

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

By email: submissions@legalservicescouncil.org.au

Dear Heather,

Legal Services Council: Costs Disclosure Threshold Review

The Law Institute of Victoria (LIV) welcomes the opportunity to provide feedback to the Legal Services Council (LSC) in relation to the Costs Disclosure Threshold Review, and thanks the LSC for the opportunity to meet with representatives of the LSC and provide feedback to those representatives at a meeting held on 17 November 2022.

Following on from the meeting held on 17 November 2022, the LIV appreciates the opportunity to provide further feedback to the Legal Services Council in response to the *Consultation Paper on Costs Disclosure Thresholds* (the Consultation Paper) dated May 2023. The LIV offers the following comments in response to the information requests and enquiries posed in the Consultation Paper:

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The LIV is of the firm view that the current figure is out of date. When one takes into account that the current figure was introduced into the NSW legislation in the early 1990s and then carried over to the Victorian legislation in the late 1990s, the LIV suggests that the equivalent figure in today’s legal practice would be upwards of \$1,500 plus GST and disbursements and possibly up to \$3,000 plus GST and disbursements.

What would “inexpensive and routine” matters include?

- Firstly, certain specific routine legal matters may be expected to be completed in full for a relatively low cost. These may include:
 - Caveats – application for lodgement/registration, administrative removal, etc
 - Debt recovery – pre-litigation letters of demand in straightforward matters
 - Employment contract review – advice on basic contracts/terms in letters of offer
 - Fencing notices – advice and/or drawing notice or response
 - Powers of attorney
 - Residential conveyancing (simple/standard)
 - Residential tenancy – advice on specific lease obligations
 - Statutory demands – drawing and service (for a judgment debt and where no affidavit is required)
 - Wills – preparation of simple will

- Secondly, certain items of work, such as initial meetings with clients in any practice area, may fall within the definition of “inexpensive and routine”. This may occur where initially the scope of services to be provided is limited to that item of work, as it is not known whether further services will be provided. An initial meeting with clients in a matter, where limited preparation is needed, could be an “inexpensive and routine” matter. If further work arises from the initial appointment, the revised scope of work is likely then to convert the matter into one in which at least the lower threshold is exceeded and the practitioner will need to provide disclosure and an updated estimate of costs.

Information request 2

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

- While certain overheads (such as reduced need for physical offices, postal/DX services, etc) may have decreased, at a practice level, several categories of costs have increased. These may include:
 - Cybersecurity, information technology costs and insurance
 - Electronic transaction and credit card fees
 - General overheads – premises, office supplies, utilities
 - Practice management software licence fees

- Staff costs – salaries, recruitment fees
- Third party provider costs, such as document production services, counsel/agents, process servers, financial and other services

Question 1

What should the lower threshold be and why?

The LIV recommends that the lower threshold should be a minimum of \$3,000 plus GST and disbursements.

The LIV recommends that the lower threshold should be indexed based upon CPI (or similar indexation measure) and adjusted annually.

The LIV recommends further that while no general disclosure obligation should arise under the lower threshold, practitioners should be encouraged to confirm the anticipated costs in writing prior to a client incurring them, as would be expected in most commercial transactions. This should not require any prescribed information other than the price of the proposed services. Identifying and confirming a price ought to be capable of being done promptly and efficiently. This would be in the interests of clients, cause minimal impost to practitioners and assist in further reducing or containing the number of low quantum consumer (costs) complaints. It would further align with expected practice.

Increasing the lower threshold to \$3,000 plus GST and disbursements would improve its utility in that it would be more likely to reflect a realistic cost for routine work. It would also increase consistency between jurisdictions to have the lower threshold uniform across participating Uniform Law jurisdictions. Finally, it would restore the threshold to its intended use, by making it sufficient for inexpensive and routine matters.

Provision for indexation of the lower threshold would allow it to remain in proportion to the costs of service provision and maintain currency over time without requiring frequent *ad hoc* review.

The lower threshold supports fees being reasonable and proportionate for routine matters. Where fees fall below the lower threshold, the burden of disclosure is avoided

entirely. Where fees exceed it, the consumer is provided with information including how the fees are estimated, allowing for greater transparency and a basis for evaluation or comparison.

Question 2

What should the upper threshold be and why?

The LIV recommends that the upper threshold should be \$5,000 plus GST and disbursements.

The LIV recommends that the upper threshold should be indexed based upon CPI (or similar indexation measure) and adjusted annually.

The LIV considers that the strong consumer protection focus of the Legal Profession Uniform Law supports the retention of an effective upper threshold above which full disclosure of prescribed matters must be given.

The increased amount of \$5,000 plus GST and disbursements would give additional scope for the use of standard form disclosure. It would adjust the balance between the benefit of full disclosure on the one hand, with the compliance burden on the other. It is also anticipated that consumers' subjective requirements for (and benefits from) full disclosure may be lower for such matters than for higher-cost matters.

While there are reasonable arguments for an increase to the upper threshold to \$10,000, the LIV considers that the time and resource impact of the requirement to make full disclosure begins to be proportionate where the estimated fees are \$5,000 or more. In that context and having regard to the consumer protection focus of the Uniform Law, the LIV supports an increase in the upper threshold to \$5,000 plus GST and disbursements.

Provision for indexation of the upper threshold would allow it to remain in proportion to the costs of service provision and maintain currency over time without requiring frequent *ad hoc* review.

Question 3

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

The LIV considers the standard costs disclosure forms are efficient and generally well-understood by practitioners and consumers.

The LIV recommends that consideration be given to certain additional (and perhaps optional) content being added to the standard costs disclosure form to provide for:

- (a) the practitioner and client expressly to agree to the provision of services on the terms of the disclosure (and sign/e-sign); and
- (b) approval for the application of funds held in trust for the client, to costs and GST when duly invoiced;

This would allow for greater certainty regarding provision of disclosure and to form a basis for an agreement to pay the disclosed 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?

The LIV does not support an expansion of the range of classes of persons to whom disclosure need not be made. In particular, the disclosure obligations should not vary with the net worth of the client or third-party payer.

The LIV does support an exemption for the need to give disclosure where:

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

Question 5

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

The LIV supports option R3, namely, that “[T]he Council could develop an amendment to the Uniform General Rules which would apply to written costs disclosures by barristers and solicitors.” The LIV favours the Council providing a new rule for barristers and solicitors in respect of the retention of evidence of written costs disclosures.

The LIV considers that solicitors and barristers both operate through (or as) law practices and a rule developed to apply to both would assist with clarity and consistency.

It is, in any event, expected practice that matter files be retained for a period of seven years from completion of the matter. The significance of costs disclosures in the practitioner-client relationship is such that the LIV considers a specific obligation to retain evidence of written costs disclosures would be reasonable and proportionate.

Should you have any queries please contact [REDACTED], Section Lead and Senior Lawyer Litigation, Costs & Privacy Officer, by telephone on [REDACTED] or by email at [REDACTED].

Yours sincerely,

[REDACTED]

Adam Awty
Chief Executive
Law Institute of Victoria