bar, the test would be inappropriate and would potentially exclude a large proportion of clients.
- As submitted by the LIV, disclosure obligations should not vary with the net worth of individuals.

The Review notes the exception to costs disclosure under s 170 of the Uniform Law applies in relation to commercial and government clients. High net worth individuals are unlikely to fall within a plain language reading of "commercial and government clients".

Taking all the views into account, the Review considers the proposal does not meet its tests and accordingly does not recommend that the list of commercial and government clients in the Uniform General Rules be expanded to include high net worth individuals.

Foreign lawyers

The LFA submitted that the list of commercial and government clients in the Uniform General Rules should be expanded to include foreign lawyers to reflect the position in all other jurisdictions except South Australia and before the Uniform Law commenced in New South Wales, Victoria and Western Australia. The LFA also submitted that their exclusion from the exemptions does not serve a "useful regulatory purpose."

The LCA questioned the view that an exemption should not apply to Australian or foreign lawyers on the basis that the definition of commercial and government clients already includes a "law practice" which in turn includes sole practitioners. The Review has not received other submissions on whether the existing definition extends the exemption to a lawyer who is a sole practitioner seeking legal advice on a personal matter rather than in relation to their law practice.

Putting that question to one side, the Review does not recommend that the list of commercial and government clients in the Uniform General Rules be expanded to include foreign lawyers as the proposal does not meet the Review's tests.

Local government owned corporations

The LFA submitted that the list of commercial and government clients in the Uniform General Rules should be expanded to include local government owned corporations.

The Review does not recommend that the list of commercial and government clients in the Uniform General Rules be expanded to include local government owned corporations. This is unnecessary because local governments fall within the definition of government authority.

Repeat clients

The LIV submitted that there should be an exemption where:

- the client is a repeat client to whom disclosure was made in the past 24 months, and
- the disclosable information (other than the amount in costs in a new matter) has not materially changed since the previous disclosure.

The LCA supported a similar exemption, albeit characterized as contracting out, in the following terms:

- the client has received a disclosure under s 174 from the law practice, and
- the client has agreed to waive the right to disclosure, and
- bills have been rendered and fees have been paid in accordance with the previous disclosure or disclosures, and
- a principal of the law practice decides on reasonable grounds that, having regard to the nature of the previous disclosures and the relevant circumstances, further disclosure is not warranted.

The LCA submitted that the absence of an exclusion for a client to waive, consent or contract out of the costs disclosure requirements is a substantial deficiency in the Uniform Law. The LCA also submitted that the defining quality of a commercial client for the purposes of costs disclosure is their level of sophistication, experience, frequency and familiarity with legal services such that consumer level protection is unnecessary.

The Review notes that repeat clients as a general class do not fall within the category of commercial and government clients and accordingly does not recommend that the list of commercial and government clients in the Uniform General Rules be expanded to include repeat clients. However, the Review considers that there may be a sub-class of repeat business clients, which could be described as commercial clients, and which may warrant further investigation if additional evidence is provided.

Corporate legal practitioners

The LCA submitted that the list of commercial and government clients in the Uniform General Rules should be expanded to include a corporate legal practitioner seeking to engage an external lawyer on behalf of their employer client. The LCA submitted that corporate legal practitioners are sophisticated and able to negotiate and make commercial decisions about the value of legal work based on previous experience in similar matters.

While it may have merit, this proposal arose at the conclusion of the consultation and would need further investigation. The Council may wish to return to this question if additional evidence is provided. Accordingly, the Review does not recommend that the list of commercial and government clients in the Uniform General Rules be expanded to include corporate legal practitioners.

Large proprietary companies

The LCA submitted that a Uniform General Rule should be made specifying that for the purposes of s 170 of the Uniform Law, the reference to large proprietary company is a reference to a large proprietary company that satisfies any (but not all) of paragraphs 45A(3)(a) or (b) of the *Corporations Act 2001* (Cth) as in force on 1 July 2007. The LCA submitted that the *Corporations Act* definition is not an accurate marker of the need for consumer-level protection or “sophistication” and that some previously included corporations are now excluded due to changes in that definition and how proprietary companies arrange their financial affairs. The LCA submitted that the threshold test should be retained as it was on the commencement in the Uniform Law.

The Review notes the Uniform Law incorporates the definition of large proprietary company set out in the *Corporations Act 2001* (Cth), and any change is more properly achieved by amending the Uniform Law, which is outside the Review’s terms of reference. Accordingly, it does not recommend that the Uniform General Rules should be used to modify those large proprietary companies which are captured by the definition of commercial and government clients.

Guidelines and directions on costs estimates

Recommendation 8

Incorporate the guidelines on costs estimates into the information sheet for legal practitioners on legal costs and costs disclosure obligations.

Recommendation 9

Amend the information sheet for legal practitioners on legal costs and costs disclosure obligations to clarify that a range may be included in an estimate of the total legal costs as long as a single figure estimate is provided.

Recommendation 10

Working with regulatory authorities, streamline data requests in relation to costs complaints and consider how the Uniform Law database could be updated to include this information.

Recommendation 11

Revoke the guidelines and directions on costs estimates issued by the Council and the Commissioner.

The Council and Commissioner issued guidelines and directions for regulatory authorities in relation to costs estimates in March 2016 (Attachment I).

For the reasons outlined below, the Review concludes that:

- the guidelines on costs estimates should be incorporated into the information sheet for legal practitioners on legal costs and costs disclosure obligations (Attachment J)
- the information sheet for legal practitioners on legal costs and costs disclosure obligations should clarify that a range may be included in an estimate of the total legal costs as long as a single figure estimate is provided
- working with regulatory authorities, data requests in relation to costs complaints should be streamlined and reviewed for consistency across jurisdictions
- the Uniform Law database should be updated to include this information, and
- the guidelines and directions on costs estimates should be revoked.

Guidelines on costs estimates

The guidelines on costs estimates were issued to provide guidance on changes to costs disclosure under the Uniform Law. One area of uncertainty was whether a costs estimate could be provided in the form of a range. The guidelines cover various aspects of calculating costs estimates and how they should be communicated to the client.

The OLSC in initial consultation advised that it regularly gives the guidelines to lawyers involved in costs disputes where a single figure estimate of the total legal costs was not provided to remind them of their obligations. As the guidelines are being used for this purpose, the Review considers that it would be more appropriate to include this content in the Council's information sheet for legal practitioners on legal costs and costs disclosure obligations, instead of guidelines for regulatory authorities.

The Council and Commissioner have expressed the view that the Uniform Law requires a single figure estimate but that a range can be provided in addition to the single figure. The guideline issued by the Council relevantly states:

For these purposes, the Legal Services Council expresses its view that an estimate of the total legal costs in a matter, as required by section 174(1)(a) of the LPUL, is a reasonable approximation of the total costs that a client is likely to have to pay in the matter for which instructions have been given, expressed as a single figure, from time to time (the estimate).

On the question of using a range to estimate legal costs, the guidelines issued by the Council and Commissioner state:

It will not be inconsistent with section 174(1)(a) to provide estimates for each of the stages that the matter might reach, whether individual stage estimates are expressed as a single figure or as a range of figures, provided the law practice, having considered all the circumstances and the most likely outcome, always gives the single figure estimate of the total legal costs in the matter that section 174(1)(a) requires.

The Review sees merit in providing clarification that a range may be included in an estimate of the total legal costs as long as a single figure estimate is also provided.

Directions on costs estimates

The directions on costs estimates ask the regulatory authorities to report a range of information to the Council and Commissioner on the application of the Uniform Law provisions on costs estimates and the

guidelines discussed above. This information has been published in the Commissioner's annual report but it is not recorded in the Council's Uniform Law database.

Regulatory authorities also provide data on their complaints functions for the Council's Uniform Law database under agreed information sharing arrangements. Information on costs complaints within specific costs disclosure ranges was requested separately by the Commissioner from around 2018. The regulatory authorities are providing this additional information although there are some inconsistencies in this reporting. Some of this information has been published in the Commissioner's annual report but it is not recorded in the Uniform Law database.

The Review considers that it would be appropriate to streamline data requests to regulatory authorities in relation to costs complaints. Information about costs complaints specific to costs disclosure ranges will continue to be of interest to the Council and Commissioner, including as a way of monitoring any changes to the costs disclosure thresholds and when the Council reviews the costs disclosure thresholds in the future. The Review also notes that some data provided to the Council needs to be better standardised to increase its usefulness. An example is that one jurisdiction reports complaints opened annually while another reports complaints closed. This a matter for discussion between the Council and regulatory authorities.

That said, it appears no longer necessary for regulatory authorities to provide all of the other information currently set out in the directions. In addition, as the Uniform Law database is the central store of data shared by regulatory authorities, the Review recommends that the Council consider how the database could be updated to include this information. This would also provide an opportunity to maximise data consistency.

The Review is of the opinion that if recommendations 8 to 10 are adopted by the Council, the guidelines and directions on costs estimates issued by the Council and the Commissioner will no longer be necessary and should be revoked.

Record keeping

Recommendation 12

Amend the information sheet for legal practitioners on legal costs and costs disclosure obligations to state that records of compliance with the costs disclosure requirements should be kept.

Recommendation 13

Recommend to regulatory authorities and professional associations that they issue guidance on the importance of keeping records of compliance with the costs disclosure requirements.

Improve guidance on record keeping

The VLSB+C and the Vic Bar supported improved guidance for barristers and the LSWA supported improved guidance for solicitors and barristers. The Vic Bar submitted that it was in barristers' interests to retain records and noted that they already provide guidance on their website. The LSNSW submitted that due to existing client file management practices and obligations, guidance focussing on education

and awareness would be helpful and well received by the profession. The LCA submitted that the need for additional guidance for solicitors is properly a matter for the commentary to the Australian Solicitors' Conduct Rules.

The Review recommends that the Council's information sheet for legal practitioners on legal costs and costs disclosure obligations be amended to state that records of compliance with the costs disclosure requirements should be kept. The Council should also recommend to regulatory authorities and professional associations that they issue similar guidance for the profession. The Review considers that improved guidance would be of particular benefit to barristers. The Review also considers that solicitors would benefit from the same guidance notwithstanding that the question has not arisen in relation to solicitors.

Stakeholder views on other options for record keeping in the consultation paper

Submissions in support of a new rule for barristers

The NSW Bar advised that it encounters problems with barristers failing to keep written costs disclosures in direct access brief matters. The NSW Bar supported a new rule for barristers by amending the Barristers' Conduct Rules to include a requirement for barristers to retain costs disclosure documents for seven years in direct access matters. The VLSB+C also supported a new rule for barristers.

The LSWA and the Vic Bar did not support a new rule. The LSWA submitted that the consequences of not producing costs disclosure could include the costs agreement being void and a new rule would not increase the likelihood of barristers retaining the costs disclosure. The LSWA submitted that protections should focus on ensuring that disclosure is given not that a record is kept. The Vic Bar submitted that caution should be exercised in increasing the burden on barristers in direct brief matters which are often undertaken pro bono, on a reduced fee or no win no fee basis.

The Review considers that there would be merit in regulatory authorities engaging in discussion to facilitate a consistent approach when barristers do not keep records of compliance with costs disclosure requirements. Noting that the Australian Bar Association is responsible for developing conduct rules for barristers, the Review does not recommend a new rule at this time.

Submissions in support of a new rule for barristers and solicitors

The LIV supported this option and was of the view that a rule that applied to barristers and solicitors would assist with clarity and consistency and would be reasonable and proportionate. The LCA opposed a new rule for solicitors and submitted that such a rule would duplicate rule 14 of the Australian Solicitors' Conduct Rules.

The Review does not support an amendment to the Uniform General Rules which would apply to written costs disclosures by barristers and solicitors. The Review notes that concerns have only been raised in relation to barristers in direct access brief matters and not in relation to solicitors. This may reflect routine client file management practices as well as the additional record-keeping obligations which apply to solicitors (e.g. rule 14 of the Australian Solicitors' Conduct Rules 2015 and rule 91E of the Uniform General Rules).

174 Disclosure obligations of law practice regarding clients

(1) **Main disclosure requirement** A law practice—

- (a) must, when or as soon as practicable after instructions are initially given in a matter, provide the client with information disclosing the basis on which legal costs will be calculated in the matter and an estimate of the total legal costs; and
- (b) must, when or as soon as practicable after there is any significant change to anything previously disclosed under this subsection, provide the client with information disclosing the change, including information about any significant change to the legal costs that will be payable by the client—

together with the information referred to in subsection (2).

(2) **Additional information to be provided** Information provided under—

- (a) subsection (1)(a) must include information about the client's rights—
 - (i) to negotiate a costs agreement with the law practice; and
 - (ii) to negotiate the billing method (for example, by reference to timing or task); and
 - (iii) to receive a bill from the law practice and to request an itemised bill after receiving a bill that is not itemised or is only partially itemised; and
 - (iv) to seek the assistance of the designated local regulatory authority in the event of a dispute about legal costs; or
- (b) subsection (1)(b) must include a sufficient and reasonable amount of information about the impact of the change on the legal costs that will be payable to allow the client to make informed decisions about the future conduct of the matter.

(3) **Client's consent and understanding** If a disclosure is made under subsection (1), the law practice must take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs.

(4) **Exception for legal costs below lower threshold** A disclosure is not required to be made under subsection (1) if the total legal costs in the matter (excluding GST and disbursements) are not likely to exceed the amount specified in the Uniform Rules for the purposes of this subsection (the **lower threshold**), but the law practice may nevertheless choose to provide the client with the uniform standard disclosure form referred to in subsection (5).

(5) **Alternative disclosure for legal costs below higher threshold** If the total legal costs in a matter (excluding GST and disbursements) are not likely to exceed the amount specified in the Uniform Rules for the purposes of this subsection (the **higher threshold**), the law practice may, instead of making a disclosure under subsection (1), make a disclosure under this subsection by providing the client with the uniform standard disclosure form prescribed by the Uniform Rules for the purposes of this subsection.

(5A) To avoid doubt, the uniform standard disclosure form prescribed by the Uniform Rules for the purposes of subsection (5) may require the disclosure of GST or disbursements or both.

(6) **Disclosure to be written** A disclosure under this section must be made in writing, but the requirement for writing does not affect the law practice's obligations under subsection (3).

- (7) **Change in amount of total costs—where previously below lower threshold** If the law practice has not made a disclosure, whether under subsection (1) or (5), because the total legal costs in the matter are not likely to exceed the lower threshold, the law practice must, when or as soon as **practicable** after the law practice becomes aware (or ought reasonably become aware) that the total legal costs (excluding GST and disbursements) are likely to exceed the lower threshold—
- (a) inform the client in writing of that expectation; and
 - (b) make the disclosure required by subsection (1) or (if applicable) subsection (5).
- (8) **Change in amount of total costs—where previously below higher threshold** If the law practice has not made a disclosure under subsection (1) but has made a disclosure under subsection (5) because the total legal costs in the matter are not likely to exceed the higher threshold, the law practice must, when or as soon as practicable after the law practice becomes aware (or **ought** reasonably become aware) that the total legal costs (excluding GST and disbursements) are likely to exceed the higher threshold—
- (a) inform the client in writing of that expectation; and
 - (b) make the disclosure required by subsection (1).
- (9) (Repealed)

COSTS DISCLOSURE THRESHOLDS REVIEW

TERMS OF REFERENCE

SEPTEMBER 2022

BACKGROUND

The Legal Services Council (**Council**) has resolved to review the costs disclosure thresholds referred to in section 174(4) and (5) of the Legal Profession Uniform Law (**Uniform Law**) (**the Review**).

TERMS OF REFERENCE

The Review will consider and report on the effectiveness and regulatory impact of the costs disclosure thresholds referred to in section 174(4) and (5) of the Uniform Law including whether they meet the objectives of:

1. providing and promoting interjurisdictional consistency in the law applying to the Australian legal profession
2. enhancing the protection of clients of law practices and the protection of the public generally
3. empowering clients of law practices to make informed choices about the services they access and the costs involved
4. promoting regulation of the legal profession that is efficient, effective, targeted and proportionate.

The Review will have particular regard to:

1. the effectiveness and regulatory impact of the threshold for non-disclosure currently set at \$750 by clause 18(3) of Schedule 4 to the Uniform Law
2. the effectiveness and regulatory impact of the threshold for disclosure currently set at \$3,000 by clause 18(4) of Schedule 4 to the Uniform Law
3. the effectiveness and regulatory impact of the short form costs disclosure forms currently prescribed by rule 72 of the Legal Profession Uniform General Rules 2015 (**Uniform General Rules**)
4. the relevant costs disclosure thresholds in the jurisdictions that have not adopted the Uniform Law
5. the effectiveness of the cost disclosure form information sheets for legal practitioners and consumers currently published on the Council website
6. the effectiveness of the Guidelines and Directions issued by the Council and the Commissioner for Uniform Legal Services Regulation pursuant to section 407 of the Uniform Law on costs estimates dated 11 March 2016 and currently published on the Council website
7. whether a person or a class should be specified in the Uniform General Rules for the purposes of the definition of “commercial and government client” currently set out in section 170(2) of the Uniform Law
8. any other related matters.

The Review will take an evidenced-based approach and will:

1. make recommendations for amendments to the Uniform General Rules, the short form cost disclosure forms, the cost disclosure form information sheets and the guidelines and directions on costs estimates, if considered necessary
2. not consider or make recommendations for amendments to the Uniform Law.¹

¹ Proposals to amend the Uniform Law can be considered in the five year review of the Uniform Law.

CONSULTATION

The Review will consult widely with relevant bodies, including regulatory authorities, law societies, bar associations and consumer and business groups.

REPORTING DATE

The Review will regularly report to the Council on its progress.

Attachment C: Cost benefit analysis

In its submission, the VLSB+C suggested an approach to estimating the impact, including unintended consequences, of adjusting the lower threshold and upper threshold. The VLSB+C suggested that it would be “necessary to measure:

- the annual volume of standard costs disclosure forms
- the annual volume of full costs disclosure forms
- the percentage reduction in the annual volume of standard costs disclosure forms required due to an increase in the threshold from \$750 to \$1,500
- the percentage reduction in the annual volume of full costs disclosure forms required due to an increase in the threshold from \$3,000 to \$5,000
- the potential for rent seeking behaviour by legal practitioners where standard costs disclosure is no longer required
- the potential for rent seeking behaviour by legal practitioners where full costs disclosure is no longer required
- the hours involved for all parties involved in the complaint process including clients, law practices and government agents, and
- the hourly charge out rate for each of the parties involved in the complaint process including clients, law practices and government agents.”

The VLSB+C submitted that in the absence of this analysis there is no evidence to support increasing the thresholds. However, the VLSB+C recognised that some data points required to estimate the impact of proposed changes may be very difficult to obtain.

The Review considers that detailed, precise cost benefit analysis is not possible or practical with the available information. The in-principle calculation is complex, the available data is insufficient and much of the key information likely does not exist. The Review does not consider that the current infeasibility of this work should delay or prevent the Council from updating the thresholds.

To support the Council in its task, the Review has aimed to determine plausible upper bounds on benefits (or losses) to consumers compared with plausible lower bounds for costs (or benefits) to lawyers. This approach is directed towards establishing conclusions about the upper and lower bounds of benefits and costs by testing their sensitivity to variations in key assumptions. In turn this allows the Review to form a view of the plausibility of the relative distribution of benefits and costs of different options and also to judge the robustness of conclusions that may be drawn. While this is less detailed than the approach suggested by the VLSB+C, it makes use of existing data, including complaints data and information collected through the Review’s solicitor survey and workshops.

The convention adopted in this analysis is that an increase in costs information disclosed to consumers is a benefit that leads to reduced rates of cost complaints, and that an increase in costs disclosure by lawyers is a cost to those law practices.

Three cases are examined:

- reducing the lower threshold to zero
- raising the lower threshold to \$1,500, and

- raising the upper threshold to \$10,000.

Case 1: Reducing the lower threshold to zero

In this case, lawyers would be required to provide costs disclosure (including by using the standard costs disclosure forms) for legal services likely to cost less than \$750. The analysis is confined to quantifying:

- upper bounds to the benefits to consumers of the additional costs disclosure for legal services less than \$750, and
- lower bounds to the costs to lawyers of providing costs disclosure for legal services less than \$750.

The conclusion is that the quantifiable benefit to consumers from increased disclosure is greatly outweighed by the additional costs to lawyers.

The intuitive explanation for this outcome is straightforward. The rate of complaints to regulators about costs matters is relatively small in absolute terms and the maximum value of the service is low. The cost to lawyers is much higher because the cost of making the disclosure is high relative to the value of the service provided and the volume of these services is much higher than the rate of complaints.

Benefit to consumers

The benefit to consumers from cost disclosure comes from having the information to:

- seek an alternative provider and/or to decide not to proceed to retain the lawyer
- identify suspected instances of overcharging, and
- contest the costs charged.

The OLSC and the VLSB+C provide data to the Council in relation to cost complaints. While this data includes all cost complaints (not only those relating to cost disclosure which are recorded to be around 10 to 20 per cent of complaints involving costs issues) and have methodological differences relating to whether complaints are opened or closed within a given year, they indicate that the absolute numbers of complaints below the lower threshold are small. The OLSC data shows that New South Wales cost complaints opened in the range \$0 to \$750 averaged 40.5 in 2021/22 and 2020/21. In Victoria, the total number of cost complaints closed averaged 30.0 for the same period.

It is very likely these formal complaints understate the actual numbers of consumers who might benefit from additional disclosure. There are likely to be other consumers who have chosen not to pursue a complaint regarding insufficient information about costs. The Review has been unable to find any information on these potential complainants and has addressed this matter through sensitivity tests. For the base case, the Review made the technical assumption that for every actual complaint there were 10 other consumers who had grounds for complaint. A sensitivity analysis assumed there were 100 other potential complainants for each actual complaint.

This information has been combined to estimate an upper bound for the annual benefits to consumers of lower-cost legal services in New South Wales and Victoria of having the additional costs disclosure for all legal services below \$750. Cost complaints relating to disclosure are likely to fall with increased disclosure because there is less scope for the consumer to be surprised about costs: the upper bound analysis assumes the rate of complaint is unchanged after the disclosure requirement is extended to zero. The upper bound analysis also assumes all consumer complainants (both actual and potential)

incur the maximum individual loss of \$750, which is set by the current threshold, noting that additional costs disclosure would be for services costing less than \$750.

This leads to an estimate of \$0.6 million to \$5.3 million for the upper bound of annual consumer benefits, with the latter figure based on an assumed 100 more potential complainants for each actual complainant and the former figure assuming 10. In addition, if the average cost of complaints were actually less than the assumed \$750, this would reduce the range for the upper bound.

This calculation does not factor in unquantifiable benefits to consumers of legal services including:

- generally better-informed consumers of legal services who understand what they are spending
- clarification of the relationship with their lawyer
- reduced likelihood of surprises in relation to legal costs
- reduced probability of overcharging by lawyers, and
- greater ease of making complaints.

Impact on lawyers

The zero threshold would impose regulatory compliance costs on those lawyers that currently provide services below the lower threshold, mainly based on the time costs of the volume of transactions below \$750.

The Review's approach is to estimate a conservative lower bound on costs to lawyers, that is, in the Review's opinion this estimate understates the actual likely cost to lawyers.

The latest information indicates that in New South Wales and Victoria combined there are 23,460 lawyers in private practice in practices with one to four lawyers.¹ This number was adjusted to 18,299 to account for the percentage of lawyers in the Review's solicitor survey who reported they provided services costing less than \$750 (77.6 per cent). This is the lower bound of the number of lawyers providing legal services below the lower threshold.

The Review's solicitor survey and the workshops suggested an average time to make cost disclosures was around 15 to 30 minutes. Advice from the workshops indicated that both a lawyer and a clerk/paralegal may be involved in the work: the Review's estimate assumes the work is split equally and is valued using the Victorian Practitioner Remuneration Order 2023. This leads to an estimated compliance cost for lawyers of \$86 to \$173. The Review notes that most of the identified services costing less than \$750 appear to be relatively uncomplicated and the lower estimate of preparing costs disclosure may be more likely.

There is no information about the volume of lower-cost services provided by the legal profession. Information from the Review's solicitor survey indicates that, for those respondents providing services less than \$750, they accounted for around one-eighth (12.2 per cent) of their practice using a weighted average of the midpoint of reporting ranges. The Review's workshops suggested most participating solicitors provided a small number of these services monthly: conservatively the calculation assumes ten such services are provided annually.

¹ Sourced from the 2022 National Profile of Solicitors prepared by Urbis for the LSNSW.

On this information and assumptions, the lower bound for annual additional direct costs to lawyers is estimated, for New South Wales and Victoria, at between \$15.8 million (for 15 minutes disclosure cost) and \$31.6 million (for 30 minutes disclosure cost).

This calculation does not factor in other suggested unquantifiable benefits to lawyers including:

- improved reputation of the profession and individual lawyer, including in relation to overcharging
- avoidance of disputes or complaints
- higher probability that they will be paid
- better client relationships including a relationship built on trust, and
- more efficient practice administration.

Net benefit/cost

Taking the highest upper bound for the benefit to consumers and the lowest lower bound for the compliance costs to lawyers yields an upper bound on the estimated net benefit from lowering the lower threshold to zero. This method, based on the assumptions, means the actual net benefit is extremely unlikely to exceed this estimate.

Taking the highest estimate for the benefit for consumers (\$5.3 million) and the lowest cost estimate for lawyers (\$15.8 million) leads to an overall net cost of \$10.5 million and a cost benefit ratio of around 3. That is, on the most favourable calculation to consumers, the annual costs to lawyers would be at least three times the annual benefit to consumers.

Case 2: Raising the lower threshold to \$1,500

In this case, the lower threshold is raised from \$750 to \$1,500. Lawyers would no longer be required to provide standard form or full costs disclosure for services in this range. Consumers would lose the benefit of this information in making comparisons between service providers and in making budgeting choices between legal services and other expenditures.

Lawyers

The starting point is an important consideration in this scenario.

Once no longer required to provide standard form or full costs disclosure, lawyers may choose to:

- continue to provide standard form or full costs disclosure (including by using the updated forms)
- provide a lesser level of written disclosure, or
- make no written costs disclosure.

The Review also heard that it is considered good practice and is not uncommon for lawyers to discuss legal costs with clients, regardless of the amount. The Review has recommended further consultation with regulatory authorities and professional associations about whether the Council's information sheet should be amended to encourage lawyers to consider what information should be provided to clients when statutory written disclosure is not required.

It is not possible to judge which of these choices lawyers would make, but they are moving from a position of currently having administrative systems and practices in place for providing costs disclosure in this range. The Review's technical base assumption is that half of lawyers will continue to provide standard form or full costs disclosure.

There is no information about how much legal services in the range \$751 to \$1,500 account for the business of a legal practice on average. Information from the Review's solicitor survey provides information that indicates the share of business from services costing \$751 to \$3,000 is around 40 per cent using a weighted average of the midpoint of reporting ranges. A linear interpolation produces an estimate of around 13.1 per cent of matters falling within the range of \$751 to \$1,500. However, this estimate is inherently imprecise. It is similar to the reported average proportion of services under \$750, with the two together suggesting the lawyers participating in the Review's solicitor survey derived, on average around one quarter of their practice from services under \$1,500. The Review is not aware of any information that could validate this estimate. Future repetitions of the survey would help in providing additional information on this point. Extrapolating from the survey the estimated number of annual transactions per lawyer is in the range of six to ten. Consistent with the approach taken in this analysis, the most conservative assumption has been made (i.e. six transactions). On the face of it, this seems low but there are no other means of verification available to the Review, noting that the focus in the solicitor workshops was on the existing thresholds.

The potential benefit (reduction in regulatory compliance costs) to lawyers is the number of lawyers who stop providing standard form or full costs disclosure multiplied by the number of transactions in the range \$751 to \$1,500 multiplied by the cost saving of not making the previous costs disclosure. The Review emphasises the only element on which there is some direct information is the estimated saving in regulatory costs by not making standard form or full costs disclosure (in the range of \$86 to \$173).

Consumers

From Tables 1 and 2 in the consultation paper, the total average annual rate of cost complaints between \$751 and \$1,500 in New South Wales and Victoria in 2021/22 and 2020/21 is 95. Other important information about interpreting the complaints data is discussed under the lower threshold in this report, including that a disclosure issue is recorded in around 10 to 20 per cent of complaints involving costs issues.

Less disclosure to consumers, all other things being equal, could be expected to increase the rate of costs complaints by the affected consumers. There is no information on the likely size of any increase and a technical assumption is required. The Review has made the assumption that there would be a doubling of complaints by consumers if all lawyers stop providing standard form or full costs disclosure (i.e. that there would be 190 complaints between \$751 and \$1,500). The actual number may be more or less than this, but the Review is unable to test this in the absence of further information. There is also no information on the number of potential complainants who have, for one reason or another, been deterred from making a complaint but who would otherwise benefit from disclosure.

That said, the potential loss to affected consumers is the number of complaints by this group (scaled up by 10 or 100 to adjust for potential complaints) multiplied by the maximum loss per complaint. The latter is \$1,500 since any legal service above this indicative threshold would require standard form or full costs disclosure.

The overall outcome

The Review has made various synthetic estimates of the costs and benefits to consumers and to lawyers based on a range of technical assumptions, including the numbers of transactions in the relevant range, the time saved in not making disclosure, doubling the number of complaints from affected consumers and the number of potential complainants and the proportion of lawyers who continue to provide standard form or full costs disclosure.

In the polar case where no lawyers continue to provide standard form or full costs disclosure in the range \$751 to \$1,500, then the range of outcomes (compared with the status quo) using tests of sensitivity on assumptions is as follows:

- potential additional loss to consumers ranging from \$1.6 million to \$14.4 million
- potential additional benefit to lawyers ranging from \$11.7 million to \$23.4 million.

It is important to note that there are combinations of assumptions that result in consumer losses outweighing the gain to lawyers and vice versa.

Moreover, the proportion of lawyers that continue to provide costs disclosure plays a very important role. Assuming half the population of lawyers continue to provide standard form or full costs disclosure, the range of outcomes using tests of sensitivity on assumptions is as follows:

- potential additional loss to consumers ranging from \$0.8 million to \$7.2 million
- potential benefit to lawyers ranging from \$5.8 million to \$11.7 million.

A reasonable conclusion is the results in this case are not clearcut and the Review regards this exercise as illustrative only.

Case 3: Raising the upper threshold to \$10,000

In this case lawyers who previously provided full costs disclosure for legal services in the range \$3,001 to \$10,000 now have a choice of either using the standard costs disclosure forms or making full costs disclosure.

Both types of disclosure meet the requirements of the Uniform Law for matters under the upper threshold. The Review's analysis of the information provided to consumers suggests there is a difference in format and in the level of detail. In terms of the information provided, the consumer is not materially disadvantaged, and this content may be communicated in a way which is more accessible.

For the lawyer there is now a choice between two forms of costs disclosure for services costing between \$3,001 and \$10,000. It would be reasonable for the lawyer to act in their self-interest, with little impact on consumers in relation to the information they receive. This option would increase the range of matters for which the standard costs disclosure forms could be used and decrease the likelihood of needing to switch to full costs disclosure if circumstances changed that affected the costs estimate.

Welcome to the Legal Services Council's costs disclosure thresholds review survey

The Legal Services Council is reviewing the costs disclosure thresholds in the Legal Profession Uniform Law and is seeking information from private practice solicitors in New South Wales, Victoria and Western Australia about how the thresholds are operating.

The survey does not ask for any personal information, responses are anonymised and results will be aggregated.

This survey is being run by the Legal Services Council on Survey Monkey as part of the Review and we are grateful for your participation. If you have any questions about this survey please contact: lsc@legalservicescouncil.org.au

1. Where is your principal place of practice?

- ☐ New South Wales
- ☐ Victoria
- ☐ Western Australia
- ☐ Other (please specify)

2. What size is the legal practice in which you are employed?

- ☐ Sole practitioner
- ☐ Two to four principals
- ☐ Five to 20 principals
- ☐ More than 20 principals

3. Do you provide legal services for which the cost to the client is \$750 or less (before disbursements or GST is added)?

- ☐ Yes
- ☐ No

4. For the legal services that you provide that are \$750 or less (before disbursements or GST is added) please select all the types of legal service that apply?

- ☐ Family/defacto
- ☐ Other civil
- ☐ Commercial/corporations/franchise
- ☐ Conveyancing
- ☐ Probate/Family provision
- ☐ Criminal
- ☐ Personal injuries
- ☐ Wills/Power of Attorney
- ☐ Employment law
- ☐ Workers' compensation
- ☐ Leases/mortgages
- ☐ Building law
- ☐ Immigration
- ☐ Strata bodies/corporates
- ☐ Professional negligence
- ☐ Land and environment
- ☐ Victims' compensation
- ☐ Insolvency
- ☐ Other (please specify)

5. What proportion of the legal services that you provide are \$750 or less (before disbursements or GST is added)?

- ☐ 0%-10%
- ☐ 11%-25%
- ☐ 26%-50%
- ☐ 51%-75%
- ☐ 76%-100%

6. Do you provide legal services that are more than \$750 and up to \$3,000 (before disbursements or GST is added)?

- ☐ Yes
- ☐ No

7. For the legal services that you provide that are more than \$750 and up to \$3000 (before disbursements or GST is added) please select all the types of legal service that apply?

- ☐ Family/defacto
- ☐ Other civil
- ☐ Commercial/corporations/franchise
- ☐ Conveyancing
- ☐ Probate/Family provision
- ☐ Criminal
- ☐ Personal injuries
- ☐ Wills/Power of Attorney
- ☐ Employment law
- ☐ Workers' compensation
- ☐ Leases/mortgages
- ☐ Building law
- ☐ Immigration
- ☐ Strata bodies/corporates
- ☐ Professional negligence
- ☐ Land and environment
- ☐ Victims' compensation
- ☐ Insolvency
- ☐ Other (please specify)

8. What proportion of the legal services that you provide are more than \$750 and up to \$3,000 (before disbursements or GST is added)?

- ☐ 0%-10%
- ☐ 11%-25%
- ☐ 26%-50%
- ☐ 51%-75%
- ☐ 76%-100%

9. Are you aware of the standard costs disclosure form developed by the Legal Services Council for matters up to \$3,000?

- ☐ Yes
- ☐ No

10. Have you ever used the standard costs disclosure form for matters up to \$3,000?

- ☐ Yes
- ☐ No

11. How often do you use the standard costs disclosure form prescribed for matters up to \$3,000, please select the frequency of your use

- ☐ For all matters under \$3,000
- ☐ For all matters under \$3,000 but above \$750
- ☐ For some matters
- ☐ For the occasional matter
- ☐ I have previously used it but no longer use it

12. How long does it normally take you to prepare your costs disclosure (complete the standard costs disclosure form or draft a costs agreement)?

- ☐ Under 15 minutes
- ☐ 15-30 minutes
- ☐ 30-60 minutes
- ☐ 1-2 hours
- ☐ Above 2 hours

Consultation paper on costs disclosure thresholds

May 2023

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LEGAL PROFESSION
Uniform Law

Table of Contents

INTRODUCTION AND BACKGROUND	4
Costs disclosure thresholds	4
The costs disclosure thresholds review	5
Terms of reference of the Review	5
The Council's role in setting the thresholds and amending the Uniform General Rules	5
About this paper	6
Call for submissions	6
EXPERT'S NOTE ON THE REVIEW	6
The regulatory approach.....	6
The impact of price and cost increases	8
INITIAL WORK UNDERTAKEN IN THE REVIEW	8
WHAT SHOULD THE LOWER THRESHOLD BE?	9
Option L1: Disclosure regardless of amount.....	9
Option L2: Maintain the existing threshold.....	10
Option L3: Adjust for the changing cost of legal services.....	11
Option L4: Cover the majority of retail legal matters.....	13
WHAT SHOULD THE UPPER THRESHOLD BE?	15
Option U1: Maintain the existing threshold	15
Option U2: Adjust for the changing cost of legal services	16
Option U3: Increase the use of the standard costs disclosure forms	16
Option U4: Abolish standard form disclosure.....	17
STANDARD COSTS DISCLOSURE FORMS AND INFORMATION SHEETS	18
COMMERCIAL AND GOVERNMENT CLIENTS	18
Other commercial and government clients.....	19
Trustees within the meaning of the <i>Bankruptcy Act 1996</i> (Cth)	19
Overseas-registered foreign law practices	19
Corporations that have a share capital and whose shares, or the majority of whose shares, are held beneficially for the Commonwealth or a State or Territory	20
Licensees under the <i>National Consumer Credit Protection Act 2009</i> (Cth)	20
Large charitable and not-for-profit organisations.....	20
High net worth individuals.....	20

GUIDELINES AND DIRECTIONS ON COSTS ESTIMATES	21
Guidelines on costs estimates	21
Directions on costs estimates.....	21
RECORD KEEPING	22
Option R1: Improve guidance on record keeping	22
Option R2: New rule for barristers	23
Option R3: New rule for barristers and solicitors	23
NEXT STEPS.....	23
ATTACHMENTS.....	24

Introduction and background

Lawyers in New South Wales, Victoria and Western Australia are regulated under the Legal Profession Uniform Law (**Uniform Law**). It commenced in New South Wales and Victoria on 1 July 2015 and in Western Australia on 1 July 2022.

Part 4.3 of the Uniform Law deals with legal costs. One of the objectives of Part 4.3 is “to ensure that clients of law practices are able to make informed choices about their legal options and the costs associated with pursuing those options”. Part 4.3 also says that lawyers must not charge more than fair and reasonable legal costs and sets out what lawyers need to include in their bills.

Lawyers must give their clients written information about legal costs as set out in s 174 of the Uniform Law (costs disclosure). At the beginning of the matter, the lawyer must give their client written information about how the legal costs will be calculated and give an estimate of the total legal costs. The lawyer must also update the information given to the client if there is any significant change to the legal costs throughout the matter. There are some situations where the requirements for costs disclosure do not apply. Section 174 is included at Attachment A.

Costs disclosure thresholds

One of the situations where full costs disclosure is not required is where the legal costs are likely to be less than a set dollar amount. There are two set dollar amounts which are called the lower and upper costs disclosure thresholds in this paper.

The lower costs disclosure threshold is set at \$750. Costs disclosure is not required where the total legal costs in a matter are not likely to be more than the lower threshold of \$750. The higher threshold is set at \$3,000. The lawyer can use a standard form for costs disclosure if the total legal costs are not likely to be more than the upper threshold of \$3,000. There are two standard forms which are almost the same except that one is designed to be used by solicitors and one is designed to be used by barristers. For the purpose of the thresholds, the total legal costs only include the lawyer’s fees. They do not include goods and services tax (GST) and extra costs paid by the client, for example for a property search or court application (known as disbursements).

The amounts of \$750 and \$3,000 were set by transitional provisions when the Uniform Law commenced in 2015.¹ Section 174 provides for the thresholds to be set in the Legal Profession Uniform General Rules (**Uniform General Rules**), although no rules have been made yet to change the thresholds. Section 174 also provides for the standard costs disclosure forms to be prescribed by the Uniform General Rules. The standard forms were included in the Uniform General Rules when they commenced in 2015. The Uniform General Rules are developed and made by the Legal Services Council (**Council**) under a process set out in the Uniform Law.

Exceptions to costs disclosure based on dollar amounts were also in place before the Uniform Law. An exemption for matters of \$750 or less has applied in Victoria since 1 January 1997² and in New South

¹ Clause 18(3) and (4), Schedule 4, Uniform Law.

² Commencement date for s 90(1)(a) of the *Legal Practice Act 1996* (Vic) which had a non-disclosure threshold of \$750.

Wales since 1 October 2005³. Before joining the Uniform Law scheme and since 1 March 2009, Western Australia had an exception to costs disclosure for matters of \$1,500 or less.⁴

The costs disclosure thresholds review

The Council announced a review of the costs disclosure thresholds (**Review**) on 30 September 2022. The Council appointed Dr Matthew Butlin as the expert consultant and leader of the Review. Dr Butlin's past roles include executive Chair of both the Victorian Competition and Efficiency Commission and South Australian Productivity Commission. He has also been a Commissioner of the Australian Productivity Commission and Victoria's Red Tape Commissioner.

Terms of reference of the Review

The terms of reference set out the scope of the Review (Attachment B).

The Review is considering and will report on the effectiveness and regulatory impact of the costs disclosure thresholds referred to in s 174(4) and (5) of the Uniform Law, including whether they meet the objectives of the Uniform Law of:

1. providing and promoting interjurisdictional consistency in the law applying to the Australian legal profession
2. enhancing the protection of clients of law practices and the protection of the public generally
3. empowering clients of law practices to make informed choices about the services they access and the costs involved, and
4. promoting regulation of the legal profession that is efficient, effective, targeted and proportionate.

The Review may make recommendations for amendments to the Uniform General Rules, the standard costs disclosure forms, the costs disclosure form information sheets and the guidelines and directions on cost estimates. Recommendations for amendment to the Uniform Law are out of scope for the Review.

The Council's role in setting the thresholds and amending the Uniform General Rules

The Uniform Law sets out the process for developing and making Uniform General Rules.

In developing a proposed rule, the Council must:

1. consult with the Commissioner for Uniform Legal Services Regulation (**Commissioner**), and such of the Council's advisory committees and local regulatory authorities as it considers appropriate, and may consult more broadly if it so chooses, for a minimum period of 30 days
2. release a draft of the proposed rule for public consultation and invite written submissions about the draft for a period of at least 30 days before finalising the draft, and
3. consider all reasonable submissions made and received.

The Council may, after considering the submissions and making any amendments to the draft, submit the proposed rule to the Standing Committee of Attorneys General in New South Wales, Victoria and Western Australia (**Standing Committee**).

³ Commencement date for s 312(1)(a) of the *Legal Profession Act 2004* (NSW) which had a non-disclosure threshold of \$750.

⁴ Commencement date for s 263(2)(a) of the *Legal Profession Act 2008* (WA) which had a non-disclosure threshold of \$1,500.

The Council may make a rule as submitted to the Standing Committee if:

1. the Standing Committee approves the rule within 30 days of its submission to the Standing Committee, or
2. the 30-day period expires without the rule being vetoed by the Standing Committee within that period.

About this paper

This consultation paper sets out issues and options for discussion and feedback. Submissions will inform Dr Butlin's final report which will be considered by the Council.

The consultation paper invites feedback on:

- the costs disclosure thresholds
- the standard costs disclosure forms and information sheets
- the exception to disclosure for commercial and government clients
- the guidelines and directions on costs estimates issued by the Council and Commissioner, and
- certain aspects of record keeping in relation to costs disclosure documents.

Call for submissions

Please send submissions to: submissions@legalservicescouncil.org.au by **2 June 2023**. Submissions will be published on the Council's website unless you ask for your submission to be treated as confidential.

Expert's note on the Review

The terms of reference ask the Review to consider whether the costs disclosure thresholds meet the four objectives set out in the Uniform Law (page 5 above). As with many aspects of regulatory design, this is a task which may require a balance to be struck across those objectives when taken as a whole.

The Review has developed options for consultation and further consideration, including whether it is possible to achieve benefits across each of the objectives as well as a significant positive net benefit. This might look like a framework of lower and upper thresholds and standard form disclosure that reduces regulatory inefficiencies, improves the overall accessibility of information to consumers and increases the alignment of the Uniform Law with non-participating jurisdictions. Those charged with regulatory design may also decide that one objective should carry more weight than some or all of the others.

The regulatory approach

The general regulatory approach to the costs disclosure thresholds is not unique to the Uniform Law. The thresholds are part of a much wider regulatory framework, including for consumer protection, that is outside the scope of the Review. The regulatory approach addresses the problem of information asymmetry between consumers (clients) and service providers (lawyers) in circumstances where providing additional information to consumers is not costless. It implicitly incorporates judgments about how much information should be disclosed to consumers where the relative cost of providing that information falls most heavily (i.e. disproportionately) on small businesses (law practices) providing lower cost services.

This approach is robust when clear and relevant principles underpin the thresholds to ensure appropriate information is provided to consumers while limiting disproportionate burdens on lawyers. These principles also help to keep the regulatory regime up to date and, in the absence of unexpected events and trends, fit for purpose.

When the Uniform Law was introduced to the Victorian Parliament in December 2013, the then Attorney-General said that:

The specialised nature of legal work means that many clients are likely to have limited capacity to determine whether proposed legal work is necessary or valuable. Under part 4.3 of the uniform law, law practices will be required to take all reasonable steps to satisfy themselves that their client has understood and given consent to the proposed course of action for the conduct of their matter and the proposed costs.

In practice, this will require law practices to make reasonable inquiries to ensure that, after mandatory written disclosure has been made, clients understand the basis on which legal costs will be charged, how the initial estimate was calculated, factors likely to alter the estimated legal costs, and their rights in relation to challenging legal costs. Legal practitioners will be expected to exercise professional judgement regarding the level of detail needed by a client to understand the options available and costs involved.

At the same time, the uniform law recognises that for many inexpensive or routine matters, extensive and detailed disclosure would not be justified. For matters that are likely to cost less than a prescribed 'lower threshold' a law practice will not be required to comply with a specified form of disclosure requirement. The bill retains a lower threshold of \$750 but allows for adjustment of the threshold by the Legal Services Council.

For matters that are likely to cost less than a prescribed 'higher threshold', a law practice will only need to comply with a basic requirement to provide a client with a standard disclosure form. The standard form disclosure is intended to be a short document that is the same for all clients with estimated costs in this band and to include basic information such as the client's rights in respect of costs. Importantly, it is intended that this standard disclosure will also include a statement that the client may not be charged more than the amount of the higher threshold without receiving full disclosure from the law practice.

The details of the standard form disclosure will be developed by the new Legal Services Council and incorporated in uniform rules prior to commencement of the uniform law. The higher threshold is set at \$3,000 but, as for the lower threshold, may be varied by the Legal Services Council after public consultation.

At that time, non-disclosure thresholds of \$750 applied in Victoria (since 1997) and New South Wales (since 2005).

Information request 1

If \$750 was intended to cover "inexpensive and routine" matters, what would be the equivalent figure in today's legal practice? What would "inexpensive and routine" matters include?

The impact of price and cost increases

Since the Uniform Law was introduced (and since the earlier history of the \$750 threshold), both the general price level and the cost of providing legal services have increased significantly. The Review is considering several possible measures, including the Consumer Price Index (**CPI**) and scales of costs used to determine costs payable between parties to litigation or between lawyers and clients in some matters. Scales of costs include hourly rates for lawyers of different levels of experience, and support staff like clerks or paralegals. Some also include rates for activities like preparing correspondence and working with documents.

Applying CPI, the general price level has risen by nearly 25 per cent between 2015 and 2023 and has doubled between 1997 and 2023 (when the \$750 threshold was introduced in Victoria).⁵ Increases in the scales of costs have varied but show a similar trend. The Review also notes that new technology or other measures may have improved productivity during this period.

Information request 2

The Review would appreciate any additional information from lawyers about how the costs of providing legal services have increased.

All else being equal, increasing prices of legal services over time increases the number of matters where the price is above the lower threshold and in which legal costs must be estimated. It also increases the number of matters above the upper threshold in which full disclosure is required.

Overall, rising costs in a regulatory system with thresholds fixed at nominal prices means the system becomes relatively less proportionate and efficient. This trend would generally increase the costs to lawyers who provide lower cost legal services, particularly small and/or regional law practices. At the same time, consumers benefit from additional information that was not required for services previously below the lower threshold. The outcome in relation to the upper threshold is less clear because the impact of moving to full disclosure depends on whether in practice the additional information is accessible to consumers.

Initial work undertaken in the Review

The Review held 22 initial consultation meetings between November 2022 and January 2023. These meetings spanned Uniform Law jurisdictions as well as jurisdictions outside the Uniform Law scheme (referred to as non-participating jurisdictions). The Review valued the opportunity to speak with key stakeholders including government agencies, regulatory authorities, legal professional associations and those who work with consumers, and the range of views they expressed. Their feedback has informed the development of this paper.

The Review developed a survey for private practice solicitors to find out about the types of legal services that may cost \$3,000 or less. The survey also asked solicitors about the standard costs disclosure form

⁵ The CPI (all capitals) rose by 23.3 per cent between the June quarter 2015 and the March quarter 2023 and by 97.9 per cent between the December quarter 1996 and the March quarter 2023. These periods reflect the commencement date for the thresholds and the latest CPI at the time this consultation paper was finalised.

and the time taken to complete costs disclosure. The survey was distributed in New South Wales, Victoria and Western Australia between February and April 2023. The questions asked in the survey are at Attachment C. The survey had a total of 782 respondents, around 90 per cent of whom reported working in law practices with four principals or less. The Review is grateful to the Law Society of New South Wales, Law Institute of Victoria and Law Society of Western Australia for distributing the survey to their members, and to everyone who completed the survey.

In March 2023, the Review held two workshops with 13 private practice solicitors from New South Wales, Victoria and Western Australia. Participants were sole practitioners or worked in law practices with four principals or less. The workshops focused on the time and steps required for costs disclosure and the range of costs for legal services. The Review appreciated the insights from both workshops and thanks the solicitors who gave up their time to be involved.

The Review has also analysed complaints data provided by regulatory authorities and published sources of information relating to legal costs. The Review is grateful to the regulatory authorities for their help with the data.

The Review has drawn on these sources of information to develop the options below. In setting out each option, the paper focuses on the stakeholder feedback which supports it and relevant information from the solicitor survey, workshops and complaints data. The Review seeks feedback from stakeholders on both the advantages and disadvantages of each option, along with additional evidence where possible. While the Review reached out to, and received valuable information and advice from, organisations which work with consumers, it remains a priority to add to this evidence base. Additional information that reflects the experience of clients is sought and would be especially welcomed.

What should the lower threshold be?

The Review is seeking feedback on what the lower threshold should be, and why. The Review is considering the principles that should inform the setting of the lower threshold as well as its dollar amount. Four options are set out below.

Question 1

What should the lower threshold be and why?

Option L1: Disclosure regardless of amount

Option L1 is for lawyers to provide costs disclosure regardless of the likely dollar amount of the legal services. Notwithstanding that s 174(4) provides expressly for a lower threshold under which disclosure is not required, it has been suggested to the Review that this option could be implemented without amending the Uniform Law by setting the lower threshold at \$0.

During the consultation, the Review was advised of the following factors in support of option L1:

- Costs disclosure informs clients so that they can make choices about whether and how to proceed with a legal matter, including whether to engage a particular lawyer.

- Disclosure has additional benefits for consumers who may be:
 - more vulnerable to “bill shock” due to financial pressures
 - infrequent users of legal services and so have less information compared to the lawyer or some other clients
 - unaware of the lower threshold and may incorrectly assume that they will not be charged when they do not receive costs disclosure (especially for initial consultations).
- Disclosure also has benefits for lawyers because it:
 - supports dialogue between the lawyer and consumer which reduces the likelihood of complaints
 - has a positive impact on perceptions of the profession in respect of transparency and billing, and
 - helps lawyers when they are scoping the work in relation to a matter.
- The burden of costs disclosure on lawyers may have reduced over time, for example due to the use of technology or alternative costing methods.

Information about legal services provided at a cost of \$750 or less, and complaints data in relation to these matters, is set out under option L2 below.

The time taken and cost to lawyers of completing disclosure is considered under option L3 below.

Option L2: Maintain the existing threshold

Option L2 is to maintain the lower threshold at \$750. This option is supported by many of the factors listed under option L1 above.

The Review’s survey of private practice solicitors in New South Wales, Victoria and Western Australia found that around three quarters of respondents provide services at or below \$750. For around two thirds of those respondents, this accounted for zero to 10 per cent of their total practice. The top area of practice for these services was overwhelmingly wills and powers of attorney. Solicitors in the workshops suggested that matters costing \$750 or less accounted for a very small proportion of their practice, possibly under two per cent. They provided examples of an initial consultation meeting or advice, a simple will, withdrawal of a caveat and a single criminal local court mention.

The Review was also able to find some limited examples of fixed fee rates advertised online for \$750 or less. They included drafting wills, powers of attorney and other simple documents such as trusts and shareholder agreements, initial attendances at prison or police stations, reviewing straightforward residential property and employment contracts and initial consultation meetings.

Complaints data shows the number of complaints involving a costs issue where the amount of the legal costs is \$750 or less (Table 1). These complaints represented:

- around 1.5 per cent of total complaints opened in New South Wales in the 2021/22 and 2020/21 financial years, and
- less than 2 per cent of total complaints closed in Victoria in the 2021/22 financial year and around 8 per cent in 2020/21.

Complaints data is not yet available for Western Australia which joined the scheme in the 2022/23 financial year.

Not all complaints which involve a costs issue are about disclosure. A costs complaint might also be about billing, overcharging or another costs issue. Data provided to the Council's database suggests that disclosure is identified as an issue in around 10 to 20 per cent of complaints involving a costs issue for the 2020/21 and 2021/22 financial years. Complaints data does not capture costs issues that are resolved by costs assessment or where the client does not complain to the regulatory authority.

Table 1: Costs complaints below \$750 – New South Wales and Victoria 2020/21 and 2021/22⁶

Jurisdiction	Year	Complaints opened involving a costs issue where the amount is \$750 or less	Total complaints opened (all complaints)	Proportion of total complaints (per cent)
NSW	2021/2022	41	2,929	1.4
	2020/2021	40	2,758	1.5
Jurisdiction	Year	Complaints closed involving a costs issue where the amount is \$750 or less	Total complaints closed (all complaints)	Proportion of total complaints (per cent)
Vic	2021/2022	13	728	1.8
	2020/2021	47	574	8.2

Option L3: Adjust for the changing cost of legal services

Option L3 considers the impact of inflation and changes in the cost of providing legal services over time. Taking into account the non-disclosure thresholds in non-participating jurisdictions, option L3 would see the lower threshold set at \$1,500.

Drawing on the consultation, factors in support of option L3 are that:

- The lower threshold now has less application compared to when the Uniform Law was introduced. The passage of time has had the effect that some routine or lower-cost matters that would have been exempt, now require disclosure. This also reflects the increasing cost of legal practice, for example, the Review heard that the rules on electronic conveyancing, including verification of identity, have increased the costs of a standard conveyancing matter.
- The time and cost of completing disclosure are high relative to the legal fees charged, especially where the lawyer provides a high volume of lower-cost services.
- In non-participating jurisdictions, costs disclosure is not required if the total legal costs are not likely to exceed \$1,500. Increasing the lower threshold to \$1,500 may promote interjurisdictional

⁶ The Victorian and New South Wales regulators provide data on costs complaints against dollar thresholds. The Victorian data is reported for complaints *closed* while the New South Wales data is reported for complaints *opened*. The New South Wales data for the total number of complaints is reported for complaints *opened* and has been sourced from the Council's annual reports. The Victorian data for the total number of complaints is reported for complaints *closed* and has been sourced from the Victorian Legal Services Board and Commissioner's annual reports.

consistency, reduce costs to law practices operating across jurisdictions and encourage other jurisdictions to join the Uniform Law scheme. However, the Review understands that in some non-participating jurisdictions there are proposals to increase the non-disclosure threshold above \$1,500.

- Disclosure is not effective when it is too long or too complex, and does not help consumers to “shop around” for legal services, especially in regional or remote areas. The legislative requirement that practitioners charge fair and reasonable fees, combined with an accessible regulator and resolution processes, provide important safeguards for consumers of legal services.

As noted above, the \$750 threshold has applied in Victoria since 1 January 1997 and in New South Wales since 1 October 2005. A \$1,500 threshold has been in place in Western Australia since 1 March 2009. Applying the CPI⁷ means that in March 2023:

- the value of \$750 had increased to \$1,484 compared with January 1997 (for Victoria)
- the value of \$750 had increased to \$1,192 compared with October 2005 (for New South Wales), and
- the value of \$1,500 had increased to \$2,150 compared with March 2009 (for Western Australia).

It is difficult to quantify increases in the costs of providing legal services and running a law practice (e.g. rent, salaries, technology and compliance) as these costs are generally not publicly available. A review of the scales of legal costs in the Supreme Court of Victoria between 1997 and 2022 indicates that the scales have increased by around a third more than inflation. These scales are determined following consideration of inflation and submissions made by the legal profession.

The Review’s survey of private practice solicitors in New South Wales, Victoria and Western Australia showed that approximately half of respondents take 15 to 30 minutes to prepare a costs disclosure, either by completing the standard costs disclosure form or drafting a costs agreement, and that a further one third of respondents took under 15 minutes. Most solicitors in the workshops also considered that their disclosure for simpler matters takes between 15 to 30 minutes but added that the time taken could vary considerably, between five minutes and hours, depending on the complexity of the matter. Most solicitors in the workshops expressed the view that disclosure should be completed by the lawyer responsible for the matter, although some noted that paralegals or administrative staff could complete part of this work. The indicative cost of disclosure in a simple matter is therefore estimated at between \$86 and \$173 for 15 to 30 minutes, applying the rates in the Practitioner Remuneration Order for 2023 made by the Victorian Legal Costs Committee for attendance by a solicitor and a clerk and assuming the work is split equally between them.⁸

Complaints data shows the number of complaints involving a costs issue where the amount of the legal costs is \$1,500 or less (Table 2), with about half of these involving an amount of \$750 or less. These complaints represented:

- three per cent or less of total complaints opened in New South Wales in the 2021/22 and 2020/21 financial years, and
- less than 12 per cent of total complaints closed in Victoria in the 2021/22 financial year and around 14 per cent in 2020/21.

⁷ CPI (all capitals), results rounded to the nearest full dollar amount.

⁸ The Practitioner Remuneration Order for 2023 provides that attendance by a legal practitioner is \$112 for each quarter hour or part thereof and attendance by a clerk is \$60.60 for each quarter hour or part thereof (First Schedule, items 17 and 18). Calculations rounded to the nearest full dollar amount.

Complaints data is not yet available for Western Australia which joined the scheme in the 2022/23 financial year. Other important information about interpreting the complaints data is discussed under option L1 above, including that a disclosure issue is recorded in around 10 to 20 per cent of complaints involving costs issues.

Table 2: Costs complaints below \$1,500 – New South Wales and Victoria 2020/21 and 2021/22

Jurisdiction	Year	Complaints opened involving a costs issue where the amount is \$1,500 or less	Total complaints opened (all complaints)	Proportion of total complaints (per cent)
NSW	2021/2022	82	2,929	2.8
	2020/2021	83	2,758	3.0
Jurisdiction	Year	Complaints closed involving a costs issue where the amount is \$1,500 or less	Total complaints closed (all complaints)	Proportion of total complaints (per cent)
Vic	2021/2022	85	728	11.7
	2020/2021	81	574	14.1

Option L4: Cover the majority of retail legal matters

Option L4 considers the application of the lower threshold in relation to commonly provided legal services. Option L4 would see the lower threshold increased to \$3,000 or \$5,000.

Drawing on the consultation, factors in support of option L4 are that:

- The lower threshold no longer captures the majority of standard retail legal matters such as conveyancing, wills and straightforward commercial, family law and criminal law matters. Work which would fall under an increased \$3,000 or \$5,000 threshold is largely non-litigious and less likely to incur unexpected legal costs.
- The lower threshold when set in the Uniform Law in 2015 was already too low in relation to commonly provided legal services, so that adjusting it by reference to inflation is insufficient.
- In some non-participating jurisdictions, there is discussion about increasing the non-disclosure threshold to \$3,000.
- Disclosure is not effective when it is too long or too complex, and does not help consumers to “shop around” for legal services, especially in regional or remote areas. The legislative requirement that practitioners charge fair and reasonable fees, combined with an accessible regulator and resolution processes, provide important safeguards for consumers of legal services.

Although the Uniform Law commenced on 1 July 2015 in New South Wales and Victoria, the \$750 non-disclosure threshold had already been in place since 1 January 1997 in Victoria and 1 October 2005 in New South Wales. This means the non-disclosure threshold has remained unchanged for at least 17 years in New South Wales and 26 years in Victoria. By comparison, the non-disclosure threshold of \$1,500 was introduced in the Australian Capital Territory on 1 July 2006, the Northern Territory on 31 March 2007, Queensland on 18 July 2008, Tasmania on 31 December 2008, Western Australia on 1 March 2009 and South Australia on 1 July 2014.

In the survey of solicitors, almost all respondents reported that they provide legal services below \$3,000 but above \$750. Almost one third of those respondents reported that this work accounted for more than half of their practice, with a further one third reporting this work was 26 to 50 per cent of their practice. The main areas of practice were wills and powers of attorney and conveyancing, followed less frequently by leases and mortgages; probate and family provision; commercial, corporations and franchising; other civil; and family and de facto.

Solicitors in the practitioner workshops confirmed that a range of legal services are provided at a cost of up to \$3,000. Examples included documentation in commercial matters, local court criminal matters, estate planning such as wills or powers of attorney, straightforward family law matters and residential conveyancing. This is consistent with some of the examples of fixed fee rates advertised online for \$3,000 or less, which included commercial conveyancing, simple agreements such as employment contracts, family law consent orders and defended local court hearings.

Complaints data shows the number of complaints involving a costs issue where the amount of the legal costs is \$3,000 or less (Table 3). These complaints represented:

- around five per cent of total complaints opened in New South Wales in the 2021/22 and 2020/21 financial years, and
- around 18 per cent of total complaints closed in Victoria in the 2021/22 financial year and 23 per cent in 2020/21.

For complaints involving a costs issue where the amount of the legal costs is \$5,000 or less, the number of complaints increased to:

- around seven per cent of total complaints opened in New South Wales in the 2021/22 and 2020/21 financial years, and
- around 23 per cent of total complaints closed in Victoria in the 2021/22 financial year and 32 per cent in 2020/21.

Complaints data is not yet available for Western Australia which joined the scheme in the 2022/23 financial year. Other important information about interpreting the complaints data is discussed under option L1 above, including that a disclosure issue is recorded in around 10 to 20 per cent of complaints involving costs issues.

Table 3: Costs complaints below \$3,000 and \$5,000 – New South Wales and Victoria 2020/21 and 2021/22

Jurisdiction	Year	Complaints opened involving a costs issue where the amount is \$3,000 or less	Complaints opened involving a costs issue where the amount is \$5,000 or less	Total complaints opened (all complaints)	Proportion of total complaints (amount is \$3,000 or less) (per cent)	Proportion of total complaints (amount is \$5,000 or less) (per cent)
NSW	2021/2022	145	206	2,929	5.0	7.0
	2020/2021	148	205	2,758	5.4	7.4
Jurisdiction	Year	Complaints closed involving a costs issue where the amount is \$3,000 or less	Complaints closed involving a costs issue where the amount is \$5,000 or less	Total complaints closed (all complaints)	Proportion of total complaints (amount is \$3,000 or less) (per cent)	Proportion of total complaints (amount is \$5,000 or less) (per cent)
Vic	2021/2022	130	164	728	17.9	22.5
	2020/2021	132	185	574	23.0	32.2

What should the upper threshold be?

The Review is seeking feedback on what the upper threshold should be, and why. The Review is considering the principles that should inform the setting of the upper threshold as well as its dollar amount. Four options are set out below.

Question 2

What should the upper threshold be and why?

Option U1: Maintain the existing threshold

Option U1 is to maintain the upper threshold at \$3,000. This option provides a point of comparison with the other options, but it was not supported by stakeholders during initial consultation.

Information about the types of legal matters provided for \$3,000 or less is set out on page 14 above.

Complaints data for complaints involving a costs issue where the amount is \$3,000 or less is in Table 3 above.

Option U2: Adjust for the changing cost of legal services

Option U2 considers the impact of inflation and increases in the costs of providing legal services over time, as well as the dollar amount which would capture most common legal services. Option U2 would see the upper threshold increased to \$5,000.

Drawing on the consultation, factors in support of option U2 are that:

- Increases in inflation and the costs of providing legal services have reduced the real value of the higher threshold over time so that standard form disclosure is available in fewer matters.
- The standard forms may be underused because:
 - Matters which might appear likely to cost \$3,000 or less at the beginning of the matter risk going over \$3,000 as the matter progresses and would then require full disclosure.
 - There is a preference for using full disclosure documents to avoid having to replace standard form disclosure with full disclosure as the matter progresses. Full disclosure documents are often based on precedents developed by law practices or professional associations and are usually much longer than the standard costs disclosure forms.
- The costs of providing full disclosure may be disproportionate for lawyers who provide a high volume of services which are close to the upper threshold.

Almost three quarters of respondents to the solicitor survey reported that they were aware of the standard costs disclosure form. Of those respondents, almost three quarters (which is around half of the total sample) had used the standard form. When the respondents who had used the standard form were asked about frequency, around 80 per cent said they use it for all or some matters under \$3,000. These results were not reflected in the feedback from professional associations or solicitor workshops. While some of the solicitors at the workshops said they used the form, it was more common to hear they had never used it, had used it in the past but no longer did, or had modified the form for their practice.

Adjusting for inflation from July 2015 would increase the higher threshold to approximately \$3,700 as at March 2023.⁹

Examples of fixed fee rates advertised online suggest that there are transactional and documentary legal services which would fall below a higher threshold of \$5,000 (but not \$3,000), for example, business structure documentation, commercial conveyancing and mortgage agreements.

Table 3 above sets out complaints data for complaints involving a costs issue where the amount is \$5,000 or less, compared with \$3,000 or less.

Option U3: Increase the use of the standard costs disclosure forms

Option U3 considers increasing the upper threshold so that the standard costs disclosure forms can be used in more matters. Option U3 would see the upper threshold increased to an amount up to \$10,000.

⁹ CPI (all capitals), results rounded to the nearest full dollar amount.

Option U3 is supported by many of the factors identified during consultation in relation to option U2 above. The Review was also advised that:

- Full disclosure may not be effective in helping some clients understand the cost of legal services and their rights. Standard form disclosure may have advantages over full disclosure which is often complex and concerned with protecting the lawyer rather than informing the consumer. Simpler disclosure may be more effective disclosure if it increases transparency for consumers.
- There is an opportunity to increase transparency of legal costs for clients, and reduce the burden to lawyers, by increasing the use of the standard costs disclosure forms. This opportunity may be greater where there is less risk of a matter exceeding the upper threshold as lawyers would be more inclined to use the standard forms (i.e. if the upper threshold is increased by a significant amount).

Recent research published by the New South Wales Council of Social Services and the Reading Writing Hotline set out that 44 per cent of Australians have levels of literacy that hinder their ability to complete complex forms required to access essential services.¹⁰

Option U4: Abolish standard form disclosure

Option U4 considers abolishing the upper threshold so that standard form disclosure is no longer available. Notwithstanding that s 174(5) provides expressly for an upper threshold below which standard form disclosure is permitted, it has been suggested to the Review that this option could be implemented without amending the Uniform Law by setting the lower and upper thresholds at the same level. The intention is to return to a single costs disclosure threshold above which full disclosure is required and below which costs disclosure is not required.

During consultation, the Review was advised of the following factors in support of option U4:

- Full disclosure is the same amount of work for lawyers as standard form disclosure.
- It is good practice to use full disclosure so that the client is aware of their rights and there is no benefit in providing less information.
- It would be more beneficial to develop a standard form for full disclosure in all matters to reduce uncertainty about whether there has been valid disclosure.
- The standard costs disclosure forms are too short and simplistic to deal with complex issues such as liens over client documents and requirements under other legislation.
- Lawyers do not use the standard costs disclosure forms.
- A single threshold for costs disclosure would increase consistency with the non-participating jurisdictions.

¹⁰ Helping Clients Fill in Forms Report, <https://www.ncoss.org.au/wp-content/uploads/2021/01/Helping-Clients-Fill-in-Forms-Research-2020-Report-of-Findings.pdf>.

Standard costs disclosure forms and information sheets

Question 3

How could the standard costs disclosure forms and information sheets be improved? For legal practitioners? For consumers?

The standard costs disclosure forms are set out in Schedule 1 to the Uniform General Rules (Attachment D).

The Review heard that the standard forms could be improved for both clients and lawyers:

- The forms could be made more user friendly and targeted to clients by simplifying the language, including by avoiding or explaining terms which may not be familiar to consumers (e.g. disbursements).
- The forms also have aspects which may be confusing to lawyers and should be amended to allow a range of legal costs to be provided in addition to the single figure estimate required by the Uniform Law.
- Changes to the forms should be user tested with both consumers and lawyers.

The Council has also developed costs disclosure information sheets for lawyers and consumers which sit alongside the standard disclosure forms (Attachment E). These information sheets will need to be updated if any changes are made to the costs disclosure thresholds and standard forms.

Commercial and government clients

Section 170 of the Uniform Law seeks to target consumer protections at those who need them by excluding specified commercial and government clients from the majority of the costs disclosure provisions. Commercial and government clients are more likely to be repeat purchasers of legal services and able to negotiate their legal costs based on previous experience and commercial decisions about the value of the work to their business or organisation.

In the second reading speech, the then Victorian Attorney-General said “Sophisticated commercial or government clients will not be covered by the costs disclosure, charging and complaints regimes that are intended to provide protection for smaller, ‘retail’ clients.” In addition to the costs disclosure provisions, protections from which commercial and government clients are excluded include:

- being able to have a costs complaint resolved as a consumer matter, and
- the right to apply for costs assessment.

Section 170(2) sets out the list of commercial and government clients (Attachment F). These include law practices, Australian or foreign government authorities, various incorporated and unincorporated business structures (including foreign companies) as well as liquidators, administrators, receivers and financial services licensees. Section 170 also permits the list of commercial and government clients to

be expanded by making Uniform General Rules. State owned enterprises and corporations in New South Wales and Victoria have been included in the list by rule 71.¹¹

Other commercial and government clients

The Review is seeking feedback on whether any new persons or classes of persons should be added to the list of commercial and government clients by making a Uniform General Rule.

During the initial consultation meetings, it was suggested that the list should include:

- licensees under the *National Consumer Credit Protection Act 2009* (Cth)
- large charitable and not-for-profit organisations
- high net worth individuals.

There are also commercial and government clients which are the subject of exemptions in non-participating jurisdictions but are not included in s 170(2) of the Uniform Law.

Each of these possible exemptions is discussed below.

Exemptions in the non-participating jurisdictions which do not relate to commercial and government clients are not considered in this paper. These include exceptions from the requirement to provide costs disclosure to Australian and foreign lawyers, repeat clients (subject to their consent) and legally assisted persons and other clients not paying legal costs.

Question 4

Should the list of commercial and government clients be expanded by specifying new persons or classes of persons in the Uniform General Rules? If so, which categories should be added and why?

Trustees within the meaning of the *Bankruptcy Act 1996* (Cth)

It was suggested during initial consultation that there is no practical reason to distinguish between a trustee in bankruptcy and a liquidator, administrator or receiver which are already listed as commercial or government clients under the Uniform Law.

This exception applies in Queensland.

Overseas-registered foreign law practices

The list of commercial and government clients in the Uniform Law includes a government authority in Australia or in a foreign country, but only a law practice in Australia (not a law practice in a foreign country). During the initial consultation, it was suggested that this distinction is anomalous.

This exception applies in the Australian Capital Territory, Northern Territory, Queensland and Tasmania. It also applied in New South Wales, Victoria and Western Australia before the Uniform Law commenced.

¹¹ The Review notes that rule 71 was made before Western Australia entered the Uniform Law scheme.

Corporations that have a share capital and whose shares, or the majority of whose shares, are held beneficially for the Commonwealth or a State or Territory

During the initial consultation, it was suggested that including this exception would, in effect, represent an extension of the government authority exception already included in the Uniform Law.

This exception applies in the Australian Capital Territory, Northern Territory, Queensland, South Australia and Tasmania. It also applied in New South Wales, Victoria and Western Australia before the Uniform Law commenced.

Licensees under the *National Consumer Credit Protection Act 2009* (Cth)

During the initial consultations, it was suggested that there is no practical reason to distinguish between a person who holds an Australian credit licence and a financial services licensee which is already a commercial or government client under the Uniform Law.

Large charitable and not-for-profit organisations

Under the *Corporations Act 2001* (Cth) a large proprietary company is one that satisfies any two of the following conditions for a financial year:

- the consolidated revenue for the financial year of the company and any entities it controls is \$50 million or more
- the value of the consolidated gross assets at the end of the financial year of the company and any entities it controls is \$25 million or more, and
- the company and any entities it controls have 100 or more employees at the end of the financial year.

It has been suggested that charitable and not-for-profit organisations which satisfy the same conditions are of a similar level of sophistication as large proprietary companies.

High net worth individuals

Under the Uniform Law, a distinction is made between large proprietary companies (which fall within the definition of a commercial or government client) and small proprietary companies (which do not). This distinction is based on consolidated revenue, consolidated assets and/or number of group employees.

During the initial consultation it was suggested that it is anomalous that a distinction is made between large and small proprietary companies but that no distinction is made in relation to individuals regardless of their assets, income or sophistication. By way of example, financial product disclosure laws under Chapter 6D and Part 7.9 of the *Corporations Act 2001* (Cth) do not apply to sophisticated investors or wholesale clients, being those with net assets of at least \$2.5 million or gross income for each of the last two financial years of at least \$250,000.

The Review notes that the exception to costs disclosure under s 170 of the Uniform Law applies in relation to commercial and government clients. The question may arise as to whether high net worth individuals fall within this category and therefore within the Council's rule-making power under this section.

Guidelines and directions on costs estimates

The Council and Commissioner issued guidelines and directions for regulatory authorities in relation to costs estimates in March 2016 (Attachment G).

Guidelines on costs estimates

The guidelines on costs estimates were issued to provide guidance on changes to costs disclosure under the Uniform Law. One area of uncertainty was whether a costs estimate could be provided in the form of a range.

The guidelines cover various aspects of calculating costs estimates and how they should be communicated to the client. On the question of using a range to estimate legal costs, the guidelines state:

It will not be inconsistent with section 174(1)(a) to provide estimates for each of the stages that the matter might reach, whether individual stage estimates are expressed as a single figure or as a range of figures, provided the law practice, having considered all the circumstances and the most likely outcome, always gives the single figure estimate of the total legal costs in the matter that section 174(1)(a) requires.

During the initial consultation meetings, the Review asked regulatory authorities whether the guidelines continue to be useful and, if so, how they might be improved. The Review heard that the practice of at least one regulatory authority is to give the guidelines to lawyers involved in costs disputes where a single figure estimate of the total legal costs was not provided.

The Council has also developed an information sheet for legal practitioners on legal costs and costs disclosure obligations (Attachment H). As the guidelines on costs estimates are being used to provide guidance to lawyers, it may be more appropriate to incorporate their content in the information sheet for legal practitioners instead of guidelines for regulatory authorities.

The Review also heard during consultation that it would be helpful to clarify that a range can be included in an estimate of the total legal costs as long as a single figure estimate is provided.

Directions on costs estimates

The directions on costs estimates ask the regulatory authorities to report a range of information to the Council and Commissioner on the application of the Uniform Law provisions on costs estimates and the guidelines discussed above. This information is published in the Commissioner's annual report.

Regulatory authorities also provide data on their complaints functions for the Council's Uniform Law database under agreed information sharing arrangements. Information on costs complaints within specific costs disclosure ranges was requested separately by the Commissioner from around 2018. Some of this additional information is being published in the annual report but not recorded in the Uniform Law database.

As the Uniform Law database is the central store of data shared by regulatory authorities, it may be more appropriate to update the agreed reporting arrangements instead of having separate directions or data requests. The experience of the Review suggests this approach could be expected to maximise data

consistency while streamlining reporting obligations. Information about costs complaints specific to costs disclosure ranges will continue to be of interest to the Council and Commissioner, including as a way of monitoring any changes to the costs disclosure thresholds. However, it may no longer be necessary for regulatory authorities to provide some or all of the other information set out in the directions.

Record keeping

The Council has been asked to consider an amendment to the Uniform General Rules to require law practices to keep a copy of written costs disclosures for seven years. The proposal is in response to instances where a question has arisen about the provision of written costs disclosure by barristers in direct access matters and a copy has not been kept on file. Keeping a copy of written costs disclosure would help regulatory authorities to investigate, and law practices to respond to, any subsequent complaint. The proposed seven-year period is consistent with other timeframes for record retention in the Uniform Law, including some trust account records.

The Review discussed this proposal with relevant stakeholders during the initial consultation. Key points include:

- The question of retaining written costs disclosure has arisen in at least some matters where a barrister accepts instructions directly from a person who is not a solicitor. Where a barrister is engaged by a solicitor on behalf of the client, the solicitor maintains the client file.
- The question of retaining written costs disclosure was not raised in relation to solicitors. This may reflect routine client file management practices as well as the additional record-keeping obligations which apply to solicitors (e.g. rule 14.2 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 and rule 91E of the Uniform General Rules).
- Given the proposed rule appears to be targeted at a small minority of law practices, it may be preferable to develop an education campaign. This would also avoid any risk that including an express obligation to retain costs disclosure documents could have unintended consequences in relation to documents which are not subject to an express obligation.
- Costs disclosure documents may be business records that should be retained for the Australian Tax Office.

The Review is seeking feedback on three options:

Option R1: Improve guidance on record keeping

The Council could amend its information sheet for legal practitioners on legal costs and costs disclosure obligations to emphasise the importance of keeping records of compliance with the costs disclosure requirements. The Council could also encourage regulatory authorities and professional associations to issue guidance and include this information in continuing professional development.

Option R2: New rule for barristers

A requirement for barristers to retain costs disclosure documents for seven years in direct access matters could be included in the Legal Profession Uniform Conduct (Barristers) Rules 2015 (e.g. rule 22). Any amendment to these rules would need to be developed by the Australian Bar Association under the process in the Uniform Law.

Option R3: New rule for barristers and solicitors

The Council could develop an amendment to the Uniform General Rules which would apply to written costs disclosures by barristers and solicitors.

Question 5

Which of these options should be adopted and why? What other options should be considered and why?

Next steps

Please send submissions to submissions@legalservicescouncil.org.au by **2 June 2023**. Submissions will be published on the Council's website unless you ask for your submission to be treated as confidential.

Submissions will inform Dr Butlin's final report which will be considered by the Council. The Council will then consider whether changes should be made to the Uniform General Rules, the standard costs disclosure forms, the information sheets and the guidelines and directions on cost estimates.

The Review is grateful for the contributions made so far and welcomes all submissions in response to this paper.

Schedule 1 Form 1 Standard costs disclosure form for clients – solicitors and other law practices (except barristers)

The standard costs disclosure Form 1 can be used when your professional fee is not likely to be more than \$3000 (before adding GST and disbursements).

Date provided to client:

Law practice details

Name:				Contact:	
Address:				Phone:	
				Mobile (Optional):	
State/Territory:		Postcode:		Email (Optional):	

Client details

Name:				Phone:	
Address:				Mobile (Optional):	
				Email (Optional):	
State/Territory:		Postcode:			

What we will do for you

Examples:

- Prepare your will and power of attorney
- Undertake legal work for the sale/purchase of property at [address]
- Provide advice about a legal issue concerning [...]

Click and delete instruction to complete electronically or print

How much we estimate you will need to pay

Estimated total cost of our legal services (excl. GST):	\$	The basis for calculating costs Choose from menu ▼ \$ Further Details: <i>Example fixed rate \$680.00 or hourly rate \$350.00</i> <i>*Click and delete instruction to complete electronically or print*</i>
Estimated amount for disbursements (excl. GST):	\$	
<i>Itemised disbursements (Optional)</i>		
<i>*Click and delete instruction to complete electronically or print*</i>		
Estimated total cost of barrister or other law practice (excl. GST):	\$	
<i>[Attach information from the second law practice]</i>		
GST:	\$	
Estimated full amount you will need to pay (incl. GST):	\$	

This is an estimate only. We will inform you if anything happens that significantly changes this estimate. If our professional fee is likely to be more than \$3000 (before GST and disbursements are added) we will provide you with a full disclosure of costs in writing.

Your rights include to:

- Ask for an explanation of this form ► Negotiate a costs agreement ► Negotiate the billing method (e.g. timing or task)
- Request a written progress report of costs incurred ► Receive a written bill for work done ► Request an itemised bill
- Contact your local regulatory authority.

Information sheets for [consumers \[PDF, 228KB\]](#) and [legal practitioners \[PDF, 253KB\]](#) explain this form

Schedule 1 Form 2 Standard costs disclosure form for clients – barristers being briefed directly by a client

The standard costs disclosure Form 2 can be used when your professional fee is not likely to be more than \$3000 (before adding GST and disbursements).

Date provided to client:

Barrister details

Name:				Phone:	
Address:				Mobile (Optional):	
				Email (Optional):	
State/Territory:		Postcode:			

Client details

Name:				Phone:	
Address:				Mobile (Optional):	
				Email (Optional):	
State/Territory:		Postcode:			

What I will do for you

Examples:

- Advice and representation to defend drink driving charge Anytown Magistrates Court

Click and delete instruction to complete electronically or print

How much I estimate you will need to pay

Estimated total cost of my legal services (excl. GST):	\$	The basis for calculating costs Choose from menu ▼ \$ Further Details: <i>Example fixed rate Court appearance \$1500</i> <i>*Click and delete instruction to complete electronically or print*</i>
Estimated amount for disbursements (excl. GST):	\$	
<i>Itemised disbursements (Optional)</i> <i>*Click and delete instruction to complete electronically or print*</i>		
GST:	\$	
Estimated full amount you will need to pay (incl. GST):	\$	
You may also need to pay other costs such as court fees.		

This is an estimate only. I will inform you if anything happens that significantly changes this estimate. If my professional fee is likely to be more than \$3000 (before GST and disbursements are added) I will provide you with a full disclosure of costs in writing.

Your rights include to:

- Ask for an explanation of this form ► Negotiate a costs agreement ► Negotiate the billing method (e.g. timing or task)
- Request a written progress report of costs incurred ► Receive a written bill for work done ► Request an itemised bill
- Contact your local regulatory authority.

An [Information Sheet](#) explains this form

Legal costs and costs disclosure obligations

This information sheet summarises the legal costs and costs disclosure obligations imposed by the Uniform Law.¹

Fair and reasonable legal costs

Legal costs must be *fair* and *reasonable*, proportionately and reasonably incurred, and proportionate and reasonable in amount. Regard must be had to matters such as the complexity and urgency of the matter, quality of the work, instructions given and the skill and experience of the legal practitioners involved.²

Avoid unnecessary cost increases

A law practice must not act in a way that unnecessarily increases costs, and must act reasonably to avoid unnecessary delay that results in increased costs.³

Written disclosure of costs

When initial instructions are given, or as soon as practicable afterwards, a client must be given a written disclosure of the estimated total legal costs, including the basis for calculating costs.⁴

If there is a significant change, including to legal costs, the client must be given a further disclosure in writing.⁵

In Western Australia, when a law practice provides a client with information disclosing the basis on which legal costs will be calculated in the matter and an estimate to total legal costs under s 174(1)(a) of the Uniform Law, the law practice must also provide the client with information about whether the legal costs are subject to a costs determination.⁶

Estimated total legal costs

An estimate of total legal costs is a reasonable approximation of the total legal costs that a client is likely to have to pay. In this context, it includes professional fees, disbursements and GST.⁷

Disclosure obligation threshold

The main disclosure obligation applies if legal costs are

likely to be more than \$750, before disbursements or GST is added. The practitioner may choose to give full disclosure or use the Uniform Law costs disclosure form.⁸

Client rights

The written disclosure document must include information about the client's rights to negotiate a costs agreement, negotiate the billing method, receive a lump sum bill, request an itemised bill, and seek the assistance of the local regulatory authority in the event of a dispute.⁹

Informed consent

In the case of full costs disclosure, a law practice must *take all reasonable steps* to be satisfied that the client has understood and given consent to the proposed course of action and costs. Making a disclosure in writing may not alone satisfy this requirement.¹⁰

Any later disclosure to inform the client about a significant change must include sufficient information about the impact on legal costs so the client can make an informed decision about the future conduct of the matter.¹¹

Disclosure if another law practice is retained

A practitioner must disclose the costs (regardless of the amount) of a second law practice retained on the client's behalf. The second law practice must provide costs information so that the practitioner can fully disclose those costs to the client.¹²

Associated third party payers

A practitioner must also provide written costs disclosure to any associated third party payer who has a legal obligation to the law practice to pay some or all of the costs of legal services. This must include relevant details and information about matters relating to payable costs.¹³

Settlement in litigation costs

In litigation matters, the client must be made aware of a reasonable estimate of legal costs payable if the matter is settled (including the legal costs of another party likely to be payable by the client), and any contribution likely to be received from another party. This must be done before

Legal costs and costs disclosure obligations

settlement.¹⁴

Costs Disclosure Forms

The Uniform Law costs disclosure form can be used if legal costs are under \$750 or not likely to be more than \$3,000 before disbursements or GST are added. The form is an easy alternative to full disclosure in lower priced matters.

User friendly versions of forms and information sheets for legal practitioners and consumers are available from the Legal Services Council website.

Failure to comply with disclosure obligations

Where a contravention of the costs disclosure obligations occurs:

- a client or associated third party is not required to pay any costs until they have been assessed or determined; and
- a cost agreement (if any) is void.

Contravention of the costs disclosure obligations can constitute unsatisfactory professional conduct or professional misconduct by a principal, legal practitioner, or foreign lawyer involved.¹⁵

Uniform General Rule 72A

Rule 72A of the Legal Profession Uniform General Rules 2015 was made by the Legal Services Council to modify the voiding provision of the Uniform Law.

A costs agreement will not be void if the law practice had:

- taken reasonable steps to comply with their disclosure requirements; and
- within 14 days of becoming aware of a contravention, rectified it by providing the necessary costs disclosure information.

The relevant authority, a costs assessor, court or tribunal will also need to be satisfied that:

- the contravention was not substantial; and
- it would not be reasonable to expect that the client would have made a different decision had they known about the change in the costs from the outset.

Transitional arrangements

If a client first instructed the law practice prior to commencement of the Uniform Law, the *Legal Profession Act 2004* of Victoria or NSW, or the *Legal Profession Act*

2008 of Western Australia, will apply.¹⁶

The provisions of the old legislation will also continue to apply to a second law practice engaged on behalf of the client if the first law practice was first instructed before 1 July 2015.

Guidelines, Rules and Forms

The Legal Services Council Guidelines and Directions, Uniform Law and Uniform Rules, costs disclosure forms and information sheets are available on the Legal Services Council website.

¹ Legal Profession Uniform Law (**Uniform Law**).

² Uniform Law, s 172

³ Uniform Law, s 173

⁴ Uniform Law, s 174(1)(a)

⁵ Uniform Law, s 174(1)(b) and 174(6)

⁶ *Legal Profession Uniform Law Application Act 2022* (WA), s 143

⁷ Uniform Law, s 6; Legal Services Council Guideline and Direction Cost Estimates 11 March 2016

⁸ Uniform Law, s 174(4), Sch 4 cl 18(3)

⁹ Uniform Law, s 174(2)

¹⁰ Uniform Law, s 174 (3) and (6)

¹¹ Uniform Law, s 174(2)(b)

¹² Uniform Law, s 175

¹³ Uniform Law, s 176

¹⁴ Uniform Law, s 177

¹⁵ Uniform Law, s 178

¹⁶ Uniform Law, Sch 4 cl 4

Costs disclosure form

The Uniform Law Costs Disclosure Form (the Form) gives an overall picture of the costs a client can expect pay for lower priced work. This information sheet explains what you need to know.

Why have I been given a costs disclosure form?

When you hire a law practice you must be given a written estimate of total legal costs if the lawyer's professional fee is likely to be more than \$750 (before disbursements and GST are added).

If the cost of their professional fee is unlikely to be more than \$3000 (before GST or disbursements are added) the law practice can use the Form. If you have briefed a barrister directly, the barrister can use the Form.

Is the Form a costs agreement?

The Form gives you an estimate only - it is not a costs agreement. By itself, it is not a contract between you and your lawyer.

What information does the Form give me?

The Form outlines the work to be done and gives you a single estimate of the overall cost. It includes an estimate of the lawyer's fee, and any additional costs for disbursements and GST.

What is a disbursement?

A disbursement is an expense paid by the law practice on behalf of the client. Some examples are the cost of a medical report, court filing fees or stamp duty.

What is GST?

The GST is a 10% tax on goods and services. Example: solicitor \$2000 + barrister \$1500 = a total of \$3500 which will incur an addition of \$350 GST.

How will I know the cost of the barrister or other law practice retained on my behalf?

The law practice must tell you the total estimated cost of the services of a barrister or another law practice engaged on your behalf. This information must be on the Form, with the details attached.

How can I make an informed choice?

To enable you to make an informed choice about your legal options, the law practice must explain the work proposed and the estimated costs. Costs must be fair and reasonable. You may need to consider other factors, such as the risks

involved.

What happens if the costs increase?

You must be informed in writing if there is a significant change in circumstances, including the legal costs you will need to pay. If the professional fee is likely to be more than \$3000, you must be given full disclosure of costs in writing.

What are my rights as a consumer?

The Uniform Law gives you certain rights in relation to legal costs, billing for legal services and complaints. You can:

- **Ask for the Form to be explained** – You are entitled to have the information on the Form explained to you.
- **Negotiate a costs agreement** – Let the law practice know if you would prefer a costs agreement. A costs agreement is more detailed and can be enforced like a contract.
- **Negotiate how you want to be billed** – This might be every month or when specific tasks have been completed or in some other way.
- **Request a written progress report of costs incurred** - You are entitled to progress reports within a reasonable time and at no extra charge.
- **Receive a written bill for work done** – You must receive a written bill for the work done. You can be given the bill in person, by post or by email.
- **Request an itemised bill** – You can ask for a lump sum bill to be itemised. You must ask for this within 30 days of the bill being payable. It must be provided within 21 days of your request. You must not be charged for the preparation of an itemised bill.
- **Ask for help from the local regulatory authority** – Talk to your legal practitioner first if you are not happy about the costs you have been charged. If you are still not satisfied you can contact your local regulatory authority - the Legal Services Commissioner in NSW or Victoria, or the Legal Practice Board in Western Australia.

Legal Services Commissioners

Victoria: 1300 796 344 (toll free) www.lsb.vic.gov.au

NSW: 1800 242 958 (toll free) www.olsc.nsw.gov.au

Legal Practice Board

WA: (08) 6211 3600 www.lpbwa.org.au

170 Commercial or government clients

(2) For the purposes of this Law, a commercial or government client is a client of a law practice where the client is—

- (a) a law practice; or
- (b) one of the following entities defined or referred to in the Corporations Act—
 - (i) a public company, a subsidiary of a public company, a large proprietary company, a foreign company, a subsidiary of a foreign company or a registered Australian body;
 - (ii) a liquidator, administrator or receiver;
 - (iii) a financial services licensee;
 - (iv) a proprietary company, if formed for the purpose of carrying out a joint venture and if any shareholder of the company is a person to whom disclosure of costs is not required;
 - (v) a subsidiary of a large proprietary company, but only if the composition of the subsidiary's board is taken to be controlled by the large proprietary company as provided by subsection (3); or
- (c) an unincorporated group of participants in a joint venture, if one or more members of the group are persons to whom disclosure of costs is not required and one or more members of the group are not any such persons and if all of the members of the group who are not such persons have indicated that they waive their right to disclosure; or
- (d) a partnership that carries on the business of providing professional services if the partnership consists of more than 20 members or if the partnership would be a large proprietary company (within the meaning of the Corporations Act) if it were a company; or
- (e) a body or person incorporated in a place outside Australia; or
- (f) a person who has agreed to the payment of costs on a basis that is the result of a tender process; or
- (g) a government authority in Australia or in a foreign country; or
- (h) a person specified in, or of a class specified in, the Uniform Rules.

Costs estimates

Guideline

1. This Guideline and Direction seeks to promote consistency in the exercise of their functions by local regulatory authorities in relation to legal costs matters under the Legal Profession Uniform Law (LPUL), other than in relation to dispute resolution and professional discipline issues.
2. It also seeks to advance the objective stated by section 169(a) of the LPUL to ensure that clients are able to make informed choices about their legal options and the costs associated with pursuing those options.
3. For these purposes, the Legal Services Council expresses its view that an estimate of the total legal costs in a matter, as required by section 174(1)(a) of the LPUL, is a reasonable approximation of the total costs that a client is likely to have to pay in the matter for which instructions have been given, expressed as a single figure, from time to time (the estimate). The definition of total legal costs in this context includes professional fees, any disbursements and GST, which should be separately identified, but not interest: LPUL section 6. It should be noted that where a costs agreement includes an uplift fee, that fee should be included as part of the estimate of total legal costs and the circumstances in which it would be payable explained to the client.
4. It should be noted that section 174(1)(a) also requires a law practice to disclose the basis on which legal costs will be calculated.
5. It is at all times important that the matter for which the estimate is required is clearly defined and understood by both the law practice and their client and in particular it should be explained to a client that the estimate is not a fixed fee quotation.
6. The requirement to give an estimate does not preclude a fixed fee quotation being given if it is desired by the law practice so to do.

7. Where a law practice is required pursuant to section 174(1)(b) to provide information about any significant change to anything previously disclosed, a revision of the estimate may be required. Any revised estimate should also be provided to the client in accordance with that section.
8. The provision of an estimate or estimates from time to time does not preclude the provision of other information to a client about the steps or stages in a matter and the provision of such information to a client should be encouraged. It will not be inconsistent with section 174(1)(a) to provide estimates for each of the stages that the matter might reach, whether individual stage estimates are expressed as a single figure or as a range of figures, PROVIDED the law practice, having considered all the circumstances and the most likely outcome, always gives the single figure estimate of the total legal costs in the matter that section 174(1)(a) requires. It is permissible and may be desirable to preface a single figure estimate with the word 'about' to reflect the fact that the figure is an estimate and is not a fixed fee.

Direction

Having regard to its opinion that the following direction is necessary and appropriate to ensure that the designated local regulatory authorities to which it is addressed act in a manner that promotes inter-jurisdictional consistency in the application of the Legal Profession Uniform Law and of the Uniform Rules, the Legal Services Council

HEREBY GIVES A DIRECTION TO:

- The Council of the Law Society of NSW;
- The Council of the NSW Bar Association;
- The NSW Legal Services Commissioner;
- The Victorian Legal Services Board; and
- The Victorian Legal Services Commissioner

Costs estimates

to keep the Council informed at intervals to be advised of the extent to which in their respective opinions the views expressed in the Guideline – Costs Estimates – LSC 01/2016 are applied in practice and of any judicial or other decisions that may come to their attention concerning the interpretation of the requirement of section 174(1)(a) and (b) to provide an estimate.

Dale Boucher

Chief Executive Officer

Legal Services Council

11 March 2016

- ¹ The Legal Services Council and the Commissioner for Uniform Legal Services Regulation perform different functions. Both are empowered to issue guidelines and directions under section 407 of the Legal Profession Uniform Law. This Guideline and Direction is issued by the Legal Services Council to provide guidance to the local regulatory authorities in the performance of their functions concerning the operation of the cost estimate disclosure requirement in section 174(1) under the Legal Profession Uniform Law.

Costs estimates

Guideline

1. This Guideline and Direction seeks to promote consistency in the exercise of their functions by local regulatory authorities in relation to dispute resolution and professional discipline matters concerning legal costs under the Legal Profession Uniform Law (LPUL).
2. It also seeks to advance the objective stated by section 169(a) of the LPUL to ensure that clients are able to make informed choices about their legal options and the costs associated with pursuing those options.
3. For these purposes, I express my view as Commissioner for Uniform Legal Services Regulation (CULSR) that an estimate of the total legal costs in a matter, as required by section 174(1)(a) of the LPUL, is a reasonable approximation of the total costs that a client is likely to have to pay in the matter for which instructions have been given, expressed as a single figure, from time to time (the estimate). The definition of total legal costs in this context includes professional fees, any disbursements and GST, which should be separately identified, but not interest: LPUL section 6. It should be noted that where a costs agreement includes an uplift fee, that fee should be included as part of the estimate of total legal costs, with the circumstances in which it would be payable explained to the client.
4. It should be noted that section 174(1)(a) also requires a law practice to disclose the basis on which legal costs will be calculated.
5. It is at all times important that the matter for which the estimate is required is clearly defined and understood by both the law practice and their client and, in particular, it should be explained to a client that the estimate is not a fixed fee quotation.
6. The requirement to give an estimate does not preclude a fixed fee quotation being given if it is desired by the law practice so to do.

7. Where a law practice is required pursuant to section 174 (1)(b) to provide information about any significant change to anything previously disclosed, a revision of the estimate may also be required. Any revised estimate should also be provided to the client in accordance with that section.
8. The provision of an estimate or estimates from time to time does not preclude the provision of other information to a client about the steps or stages in a matter and the provision of such information to a client should be encouraged. It will not be inconsistent with section 174(1)(a) to provide costs estimates for each of the stages that the matter might reach, whether individual stage estimates are expressed as a single figure or as a range of figures, PROVIDED the law practice, having considered all the circumstances and the most likely outcome, always gives the single figure estimate of the total legal costs in the matter that section 174(1)(a) requires. It is permissible and may be desirable to preface a single figure estimate with the word 'about' to reflect the fact that the figure is an estimate and is not a fixed fee.

Direction

Having regard to my opinion that the following direction is necessary and appropriate to ensure that the designated local regulatory authorities to which it is addressed act in a manner that promotes inter-jurisdictional consistency in the application of the Legal Profession Uniform Law and of the Uniform Rules:

I HEREBY GIVE A DIRECTION TO:

- The Council of the Law Society of NSW;
- The Council of the NSW Bar Association;
- The NSW Legal Services Commissioner;
- The Victorian Legal Services Board; and
- The Victorian Legal Services Commissioner

Costs estimates

- i to keep me as the Commissioner for Uniform Legal Services Regulation informed at intervals to be advised of the extent to which in the ordinary exercise of their functions and in their respective opinions the views expressed in Guideline CULSR 01/2016 – Costs Estimates are applied in practice; and of any judicial or other decisions that may come to their attention concerning the interpretation of the requirements of section 174(1)(a) and (b) to provide an estimate; and
- ii to report pursuant to section 440 at least annually and as required on:
 - the extent to which the total estimated legal costs in matters are based on the appropriate exercise of the professional judgment of law practices generally or in particular matters or classes of matters;
 - the extent to which law practices adequately disclose and explain the possible variables that may impact on total legal costs to their clients;
 - the extent to which the disclosed estimated total legal costs depart from final bills;
 - what are fair and reasonable legal costs in particular circumstances, having regard to the principles and criteria set out in section 172;
 - the operation of any rule made under section 178(3); and
 - any other matters required or permitted by the Uniform Law and notified to local regulatory authorities in relation to legal costs.

Dale Boucher

Commissioner for Uniform Legal Services Regulation

11 March 2016

¹ The Commissioner for Uniform Legal Services Regulation and the Legal Services Council perform different functions. Both are empowered to issue guidelines and directions under section 407 of the Legal Profession Uniform Law to local regulatory authorities about how they exercise their functions under the Uniform Law and Uniform Rules. The Commissioner can issue guidelines and directions about the complaints and professional discipline functions exercised under Chapter 5 of the Legal Profession Uniform Law. This Guideline and Direction is intended to enable opinions to be formed from time to time by the Commissioner on the operation of the cost estimate disclosure requirements in the context of complaints and professional discipline matters.

Legal costs and costs disclosure obligations

This information sheet summarises the legal costs and costs disclosure obligations imposed by the Uniform Law.¹

Fair and reasonable legal costs

Legal costs must be *fair* and *reasonable*, proportionately and reasonably incurred, and proportionate and reasonable in amount. Regard must be had to matters such as the complexity and urgency of the matter, quality of the work, instructions given and the skill and experience of the legal practitioners involved.²

Avoid unnecessary cost increases

A law practice must not act in a way that unnecessarily increases costs, and must act reasonably to avoid unnecessary delay that results in increased costs.³

Written disclosure of costs

When initial instructions are given, or as soon as practicable afterwards, a client must be given a written disclosure of the estimated total legal costs, including the basis for calculating costs.⁴

If there is a significant change, including to legal costs, the client must be given a further disclosure in writing.⁵

In Western Australia, when a law practice provides a client with information disclosing the basis on which legal costs will be calculated in the matter and an estimate to total legal costs under s 174(1)(a) of the Uniform Law, the law practice must also provide the client with information about whether the legal costs are subject to a costs determination.⁶

Estimated total legal costs

An estimate of total legal costs is a reasonable approximation of the total legal costs that a client is likely to have to pay. In this context, it includes professional fees, disbursements and GST.⁷

Disclosure obligation threshold

The main disclosure obligation applies if legal costs are

likely to be more than \$750, before disbursements or GST is added. The practitioner may choose to give full disclosure or use the Uniform Law costs disclosure form.⁸

Client rights

The written disclosure document must include information about the client's rights to negotiate a costs agreement, negotiate the billing method, receive a lump sum bill, request an itemised bill, and seek the assistance of the local regulatory authority in the event of a dispute.⁹

Informed consent

In the case of full costs disclosure, a law practice must *take all reasonable steps* to be satisfied that the client has understood and given consent to the proposed course of action and costs. Making a disclosure in writing may not alone satisfy this requirement.¹⁰

Any later disclosure to inform the client about a significant change must include sufficient information about the impact on legal costs so the client can make an informed decision about the future conduct of the matter.¹¹

Disclosure if another law practice is retained

A practitioner must disclose the costs (regardless of the amount) of a second law practice retained on the client's behalf. The second law practice must provide costs information so that the practitioner can fully disclose those costs to the client.¹²

Associated third party payers

A practitioner must also provide written costs disclosure to any associated third party payer who has a legal obligation to the law practice to pay some or all of the costs of legal services. This must include relevant details and information about matters relating to payable costs.¹³

Settlement in litigation costs

In litigation matters, the client must be made aware of a reasonable estimate of legal costs payable if the matter is settled (including the legal costs of another party likely to be payable by the client), and any contribution likely to be received from another party. This must be done before

Legal costs and costs disclosure obligations

settlement.¹⁴

Costs Disclosure Forms

The Uniform Law costs disclosure form can be used if legal costs are under \$750 or not likely to be more than \$3,000 before disbursements or GST are added. The form is an easy alternative to full disclosure in lower priced matters.

User friendly versions of forms and information sheets for legal practitioners and consumers are available from the Legal Services Council website.

Failure to comply with disclosure obligations

Where a contravention of the costs disclosure obligations occurs:

- a client or associated third party is not required to pay any costs until they have been assessed or determined; and
- a cost agreement (if any) is void.

Contravention of the costs disclosure obligations can constitute unsatisfactory professional conduct or professional misconduct by a principal, legal practitioner, or foreign lawyer involved.¹⁵

Uniform General Rule 72A

Rule 72A of the Legal Profession Uniform General Rules 2015 was made by the Legal Services Council to modify the voiding provision of the Uniform Law.

A costs agreement will not be void if the law practice had:

- taken reasonable steps to comply with their disclosure requirements; and
- within 14 days of becoming aware of a contravention, rectified it by providing the necessary costs disclosure information.

The relevant authority, a costs assessor, court or tribunal will also need to be satisfied that:

- the contravention was not substantial; and
- it would not be reasonable to expect that the client would have made a different decision had they known about the change in the costs from the outset.

Transitional arrangements

If a client first instructed the law practice prior to commencement of the Uniform Law, the *Legal Profession Act 2004* of Victoria or NSW, or the *Legal Profession Act*

2008 of Western Australia, will apply.¹⁶

The provisions of the old legislation will also continue to apply to a second law practice engaged on behalf of the client if the first law practice was first instructed before 1 July 2015.

Guidelines, Rules and Forms

The Legal Services Council Guidelines and Directions, Uniform Law and Uniform Rules, costs disclosure forms and information sheets are available on the Legal Services Council website.

¹ Legal Profession Uniform Law (**Uniform Law**).

² Uniform Law, s 172

³ Uniform Law, s 173

⁴ Uniform Law, s 174(1)(a)

⁵ Uniform Law, s 174(1)(b) and 174(6)

⁶ *Legal Profession Uniform Law Application Act 2022* (WA), s 143

⁷ Uniform Law, s 6; Legal Services Council Guideline and Direction Cost Estimates 11 March 2016

⁸ Uniform Law, s 174(4), Sch 4 cl 18(3)

⁹ Uniform Law, s 174(2)

¹⁰ Uniform Law, s 174 (3) and (6)

¹¹ Uniform Law, s 174(2)(b)

¹² Uniform Law, s 175

¹³ Uniform Law, s 176

¹⁴ Uniform Law, s 177

¹⁵ Uniform Law, s 178

¹⁶ Uniform Law, Sch 4 cl 4