



Our ref: 22/75

29 May 2023

Ms Heather Moore
Chief Executive Officer
Legal Services Council
Level 3, 19 O'Connell Street
Sydney NSW 2000

By email: [REDACTED]

Cc: [REDACTED]

Dear Ms Moore,

Response to the Legal Services Council's Consultation Paper on Costs Disclosure Thresholds

Introduction

1. The New South Wales Bar Association (the **Association**) thanks the Legal Services Council (**LSC**) for the invitation to respond to its May 2023 Consultation Paper on Costs Disclosure Thresholds (**Consultation Paper**). Our response to the questions and options proposed in the Consultation Paper are set out below.

Association's response

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?

2. Based on our members' experience, "an inexpensive and routine" matter would fall within the range of \$2,000 to \$3,000 excluding GST. This would typically cover:
 - a. initial conference and general advice;
 - b. preparation of a standard and uncomplicated will;
 - c. preparation of an ordinary power of attorney and appointment of an enduring guardian, together with medical directions if required;
 - d. attendance at a one-off directions hearing (generally in the range of \$450 to \$700);
 - e. a high level preliminary review of a matter and general conference with client advising on key issues;
 - f. standard advice on a caveat and whether there is a caveatable interest;
 - g. attending on a relative and sending some basic letters to see if a copy of a will can be provided;
 - h. review and provision of oral advice on a small commercial matter or conveyance of a property (at the lower end of the market; most lawyers charge more than \$2,500 for the sale of a house once disbursements are taken into account).¹

¹ We note that solicitors are more likely to undertake the matters referred to in (b),(c) and (g) although it is conceivable that it is performed routinely by a small number of barristers on a direct access basis (with the possible exception of (g)).

3. In the criminal jurisdiction, a simple inexpensive and routine matter would be a one day Local Court hearing involving one day's preparation and one day's appearance at hearing for a senior junior criminal counsel. This would cost approximately \$8,800 (inclusive of GST).

Information request 2: *The Review would appreciate any additional information from lawyers about how the costs of providing legal services have increased.*

4. The Association notes that the threshold caps apply to both legal services as well as disbursements. In our view, this makes the current thresholds even more unrealistic.

Question 1: *What should the lower threshold be and why?*

5. The Association strongly supports Option L3 of the Consultation Paper, which takes account of the impact of inflation and changes in the cost of providing legal services over time by increasing the lower threshold from \$750 to \$1,500.
6. 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 that the threshold has remained unchanged for at least 17 years in New South Wales. It is so far out of date that in our view, every practitioner must disclose fully at the commencement of a matter. The objectives of the carve out are therefore wholly undermined.
7. The Association agrees with the observations of the Consultation Paper at page 8 that since 2005, both the general price level and the cost of providing legal services have increased significantly. We further agree with the analysis in the Consultation Paper that by applying CPI the general price level has risen by nearly 25 per cent between 2005 and 2023, and has doubled between 1997 and 2023. In our view the non-disclosure threshold should, at a minimum, be adjusted in line with CPI increases.
8. We also agree with the other grounds of support for Option 3 identified on pages 11-12 of the Consultation Paper. These include:
 - a. 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; and
 - b. 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 consistency, reduce costs to law practices operating across jurisdictions and encourage other jurisdictions to join the Uniform Law scheme.
9. The Association strongly opposes Option L1 (disclosure regardless of amount) and Option L2 (maintain the existing lower threshold).

Question 2: *What should the upper threshold be and why?*

10. The Association considers that the upper threshold should be increased from \$3,000 to \$5,000.
11. The Association strongly supports Option U2 of the Discussion Paper, which takes account of the impact of inflation and changes in the cost of legal services over time, as well as the dollar amount which would capture the most common legal services, by increasing the upper threshold from \$3,000 to \$5,000.
12. The Association agrees with each of the grounds identified on page 16 of the Consultation Paper in support of Option U2. These include:
 - a. 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; and

- b. 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.
13. The Association opposes Option U1 (maintain the existing upper threshold) and notes that this option was not supported by stakeholders during initial consultation.

Question 3: *How could the standard costs disclosure forms and information sheets be improved? For legal practitioners? For consumers?*

14. The Association considers that the standard costs disclosure forms set out in Schedule 1 to the *Legal Profession Uniform General Rules 2015 (Uniform General Rules)* and information sheets are appropriate for legal practitioners and provide sufficient protection for consumers.
15. The Association does not believe that any change to the forms or information sheets is required.

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?*

16. The Association considers that the current Uniform General Rules deal satisfactorily with section 170 of the Legal Profession Uniform Law (**Uniform Law**), which is an extensive provision (refer to **Attachment A** to the Consultation Paper). The Association considers that any attempt to further qualify the definition of commercial and government clients by way of an amendment to the Uniform General Rules is not necessary and would only lead to confusion.
17. If any further explanation as to the meaning of section 170 of the Uniform Law is required, which the Association does not accept, the Association considers that this explanation should be by way of an amendment to the Uniform Law rather than to the Uniform General Rules.

Question 5: *Which of these options [regarding record keeping] should be adopted and why? What other options should be considered and why?*

18. The Association refers to **Annexure A** to this submission, which comprises the following:
- a. Letter from the Association to the LSC dated 31 March 2022;
 - b. Letter from the LSC to the Association dated 8 July 2022; and
 - c. Letter from the Association to the LSC dated 24 August 2022.
19. In its letter of 31 March 2022, the Association proposed an amendment to the Uniform General Rules to introduce additional record keeping requirements for barristers. Specifically, the Association proposed that a barrister be required to retain, for a period of seven years, a copy of all written cost disclosures made in accordance with sections 174 or 175(2) of the Uniform Law.
20. In its reply of 8 July 2022, the LSC, amongst other things, sought the Association's views on whether an education campaign would be preferable to creating a rule.
21. In its reply of 24 August 2022, the Association stated that, whilst it was content to embark upon an education campaign, without legislative requirement, any such education campaign could at best only encourage barristers to keep records for seven years. The Association also notes that continuing professional development routinely includes education.
22. The Association maintains its position as set out in its letters of 31 March 2022 and 4 August 2022.
23. The Association accordingly supports Option R2 of the Discussion Paper, being a requirement for barristers to retain costs disclosure documents for seven years in direct access matters, to be enforced by way of an amendment to the *Legal Profession Uniform Conduct (Barristers) Rules 2015*. The cases we encounter where the failure to keep records is a particular problem are those involving direct access

work of barristers. Where a solicitor is involved, written disclosure is desirable, but not strictly required. We are therefore unable to comment on Option R3.

Conclusion

24. The Association thanks you in advance for considering this feedback. If you have any questions or wish to discuss, please do not hesitate to contact [REDACTED], Policy Lawyer, at [REDACTED].

Yours sincerely,



Gabrielle Bashir SC

President

Enc: Annexure A: Correspondence between NSW Bar Association and the Legal Services Council concerning record-keeping requirements



Our ref: 22/25

31 March 2022

Ms Megan Pitt
CEO, Legal Services Council
Commissioner for Uniform Legal Services Regulation
PO Box H326
Australia Square 1215

By email: [REDACTED]

Dear Ms Pitt

Proposed amendment of the Legal Profession Uniform General Rules 2015 – record keeping requirements for barristers

1. The New South Wales Bar Association (**the Association**) wishes to raise with the Legal Services Council a proposal that the *Legal Profession Uniform General Rules 2015* (**the Uniform General Rules**) be amended to introduce additional record keeping requirements for barristers. Specifically, it is proposed that a barrister be required to retain, for a period of seven years, a copy of all written cost disclosures made in accordance with sections 174 or 175(2) of the *Legal Profession Uniform Law (NSW)* (**the Uniform Law**).
2. Bar Council has recently considered a number of complaint matters involving direct access briefs, in which it has been alleged that barristers failed to provide written costs disclosure to clients as required by section 174 of the Uniform Law. The barristers maintained that the disclosures had been provided, but were unable to produce the documents.
3. The Association considers that sound record keeping and document management practices would dictate that a copy of such documents should be retained by a barrister. However, there is no specific statutory requirement for a barrister who makes a written costs disclosure to retain records. The Association therefore recommends that the Uniform General Rules be amended to require a barrister to retain, for a period of seven years, a copy of all written cost disclosures made in accordance with sections 174 or 175(2) of the Uniform Law.
4. The proposed seven year period is consistent with other timeframes for record retention in the Uniform Law, including certain trust account records and records relating to barristers fees in advance. It would also allow sufficient time for a complaint to be made within three years of the alleged conduct the subject of the complaint, and for the complaint authority to consider a complaint made outside that timeframe.



5. One way to incorporate the proposed amendment into the Uniform General Rules would be by amending *Part 4.6 Business management and control, Division 1A Files about matters*. The provision could perhaps be in the following terms:

91F Record keeping requirements of barristers

A barrister must retain a copy of all written disclosures made in accordance with section 174 and subsection 175(2) of the Uniform Law for a period of seven years from the date the written costs disclosure was made.

6. I am also writing to the Australian Bar Association to propose an equivalent amendment to the *Legal Profession Uniform Conduct (Barristers) Rules 2015* to introduce additional record keeping requirements for barristers – specifically, to require a barrister to retain a copy of written disclosures made in accordance with rule 22 of those rules for a period of seven years. Rule 22 requires a barrister to make a written disclosure to a client in a direct access matter.
7. If you or the Council members require any further information about the proposed amendment to the Rules, please do not hesitate to contact the Association's Director of Policy and Law Reform, [REDACTED] at [REDACTED].

Yours sincerely

Michael McHugh SC
President

8 July 2022

Mr Andreas Heger
Executive Director
NSW Bar Association
Selborne Chambers
B/174 Phillip Street
Sydney NSW 2000

By email: [REDACTED]

Cc: [REDACTED]

Dear Andreas

Proposed amendment of the Legal Profession Uniform General Rules 2015 – record keeping requirements for barristers

Thank you for your letter dated 31 March 2022 requesting that the Legal Services Council (**Council**) consider an amendment to the Legal Profession Uniform General Rules 2015 (**Uniform General Rules**), to introduce an additional record keeping requirement for barristers in relation to costs disclosures.

The proposed amendment would require barristers to keep a copy of all written disclosures made in accordance with section 174 and subsection 175(2) of the Legal Profession Uniform Law (**Uniform Law**) for a period of seven years from the date the written costs disclosure was made.

At its meeting on 1 June 2022, the Council discussed this proposal and indicated that it would be assisted by further information from the NSW Bar Association that demonstrates the extent of the problem and the need for the proposed amendment. This may include, for example:

- the total number of complaints in which it has been alleged that a barrister failed to provide written costs disclosure
- the total number of barristers involved in these complaints
- where there is more than one complaint about an individual barrister, the total number of complaints about that barrister
- the total number of complaints in which the barrister maintained that the disclosure had been provided, but was unable to produce the documents
- the total number of barristers who maintained that the disclosure had been provided but were unable to produce the disclosure document.

I would be grateful if you could provide this additional information by 22 August 2022, so that the Council can consider this matter further at its September meeting.

In the event that most barristers are maintaining correct records, the Council queried whether an education campaign would be preferable to creating a rule. I would be grateful for your views on whether the issue could be appropriately addressed in this way.

The Council also noted that the proposed amendment may suggest that there are unintended exceptions to the record keeping requirements. In particular, consideration would need to be given as to whether any such rule, if made, should apply to solicitors as well as barristers.

Finally, the Council noted that including the proposed requirement in both the Uniform General Rules and the Legal Profession Uniform Conduct (Barristers) Rules 2015 may lead to difficulties in the event the provisions are inconsistently worded. I would therefore be grateful if you would keep me informed of your discussions with the Australian Bar Association regarding the proposed amendment.

If you have any questions in relation to the additional information sought by the Council, please contact [REDACTED], Senior Principal Policy Officer on [REDACTED] or at [REDACTED].



Megan Pitt
**Chief Executive Officer | Legal Services Council
Commissioner for Uniform Legal Services Regulation**



24 August 2022

Ms Megan Pitt
CEO, Legal Services Council
Commissioner for Uniform Legal Services Regulation
PO Box H326
Australia Square NSW 1215

By email only: lsc@legalservicescouncil.org.au: [REDACTED]

Dear Ms Pitt

Proposed amendment of the Legal Profession Uniform General Rules 2015 – Record keeping requirements for barristers

I refer to your letter of 8 July 2022.

In response to your suggestion that an education campaign on the issue of record keeping might be a preferable course of action, the Bar Association is happy to embark upon an education campaign on this issue. However, without any legislative requirement to keep records for seven years, at best any such education campaign can only encourage barristers to do so.

Unfortunately, the way the Bar Association records its complaint data does not readily lend itself to the empirical statistical evidentiary base that your letter requests. The context of the Association's initial request was not that the issue of failing to have a costs disclosure was the basis of many current complaints, but rather that it was an issue which has arisen in a number of complaints which have recently been considered by the Professional Conduct Committees and the Bar Council within a short period of time that has shown up a current gap in the rules.

Anecdotally, it is an issue which arises relatively commonly in the investigation of complaints and causes significant difficulty for the Bar Council in circumstances where the barrister maintains that a costs disclosure was provided, but can no longer produce it. Without a requirement to keep proper records being placed on barristers, the Bar Council is potentially placed in a difficult position in properly exercising its complaint powers under the *Legal Profession Uniform Law (NSW)* and in most cases has no option but to resolve these complaints in favour of the barrister due to the factual uncertainty.

The Bar Association considers there are two key benefits of the proposed rule amendments for the investigation of complaints:

- First, retention of either a hard or soft copy of documents, such as written disclosures claimed to have been made in accordance with s 174 of the Uniform Law would permit barristers to respond more expeditiously, and with greater accuracy, to complaints; and
- Secondly, the Bar Council will be better able to monitor compliance with the disclosure requirements under Rule 22 of the *Legal Profession Uniform Conduct (Barristers) Rules*

2015 and the costs disclosure requirements under ss 174 and 175(2) of the Uniform Law, which would also facilitate the more timely investigation of complaints.

Please let me know if the Bar Association can be of any further assistance in relation to this matter.

Yours sincerely,



Gabrielle Bashir SC
President