

**Ms Heather Moore**  
Chief Executive Officer  
Legal Services Council  
Level 3, Public Trustee Building  
19 O'Connell Street  
SYDNEY NSW 2000

2 June 2023

Dear Heather

### **Consultation on costs disclosure thresholds**

Thank you for inviting the Law Society of NSW (the **Law Society**) to make submissions on your *Consultation paper on costs disclosure thresholds* (the **Consultation**).

Without doubt, the current costs disclosure thresholds under the *Legal Profession Uniform Law* (NSW) (the **Uniform Law**) are outdated and have been overtaken both by inflation and increasing costs of legal practice, for example, in rent, technology and compliance. The Consultation rightly notes that costs disclosure is essential to the protection of consumer interests and rights, a fundamental objective of the Uniform Law.<sup>1</sup> However, we also consider that this objective must be balanced with another important objective of the Uniform Law, namely, a regulatory system that is 'effective, efficient, targeted and proportionate'.<sup>2</sup> The current costs disclosure model is at risk of compromising the latter objective.

Ensuring that the costs disclosure framework adequately reflects costs of legal services will likely mean that our currently outdated costs disclosure framework would no longer be a barrier for other jurisdictions who would otherwise consider joining the Uniform Law scheme. Amending the costs thresholds so that they are of an adequate level is therefore a significant step in promoting consistency among Australian jurisdictions.

The Law Society's responses to the Consultation questions are informed by feedback from various Committees of the Law Society.

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

- Option L1: Disclosure regardless of amount
- Option L2: Maintain the existing threshold
- Option L3: Adjust for the changing cost of legal services

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<sup>1</sup> Pages 5, 6 & 7 of the Consultation.

<sup>2</sup> Section 3(e) of the Legal Profession Uniform Law (NSW)

- Option L4: Cover the majority of retail legal matters

We are of the view that the lower threshold should be increased to \$5,000 to reflect the current costs of providing legal services by practitioners and accommodate inflation.

While some jurisdictions have a lower threshold of \$1,500, we consider this amount, which has been in place for several years, is substantially too low, particularly in jurisdictions that have a greater concentration of smaller practices.

A lower threshold of \$1,500 would perhaps cover some inexpensive and routine services such as advising on a simple will. However, such pricing is not applicable to all areas of legal practice, where even the most simple or ordinary matter would exceed \$1,500. Increasing the lower threshold to only \$1,500 would therefore not achieve the policy objective of excluding disclosure requirements for their most basic or ordinary matters.

Given the rising costs for practitioners to provide legal services and inflation increases overall, the Law Society supports increasing the lower threshold to \$5,000, which should capture the provision of straightforward legal advice, such as explaining the terms of a contract or providing uncomplicated legal advice.

A \$5,000 threshold would also take into account the marked changes that have occurred in conveyancing since 2015, when the Uniform Law was adopted, and indeed since 2005, when the \$750 threshold was introduced in NSW. A typical conveyance now involves dealing with issues including the operation of the Foreign Residents Capital Gains Withholding regime, the GST at settlement regime, compliance with the requirements of electronic conveyancing and the increased complexity of NSW state taxes such as foreign surcharge duty – all of which have collectively increased conveyancing costs.

Raising the lower threshold to \$5,000 would therefore be appropriate, as it would release practitioners from burdensome disclosure obligations for simple and day-to-day matters across a broader cross section of legal practices.

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

- Option U1: Maintain the existing threshold
- Option U2: Adjust for the changing cost of legal services (increase the upper threshold to \$5,000)
- Option U3: Increase the use of the standard costs disclosure forms (increase the upper threshold to \$10,000)
- Option U4: Abolish standard form disclosure

We are of the view that standard form disclosure should be abolished (Option U4), such that there is a single costs disclosure threshold, above which full disclosure is required.

As previously submitted, standard form disclosure is used relatively infrequently and regarded by most practitioners as inadequate for most matters. Given the current costs of legal services, even the most routine matters, if involving a degree of complexity, will likely



be an unsuitable matter for which to give standard form disclosure. A common piece of feedback from our members, particularly our Costs Committee, is that the difference in time and effort to provide standard form disclosure compared to full disclosure is negligible. We understand that the vast majority of practitioners therefore elect to discard standard form disclosure in preference for full disclosure even if their professional fees are unlikely to exceed the upper threshold.

Another reason most practitioners prefer to provide full disclosure in instances where the anticipated cost of legal services falls below the upper threshold is to protect themselves against breaching the Uniform Law in the event costs exceed the upper threshold. Doing so also prevents practitioners from having to provide disclosure twice.

Importantly, abolishing standard form disclosure would also increase consistency with costs disclosure requirements of other non-Uniform Law jurisdictions – a significant policy objective of the Uniform Law.<sup>3</sup>

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

The Law Society has no comment at this time.

**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 Law Society supports expanding the list to include:

- trustees within the meaning of the *Bankruptcy Act 1996* (Cth), and
- overseas-registered foreign law practices and licensees under the *National Consumer Credit Protection Act 2009* (Cth).

Trustees in bankruptcy typically have a similar skill set as a corporate insolvency practitioner such as a liquidator, administrator and receiver.

Relevantly, such trustees are usually experienced in instructing lawyers and engaging in litigation and operate under a similar regime of recording their own time costs. It is also quite common for a trustee in bankruptcy to also be a registered liquidator. The inclusion of trustees within the meaning of the *Bankruptcy Act 1996* (Cth) would also be consistent with Queensland's *Legal Profession Act 2007*.<sup>4</sup>

In relation to cost disclosure, we see no practical reason to distinguish between an insolvency practitioner who practices in corporate insolvency and a practitioner who practices in personal insolvency.

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<sup>3</sup> Section 3(a) of the *Legal Profession Uniform Law (NSW)*

<sup>4</sup> See section 311(1)(c)(ix) of the *Legal Profession Act 2007* (QLD).



THE LAW SOCIETY  
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**Question 5 – Which of these options (on record keeping) should be adopted and why? What other options should be considered and why?**

- Option R1: Improve guidance on record keeping
- Option R2: New rule for barristers
- Option R3: New rule for barristers and solicitors

The Law Society supports improving guidance on record keeping (Option R1). Given existing client file management practices and obligations, we consider that guidance focussing on improving education and awareness would be helpful and well received by the legal profession.

**Other comments**

The Law Society is informed that there is significant confusion amongst some practitioners who work in schemes with mandated legal costs (such as personal injury) as to whether costs disclosure is required at all. This is particularly the case with respect to NSW workers compensation matters funded by the Independent Legal Assistance and Review Service, where the client is not required to pay legal costs. It may be helpful in the context of this review to lend further clarity to such situations, whether at a state and territory or national level.

If you have any questions or would to discuss, please do not hesitate to contact [REDACTED]  
[REDACTED] Team Leader, Professional Support and Regulatory Policy at  
[REDACTED] or on [REDACTED].

Yours sincerely

[REDACTED]

Sonja Stewart  
**Chief Executive Officer**