



THE VICTORIAN BAR INCORPORATED

**SUBMISSION TO
THE LEGAL
SERVICES COUNCIL**

CONSULTATION PAPER: COST
DISCLOSURE THRESHOLDS IN
THE *UNIFORM LAW*

INTRODUCTION

1. The Victorian Bar (**the Bar**) welcomes the opportunity to provide submissions to the Legal Services Council (**the Council**) in response to the *Consultation Paper: Review of the Costs Disclosure Thresholds in the Uniform Law* (**the Consultation Paper**).
2. The Bar's submission will use the terms in the Consultation Paper. This submission responds to the five (5) questions for comment in the Consultation Paper.

ACKNOWLEDGEMENT

3. The Bar acknowledges the contributions of [REDACTED] in the preparation of this submission.

COMMENTS IN RESPONSE

4. This response should be seen in the light of the fact that the Bar has very little experience in relation to this part of the costs regulation regime as:
 - (a) apart from matters where barristers are briefed directly by clients (direct briefs) barristers do not have an obligation to provide costs disclosure to clients, but are required to disclose to their instructing solicitors the information required so that the solicitor can make the required disclosure;¹ and
 - (b) there are few matters in which barristers are briefed in which the total legal costs (that is solicitor and barrister fees) would not exceed \$750. There are also areas where relatively low fees may be charged by barristers, but which fall outside the costs disclosure regime in any event, such as matters where a fee is fixed and paid by legal aid authorities in criminal matters.
5. Accordingly, the Bar's comments are of necessity brief and do not comment on certain parts of the Paper. For the same reasons, the Bar's comments will focus on litigation matters. Members of the Bar have little insight in relation to matters in solicitors' practices that may be relevant to the costs thresholds, such as drafting of simple wills.

Information request 1: If \$750 was intended to cover "inexpensive and routine" matters, what would be the equivalent figure in today's legal practice?

6. The Bar agrees that the inflation adjusted figure would be approximately \$1,500. As noted above, in contrast to a solicitors' practice, there are few standardised 'inexpensive and routine' matters for barristers such that it is difficult to provide a response to this question.

¹ S 175(2) *Uniform Law*.

7. However, from the perspective of a commercial barrister, \$750 for a barrister's fee alone, is very low even for routine matters such as attending on winding up applications or in matters when it is agreed that the services will be on scale (and it is a low-cost item).
8. The Supreme Court Scale provides for junior barrister's fees to be charged at \$653 per hour (the County Court scale is 80% of the Supreme Court scale) and if there was to be some arbitrary category of 'inexpensive and routine' matters then one could select a matter that required say three hours on Supreme Court Scale, which would result in a threshold in the vicinity of \$2,000. Given the threshold is for total legal costs this is somewhat of an academic exercise.

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

9. Barristers are subject to the usual costs increases as have applied to business generally. Costs such as research subscriptions and chambers rents continue to increase.
10. The Bar agrees that the 'above inflation' increases in the Court's scales reflects an attempt to recognise these factors.

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

11. The present position (Option 2) is the worst outcome. There is the added complexity of the thresholds, but the lower limit is so low so that it is likely exceeded in almost all cases involving litigation.
12. Again, noting that this is very unlikely to apply to barristers the preferable option is Option 1, disclosure in all cases, followed by Option 3 or 4, an increased threshold.
13. The key issue in preferring Option 1 is transparency regarding the actual cost of services and the management of client expectations. Both clients and lawyers may have different expectations as to what a 'minimal' cost matter is. This would appear to be supported by the complaint figures referenced in the paper.
14. In respect of the issue that such a requirement is unfairly burdensome on high volume/low value practices, the Bar anticipates that most of those practices will have relatively standard pricings for those services and relevant disclosure documents such that any additional time required from lawyers would seem minor in comparison to the transparency benefit.
15. If there is to be a retention of the lower limit, then, at the least it ought to be in line with other non-Uniform Law jurisdictions, \$1,500 (Option 3) but Option 4, a genuine attempt to set the limit to actually exclude most standard retail legal matters is preferable.

Question 2 – What should the Upper Threshold Be?

16. The use of 'standard form' costs disclosure for under \$3,000 matters has, anecdotally, not seen significant use at the Bar. The Bar has template agreements on its website for the use of members for costs disclosure and costs agreements. Those agreements point to the existence of the standard form for under \$3,000 matters, but as the forms note, this does not replace the need for a costs agreement.
17. Option 4, abolition of the standard form disclosure, is preferred, for the reasons given in the Paper. This has the advantage of simplifying the disclosure requirements. In particular, the use of precedent cost agreements significantly reduces the burden of preparing full form cost disclosures.
18. The time-consuming elements of preparing a cost disclosure (short form or full) are the consideration of the possible variables and the services that will be required. These remain constant such that, in effect, the short form disclosure has limited utility.
19. Further, the use of the short form disclosure carries with it the danger that if costs increase then the need to provide full disclosure later may be missed.
20. If Option 4 is not accepted then, again in the interests of simplicity, Option 3 is preferable to allow practices that find the preparation of the full form agreement burdensome to use the shorter form in as large a number of cases as practicable.
21. There is force in the point that the shorter form may be more approachable for less sophisticated clients and may encourage them to actually read the agreement and estimate in more detail.

Question 3 – How can the Standard Form Cost Disclosure Forms be improved?

22. As the Bar recommends that this not be continued with, no further comment is made. If the authors of the Paper do not have copies of the Bar's standard cost disclosure forms, they can be provided upon request.

Question 4 – Should the list of 'commercial and government clients' be expanded?

23. The Bar considers that there ought to be expansion to the list of excluded clients. The impact upon legal practitioners of a failure to make full costs disclosure, including updating disclosure, can be severe, including rendering a costs agreement void ab initio. While these consequences may be justified in balancing the interests of many clients and legal practitioners, this is not appropriate in relation to clients with sufficient sophistication to look after their own interests.
24. *Trustees in Bankruptcy*. The Bar agrees that expansion to trustees is appropriate. Trustees are in effect 'professional litigants' and regularly conduct litigation on a 'no win no fee basis'.

25. *Overseas Registered Foreign Law Practices*. The Bar agrees that this extension is warranted for the reasons given. The exception does seem to be an anomaly.
26. *Corporations with Commonwealth/State/Territory shareholding*. The Bar agrees that this extension is warranted for the reasons given. The exception does seem to be an anomaly.
27. *Licensees under the National Consumer Credit Protection Act 2009 (Cth)*. The Bar agrees that this extension is warranted for the reasons given.
28. *Large Charitable and not-for-profit Organisations*. The Bar agrees that this extension is warranted for the reasons given. The sophistication of an organisation of this size is not relevantly affected by its not-for-profit status.
29. *High Net Worth Individuals*. The Bar cautions against the extension of the list in this way. These are still individuals and while they may have greater familiarity with legal process (and ability to absorb costs), they should still be provided with the same disclosure as any other client/litigant. In any event, the tests for sophisticated investors in the *Corporations Act* would be inappropriate as potentially excluding a very large proportion of individual clients from the disclosure requirements.
30. *Guideline and directions on cost estimates*. These matters are beyond the Bar's competence and are for the relevant regulatory authorities.

Question 5 – Which of these options (as to Record Keeping) should be adopted and why?

31. As noted above, an obligation to keep written costs disclosures is only likely to apply to barristers in direct access matters. The discharge of barristers' obligations under s.175(2) of the *Uniform Law* is not required to be in writing. In any event, barristers usually return any papers to the instructing solicitor at the end of a matter in which they are briefed.
32. Caution needs to be exercised in relation to increasing the burden on barristers undertaking direct briefs, many of which are undertaken pro bono, on a reduced fee or no win no fee basis.
33. The Bar's view is that Option 1, improved guidance on record keeping, is preferable. There is the obvious self interest in barristers retaining such records so as any dispute or complaint can be responded to. It is common sense risk management that should be adopted anyway when taking on a direct access brief. The Bar has a role in this regard and currently provides such guidance on its website.²

² <https://www.vicbar.com.au/members/victorian-bar/legal-practice-and-compliance/costs-agreements-and-disclosure-requirements>

34. In the event that there is to be a record keeping requirement imposed then the relevant period ought to be either 3 years, the time within which a complaint may be made, without waiver by the designated local regulatory authority,³ or 7 years in line with other requirements.

³ S.272 Uniform Law. Waiver of the requirement in relation to a costs complaint can only be if the complaint has been made within a further 4 months, s.272(2) *Uniform Law*