

# Consultation paper on costs disclosure thresholds

May 2023

PO Box H326, Australia Square NSW 1215  
[lsc@legalservicescouncil.org.au](mailto:lsc@legalservicescouncil.org.au)  
[legalservicescouncil.org.au](http://legalservicescouncil.org.au)

  
LEGAL PROFESSION  
**Uniform Law**

## Table of Contents

<b>INTRODUCTION AND BACKGROUND</b> .....	<b>4</b>
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
<b>EXPERT’S NOTE ON THE REVIEW</b> .....	<b>6</b>
The regulatory approach.....	6
The impact of price and cost increases .....	8
<b>INITIAL WORK UNDERTAKEN IN THE REVIEW</b> .....	<b>8</b>
<b>WHAT SHOULD THE LOWER THRESHOLD BE?</b> .....	<b>9</b>
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
<b>WHAT SHOULD THE UPPER THRESHOLD BE?</b> .....	<b>15</b>
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
<b>STANDARD COSTS DISCLOSURE FORMS AND INFORMATION SHEETS</b> .....	<b>18</b>
<b>COMMERCIAL AND GOVERNMENT CLIENTS</b> .....	<b>18</b>
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

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

## 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.<sup>1</sup> 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 1997<sup>2</sup> and in New South

<sup>1</sup> Clause 18(3) and (4), Schedule 4, Uniform Law.

<sup>2</sup> 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 2005<sup>3</sup>. 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.<sup>4</sup>

## 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**).

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

<sup>4</sup> 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](mailto: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).<sup>5</sup> 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

<sup>5</sup> 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 2021/22<sup>6</sup>**

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

<sup>6</sup> 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 CPI<sup>7</sup> 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.<sup>8</sup>

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.

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

<sup>8</sup> 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.<sup>9</sup>

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.

<sup>9</sup> 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.<sup>10</sup>

#### **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.

<sup>10</sup> 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.<sup>11</sup>

## 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.

<sup>11</sup> 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](mailto: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.

**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.<sup>1</sup>

---

<sup>1</sup> 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.

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](mailto: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

## 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 <b>Choose from menu ▼</b> \$ 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:	\$	
<b>Estimated full amount you will need to pay (incl. GST):</b>	<b>\$</b>	

**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 <b>Choose from menu ▼</b> \$ 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:	\$	
<b>Estimated full amount you will need to pay (incl. GST):</b>	<b>\$</b>	
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](#)

## Costs disclosure forms

Costs disclosure forms are an easy alternate to full costs disclosure in lower priced matters. The new costs disclosure form enables you to give your client an overall picture of the costs they can expect to pay.

This information sheet explains the information to be included if you choose to use the costs disclosure form instead of making a full costs disclosure.

### When can I use this form?

From 1 July 2015, a law practice in NSW or Victoria (including a barrister when briefed directly) can use a costs disclosure form when legal costs are unlikely to exceed \$3000, before disbursements and GST are added.<sup>1</sup>

### Is the costs disclosure form a costs agreement?

A costs disclosure form is an estimate only. It is not a costs agreement.

### Can I use the form if the overall costs are likely to be more than \$3000?

The threshold of \$3000 does not include the cost of disbursements or GST. The cost of disbursements, the fee for a barrister or another law practice and GST must be shown to give the client the overall picture of what they can expect to pay.<sup>2</sup>

### How do I disclose the basis for calculating costs?

If you use the costs disclosure form available from the Legal Services Council website, you can choose from the drop down box (hourly rate, fixed rate) and include the rate or fixed price in the space provided.

### How do I outline the work to be done?

A summary of the work is sufficient, but you should provide enough detail so the client can understand the proposed course of action. It is best to use language that the client can easily understand.

### Can I use the costs disclosure form if a barrister or second legal practice is engaged?

The costs disclosure form can be used in any matter when your own fee is not likely to be more than \$3000, before disbursements and GST are added.

Your form must include an estimate of the total fee payable for the barrister or other law practice you retain on behalf of the client. The barrister or other law practice must provide you with sufficient information to give your client full disclosure. This information should be attached to the form.<sup>3</sup>

### What if something changes?

You must inform your client in writing if circumstances change and significantly alter any of the information disclosed on the form, including legal costs.<sup>4</sup>

You must provide sufficient information about the changes to ensure your client understands the impact on legal costs, and can make an informed choice about future conduct of the matter.<sup>5</sup>

If the change in circumstances means that your legal costs are likely to exceed \$3000, you must provide full written disclosure to the client.<sup>6</sup>

### What rights does the client have?

An objective of the Uniform Law is that clients of law practices are able to make informed choices about their legal options.

A client has the right to have proposed work and estimated costs explained to them. You should also give your client the *Costs Disclosure Form Information Sheet for Consumers*, which explains the cost disclosure form and the rights a client has in relation to costs disclosure and billing.

### Where can I find the forms?

The forms can be found in Schedule 1 of the Uniform General Rules. A user-friendly version of the forms is available on the Legal Services Council website.

## Costs disclosure forms

**Table 1 Summary of cost disclosure thresholds<sup>7</sup>**

Thresholds	Solicitors	Barristers (briefed directly)
Estimate of total legal costs not more than \$750 before disbursements and GST are added	<p>No obligation to disclose legal costs, s 174(4).</p> <p><b>Options:</b></p> <ul style="list-style-type: none"> <li>• short form disclosure, s 174(5); or</li> <li>• full disclosure, s 174(1).</li> </ul> <p>If you do not disclose costs, and circumstances change, you can use the form if the estimate of your fee is not more than \$3000, s 174(7).</p>	Same as for solicitors
Estimate of total legal costs more than \$750 but not more than \$3000 before disbursements and GST are added	<p><b>Options:</b></p> <ul style="list-style-type: none"> <li>• short form disclosure, s 174(5); or</li> <li>• full disclosure, s 174(1).</li> </ul> <p>You can use the form for your own costs disclosure if you engage a second legal practice, provided the estimate of your fee is not more than \$3000.</p> <p>You should attach the information from the second legal practice to the costs disclosure form, and include the total in the space provided on the form.</p> <p>Disclose relevant information to any associated third party payer, s 176.</p>	<p><b>Options:</b></p> <ul style="list-style-type: none"> <li>• short form disclosure, s 174(5); or</li> <li>• full disclosure, s 174(1).</li> </ul> <p>Disclose relevant information to any associated third party payer, s 176.</p>
Total legal costs likely to exceed \$3000	<p>Full disclosure, s 174(1).</p> <p>Disclose relevant information to any associated third party payer, s 176.</p>	<p>Full disclosure, s 174(1).</p> <p>Disclose relevant information to any associated third party payer, s 176.</p>
All	If you engage counsel, or another legal practice you must also disclose the cost of these legal services to your client, s 175(1).	If you are engaged by a solicitor, you must give the solicitor all the information necessary for the full disclosure of your costs to the client, s 175(2).

This information sheet does not deal with costs disclosure obligations in settlement of litigation. See Uniform Law, s 177.

<sup>1</sup> Legal Profession Uniform Law (2014) (Uniform Law), sub-s 174(5); Legal Profession Uniform General Rules (General Rules), r 72

<sup>2</sup> Uniform Law, sub-s 174(5); General Rules, r 72

<sup>3</sup> Uniform Law, s 175

<sup>4</sup> Uniform Law, sub-ss 174(1)(b) and 174(6)

<sup>5</sup> Uniform Law, sub-s 174(2)(b)

<sup>6</sup> Uniform Law, sub-ss 174(6) and 174(8)

<sup>7</sup> Costs disclosure obligations do not apply to larger commercial or government clients. This includes state owned enterprises.

## 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 the Legal Services Commissioner in your State.

### Legal Services Commissioners

**Victoria:** 1300 796 344 (toll free) [www.lsbv.vic.gov.au](http://www.lsbv.vic.gov.au)

**NSW:** 1800 242 958 (toll free) [www.olsc.nsw.gov.au](http://www.olsc.nsw.gov.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.

Level 40, MLC Centre, 19 Martin Place, Sydney NSW 2000  
 PO Box H326, Australia Square NSW 1215  
 T +61 8293 5900 F +61 2 8293 5959 E [lsc@legalservicescouncil.org.au](mailto:lsc@legalservicescouncil.org.au)  
[legalservicescouncil.org.au](http://legalservicescouncil.org.au)

This document is for general information purposes only | March 2016

**COMMISSIONER**  
 FOR UNIFORM LEGAL  
 SERVICES REGULATION

## Legal costs and costs disclosure obligations

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

### 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.<sup>2</sup>

### 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.<sup>3</sup>

### 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.<sup>4</sup>

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

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.<sup>6</sup>

### 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.<sup>7</sup>

### 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.<sup>8</sup>

### 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.<sup>9</sup>

### 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.<sup>10</sup>

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.<sup>11</sup>

### 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.<sup>12</sup>

### 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.<sup>13</sup>

### 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.<sup>14</sup>

### 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.<sup>15</sup>

### 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.<sup>16</sup>

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.

<sup>1</sup> Legal Profession Uniform Law (**Uniform Law**).

<sup>2</sup> Uniform Law, s 172

<sup>3</sup> Uniform Law, s 173

<sup>4</sup> Uniform Law, s 174(1)(a)

<sup>5</sup> Uniform Law, s 174(1)(b) and 174(6)

<sup>6</sup> *Legal Profession Uniform Law Application Act 2022* (WA), s 143

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

<sup>8</sup> Uniform Law, s 174(4), Sch 4 cl 18(3)

<sup>9</sup> Uniform Law, s 174(2)

<sup>10</sup> Uniform Law, s 174 (3) and (6)

<sup>11</sup> Uniform Law, s 174(2)(b)

<sup>12</sup> Uniform Law, s 175

<sup>13</sup> Uniform Law, s 176

<sup>14</sup> Uniform Law, s 177

<sup>15</sup> Uniform Law, s 178

<sup>16</sup> Uniform Law, Sch 4 cl 4