

## Submission to the Legal Services Council

### Consultation paper on costs disclosure thresholds – May 2023

#### Introduction

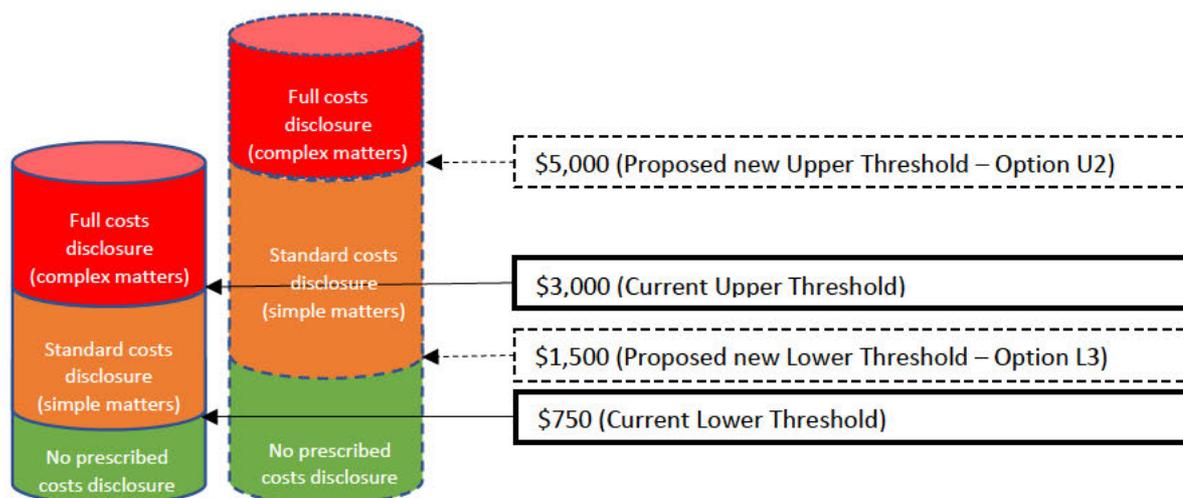
1. The Victorian Legal Services Board and Commissioner (“VLSB+C”) thanks the Legal Services Council for the opportunity to comment on the Council’s May 2023 consultation paper on costs disclosure thresholds under the Legal Profession Uniform Law (“Uniform Law”).
2. As the independent regulator of Victoria’s legal profession, one of VLSB+C’s key functions is to resolve complaints made by consumers about their legal costs. Our experience assessing and investigating these complaints has made clear to us the importance of cost disclosure as a consumer protection mechanism: the information that consumers receive about what their legal matter is likely to cost helps them to make informed and independent decisions about whether and how to proceed with the matter – and whether to engage the services of a particular lawyer. This is a public good that is reflected in the objectives of Part 4.3 of the Uniform Law and an outcome we strongly support.
3. We also know that costs disclosure benefits individual lawyers and the profession as a whole. VLSB+C recently commissioned the Victorian Law Foundation and Monash Business School to undertake primary research on costs in legal services, and many of the surveyed practitioners said that the requirement to give costs disclosure was an advantage in reducing costs complaints and that over time, the skill of giving a relatively accurate estimate increases. Practitioners were broadly in consensus that, despite the dissatisfaction associated with the ‘single figure estimate’ requirements, the underlying principle of upfront costs disclosure had improved standards of legal practice for clients and lawyers. We have attached a copy of the interim report for the Council’s consideration in confidence (**Attachment A**)
4. We do not consider that the consultation paper makes the case for increasing current disclosure thresholds. Although the paper provides some estimation of the costs of disclosure for lawyers, it does not quantify the benefits of disclosure for consumers<sup>1</sup> of legal services (and others) or the costs for consumers associated with increased thresholds.
5. In order to determine appropriate costs disclosure thresholds, it is necessary to weigh the market inefficiency caused by disclosure (i.e. the costs to law practices) against the market efficiency that improved transparency regarding the cost of legal services is likely to provide. This requires further research and a full cost-benefit analysis. In the absence of such an analysis, our view is that there is no evidence to support increasing the cost disclosure thresholds and lessening the existing consumer protections that are a cornerstone of the Uniform Law.
6. In this submission, therefore, our focus is on offering the Review suggested approaches to estimating the impact – including unintended consequences – of threshold changes on both lawyers and consumers of legal practitioner services, for the purposes of any future cost-benefit analysis. All suggested approaches are based on the impacts of Option L3 (increasing the lower threshold to \$1500) and U2 (increasing the upper threshold to \$5000), as we understand that these options have some support within the profession. **Figure 1**, on the following page, presents the current disclosure thresholds, compared with proposed thresholds under Options L3 and U2.

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<sup>1</sup> We note that the independent expert conducting the review recognises the need to increase the evidence base of the consumer experience of disclosure.

7. In making these suggestions, we recognise that some of the data points required to estimate the impact of threshold changes may be very difficult to obtain; nonetheless they will be important for understanding the magnitude of impact of any increased thresholds on clients, as well as the magnitude of red tape with which law firms are currently faced.
8. Finally, we provide some general comments on the consultation paper, and respond to Questions 3 – 5.

**Figure 1: Current costs disclosure thresholds c.f. proposed thresholds under Options L3 and U2**



**The problem that costs disclosure is designed to address**

9. For most goods and services, when a consumer chooses the quantity and quality of output they are willing to pay for, their output choices determine what input quantities will be used in producing that output.<sup>2</sup> However with regards to legal services, legal practitioners rather than clients often determine *what* is produced (i.e. what service will be provided) and *how* it is produced (i.e. what combinations of skill and time are used in rendering those services).<sup>3</sup> It has been noted that:

*This may seem logical and efficient given that the attorney knows best his [sic] own skill, and thus the productivity of his [sic] time; nevertheless, it also means that attorneys can exercise considerable discretion in the pricing of their services.<sup>4</sup>*

10. Fixed price quotes provide consumers with certainty, however with most legal services clients are never quite sure of what the scope of legal services is *ex-ante* (though it is also true that lawyers may not know the way the matter will unfold and therefore what the scope of legal services will be). Where parties to a transaction do not have access to complete information concerning, for example, the supplier's cost *ex ante* – whether for a simple or complex matter – inefficient activity may arise *ex post*.<sup>5</sup>

<sup>2</sup> Cox, S.R, DeSerpa, A.C, and Canby, Jr, W.C, (Mar., 1982), *Consumer Information and the Pricing of Legal Services*, The Journal of Industrial Economics, Vol. 30, No. 3, pp 305-318

<sup>3</sup> Ibid, (March., 1982).

<sup>4</sup> Ibid, (March., 1982), p.306.

<sup>5</sup> Tirole, J. (1988), "The Theory of the Firm", section 1 in *The Theory of Industrial Organisation*, Vol.1, Chapter 2, North-Holland: New York

11. Disclosure requirements address information failure brought about by asymmetric information, which results in problems of moral hazard by creating the potential for rents<sup>6</sup> to be appropriated – in this case, by the lawyer, if the client is not fully informed.<sup>7</sup> Rent appropriation by lawyers might take the form of increasing costs or transferring work to more junior staff in the law practice where the original agreed price is no longer viable.
12. This moral hazard creates the potential for:
  - a) an increase in costs complaints by clients engaging lawyer services, leading to a waste of resources, and/or
  - b) clients becoming less willing to obtain lawyer services in the first place, as confidence in the pricing of legal services comes into question.
13. Costs disclosure requirements in the Uniform Law seek to protect clients of law practices by targeting information failure in the market for legal services. From the perspective of the community, costs disclosure seeks to address a point of market failure and direct legal resources to their best uses in the economy, promoting a more socially optimal level of legal services being provided for society.
14. In the following sections, we offer approaches for estimating the potential outcomes referred to in paragraph 12.

#### Impact of threshold changes on complaints – direct inefficiency costs

15. The prices that consumers pay for a routine legal service should be roughly the same, where routine matters are characterised by:
  - a) the skill variable in the production function consisting merely of certification to practice law, familiarity with basic legal procedures, and clerical efficiency
  - b) the service being broken down into a set of well-defined tasks, and
  - c) the quality of the service not being significantly variable either from the lawyer's or client's perspective.<sup>8</sup>
16. However, a study of legal services provided in Phoenix Arizona (with 243 respondents) by Cox et al found that:

*some variation in attorney fee quotations, even for exactly the same routine legal service, was expected, but the magnitude of fee variance we did find was unanticipated". The variance estimates we found for price paid were even more surprising given the rather modest informational needs of consumers of routine services. It is difficult to imagine, in fact, that such fee dispersion could exist unless consumers were almost totally ignorant of available market alternatives<sup>9</sup>*

17. In this respect we note that, despite being 'routine' matters, there were still 60 instances of cost complaints being made in Victoria in the last two financial years for amounts under the threshold of \$750, as shown in **Table 1**. The existence of costs complaints for even 'routine' matters (in which the costs are nonetheless highly variable according to research) suggests that we can assume that disclosure would contribute to at least some reduction in costs complaints for more expensive matters.

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<sup>6</sup> I.e. payments which are greater than and do not reflect productivity/services delivered

<sup>7</sup> Alston, L.J., and Gillespie, W. (1986), Resource Coordination and Transaction Costs: A Framework for Analysing the Firm/Market Boundary.

<sup>8</sup> Ibid, (Mar., 1982)

<sup>9</sup> Ibid, (Mar., 1982), p.312

**Table 1: No. of cost complaints – by amount – FY 2020/21 and 2021/22**

Amounts charged for legal services	FY	No. Complaints
below \$750	2020/21	47
	2021/22	13
below \$1500	2020/21	81
	2021/22	85
\$3000 or less	2020/21	132
	2021/22	130
\$5000 or less	2020/21	164
	2021/22	185

18. A central question when considering changes to disclosure thresholds is the degree to which the changes would result in increased complaints. That is, how sensitive are cost complaints to cost disclosure requirements?
19. In the UK the Solicitors Regulation Authority estimates that about 25% of all complaints dealt with by the Legal Ombudsman relate to costs.<sup>10</sup> Data from Victoria in the last two financial years, set out in **Table 1**, shows that for FY2021/22 total cost complaints of 164 represents around 23% of 728 total complaints.<sup>11</sup> However, for FY2020/21 total cost complaints of 185 represents around 32% of 574 total complaints.
20. What is more critical, however, is the *distribution* of cost complaints between thresholds. **Charts 1 and 2** clearly show that over both FY2021/22 and FY2020/21 most cost complaints occur between the lower \$750 and upper \$3,000, thresholds. We note that one third of respondents to a survey by the Legal Services Council noted that legal services between \$750 and \$3,000 accounted for more than half their practice, with another one third reporting that it accounted for 26% to 50% of their practice.<sup>12</sup>
21. Moreover, the \$750 to \$3,000 band appears to be most sensitive to cost complaints. Cost complaints within that band comprise 71.34% and 45.95% of all cost complaints in FY2020/21 and FY2021/22, respectively.

**Chart 1: Distribution of cost complaints with regards to cost of legal services FY 2020/21**

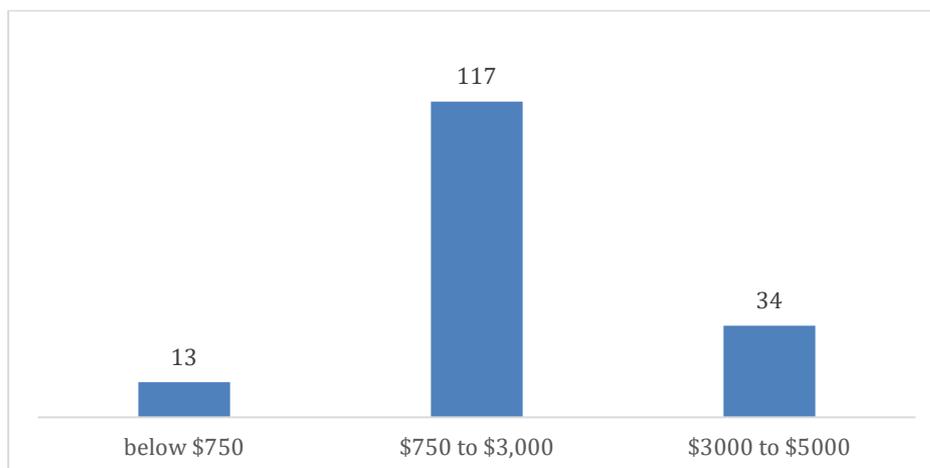


<sup>10</sup> See <https://www.sra.org.uk/solicitors/guidance/transparency-in-price-and-service/> (accessed 18 May 2023)

<sup>11</sup> Legal Services Council (May 2023) Consultation paper on costs disclosure thresholds

<sup>12</sup> *Ibid.*, (May 2023).

Chart 2: Distribution of cost complaints with regards to cost of legal services FY 2021/22



22. To calculate the potential increase in inefficiency costs of cost complaints from increasing thresholds for costs disclosure as proposed in Options L3 and U2, it is necessary to measure:
- the annual volume of standard costs disclosure forms
  - the annual volume of full costs disclosure forms
  - the percentage reduction in the annual volume of standard costs disclosure forms required due to an increase in the threshold from \$750 to \$1,500
  - the percentage reduction in the annual volume of full costs disclosure forms required due to an increase in the threshold from \$3,000 to \$5,000
  - the potential for rent seeking behaviour by legal practitioners where standard costs disclosure is no longer required
  - the potential for rent seeking behaviour by legal practitioners where full costs disclosure is no longer required
  - the hours involved for all parties involved in the complaint process including, clients, law practices and government agents, and
  - the hourly charge out rate for each of the parties involved in the complaint process including clients, law practices and government agents.

23. Increased inefficiency or loss of market surplus arising from cost complaints (due to changing thresholds) would be estimated as:

$$\text{Increase in cost of complaints} = [(S \times \gamma \times \varepsilon) + (F \times \delta \times \rho)] \times \theta \times \mu$$

Where:

- $S$  = the annual volume of standard costs disclosure forms
- $\gamma$  = the % reduction in the volume of standard cost disclosure forms required
- $\varepsilon$  = the likelihood of rent seeking behaviour where standard costs disclosure forms are no longer required
- $F$  = the annual volume of full costs disclosure forms
- $\delta$  = the % reduction in the volume of full cost disclosure forms required

- $\rho$  = the likelihood of rent seeking behaviour where full costs disclosure forms are no longer required
- $\theta$  = the average hours dedicated to the cost complaint process
- $\mu$  = the average hourly charge out rate (based on hourly charge out rates of legal practitioners, their clients, and government agents)

24. It can be assumed that complex matters involve greater uncertainty than simple matters and are harder for lawyers to accurately scope. They therefore involve a greater potential for rent seeking behaviour. The likelihood for rent seeking behaviour or hold up costs (i.e., transaction costs) comes from the investment required by both parties to an agreement which locks them into a bilateral monopoly.<sup>13</sup> The greater the complexity of matters the more investment is assumed to be made by both parties in the legal services agreement and therefore the greater the potential for hold up costs.

*These information, transaction, and enforcement costs generally may be expected to increase with the complexity of the legal service involved...[and]...the more complex the legal service involved, **the more pricing discretion attorneys will enjoy**, partly because of consumer information costs and partly because of the nature of the service rendered.<sup>14</sup>*

25. Therefore, it is assumed that the potential for rent seeking behaviour is greater in going from \$3,000 (the upper threshold) to \$5,000 than going from \$750 (the lower threshold) to \$1,500. Hence:

$$\rho > \varepsilon$$

#### Impact of threshold changes on consumer demand – indirect costs

26. This section of the submission focuses on unintended consequences of an increase in disclosure thresholds, in particular the likelihood that consumers will pursue alternatives to traditional legal advice, or alternatively drop out of the market completely.

#### Reduced legal practitioner services – substitution to DIY kits

27. Lawyers will lose business when prospective clients, faced with costs uncertainty/reduced transparency following an increase in costs disclosure thresholds, pursue alternative sources of legal advice.
28. In this respect, it should be noted that online legal services such as Bare Law and Ailira currently offer consumers will preparation assistance at a significantly cheaper price than most solicitors. The services Legal Vision, Sprint Law and LawPath all provide legal solutions for small businesses and are likely to take increasing chunks of that sector – with price transparency and certainty. Increased adoption of AI-enabled services also have the potential to further erode lawyers' market opportunities if they are unable to demonstrate their value to consumers.
29. Importantly, DIY legal kits are currently available in a wide range of areas (e.g., will kits, probate kits, separation kits, loan agreements, power of attorney, employment contracts, and commercial lease agreements) and are specifically aimed at consumers who want to save time and money, understand what they are dealing with and keep personal control.<sup>15</sup>

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<sup>13</sup> Rivers, G (October 1 2003) An Indirect Approach to the Identification and Measurement of Transaction Costs – refereed publication in Ng, Shi and Sun (editors) *The Economics of E-Commerce and Networking Decisions: Applications and Extensions of Inframarginal Analysis*, Palgrave Macmillan, UK.

<sup>14</sup> Cox, S.R, DeSerpa, A.C, and Canby, Jr, W.C, (Mar., 1982), *Consumer Information and the Pricing of Legal Services*, *The Journal of Industrial Economics*, Vol. 30, No. 3, pp 307-308.

<sup>15</sup> <https://www.legalkits.com.au/> (accessed 18 May 2023)

30. If the lower and upper costs disclosure thresholds were increased as proposed in Options L3 and U2, there is a real chance that some consumers who are concerned about a lack of certainty concerning costs will access DIY kits rather than legal advice, for simple matters no longer covered by costs disclosure requirements (i.e. matters between \$750 and \$1,500).
31. Although some clients will continue to bear the cost of acquiring information about potential legal costs from lawyers, they will only try to acquire information for standard matters up to \$1,500 and complex matters above \$3,000 where the incremental benefit of doing so is outweighed by the incremental cost. In most cases, however (particularly with simple matters between \$750 and \$1,500 and complex matters between \$3,000 and \$5,000), there will be some increase in consumers using DIY kits as the cost of acquiring information becomes higher than the kits themselves.
32. Given that the cost of some DIY kits (e.g., \$20 for a will kit) is low, there is a high probability in the case of simple matters that the cost of acquiring information about legal practitioner costs will be greater than the cost of the DIY kit itself. The cost of acquiring information will be determined by time spent getting access to information about legal practitioner costs, as well as levels of literacy needed to understand legal costs (i.e. to integrate the information). In the latter respect, we note that the consultation paper states that “44 per cent of Australians have levels of literacy that hinder their ability to complete complex forms required to access essential services”.<sup>16</sup>
33. To calculate the estimated potential value of substitution to DIY legal kits from increasing thresholds for costs disclosure it is necessary to measure:
- the annual volume of standard costs disclosure forms
  - the annual volume of full costs disclosure forms
  - the percentage reduction in the annual volume of standard costs disclosure forms required due to an increase in the threshold from \$750 to \$1,500
  - the percentage reduction in the annual volume of full costs disclosure forms required due to an increase in the threshold from \$3,000 to \$5,000
  - average time of acquiring cost information by clients for simple matters
  - average time of acquiring cost information by clients for complex matters
  - average opportunity cost of time for a client
  - average cost of DIY kit for simple matters
  - average cost of DIY kit for complex matters
  - average value of simple matters no longer supplied by legal practitioners, and
  - average value of complex matter no longer supplied by legal practitioners.

34. Loss of producer surplus (i.e., gains from trade not realised by legal practitioners) can be estimated in the following way:

$$\text{Loss of producer surplus} = \left[ \left( S \times \gamma \times \frac{\varphi \times \sigma}{k} \right) \times V_s + \left( F \times \delta \times \frac{\omega \times \sigma}{i} \right) \right] \times V_c$$

- S* = the annual volume of standard costs disclosure forms  
*γ* = the % reduction in the volume of standard cost disclosure forms required (going from \$750 to \$1,500)  
*F* = the annual volume of full costs disclosure forms

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<sup>16</sup> The Legal Services Council (May 2023) Consultation paper on costs disclosure thresholds, p 17.

$\delta$	= the % reduction in the volume of full cost disclosure forms required (going from \$3,000 to \$5,000)
$\frac{\varphi \times \sigma}{k}$	= ratio of the product of the average time of acquiring cost information for simple matters, $\varphi$ and average opportunity cost of time, $\sigma$ to the average value of DIY kits, $k$ , for simple matters
$\frac{\omega \times \sigma}{i}$	= ratio of the product of the average time of acquiring cost information for complex matters, $\omega$ and average opportunity cost of time, $\sigma$ to the average value of DIY kits for simple matters to the average value of DIY kits, $i$ for complex matters
$V_s$	= average value of simple matter not covered by legal practitioners
$V_c$	= average value of complex matter not covered by legal practitioners

35. There will be other unintended consequences where clients fail to receive the outcome from DIY legal kits that they expected, given the difficulty in understanding any hidden/unknown contingencies that may arise from legal matters over time, and noting the likely inexperience of clients in such legal matters. Therefore, it is not expected that the loss of surplus for legal practitioners will be balanced by a sufficient increase in surplus for consumers of such DIY kits.

Reduced legal practitioner services – consumers dropping out of the market

36. The demand for practitioner services can be described by the following function:

$$\text{Demand for practitioner services} = (-\alpha P_{\text{legalprac}} + \beta_1 P_{\text{Cert}} + \beta_2 P_{\text{Sub}} + \beta_3 I + \beta_4 \text{Pop} + \varepsilon)$$

Where:

$P_{\text{legalprac}}$	= The price of legal practitioner services
$P_{\text{Cert}}$	= certainty over the price of legal practitioner services
$P_{\text{Sub}}$	= the price of substitutes (e.g., will kits etc.)
$I$	= real income (purchasing power of consumers)
$\text{Pop}$	= population of consumers of legal services
$\varepsilon$	= unknown error term (white noise determinants of demand)
$\alpha$	= the own price elasticity (sensitivity) of demand, and
$\beta_1, \beta_2, \beta_3, \beta_4$	= the elasticity coefficients for other determinants, excluding price.

37. Having price certainty through thresholds promotes demand for practitioner services notwithstanding other factors that determine demand above. Therefore, another unintended consequence of changing thresholds is that some consumers, due to a reduction in price certainty, will drop out of the market for legal services completely to avoid bill shock. This will be a result of potential consumers attempting to alleviate bill shock, for simple matters between \$750 and \$1,500 and complex matters between \$3,000 and \$5,000. The level of contraction in the demand of practitioner services will depend on clients' sensitivity to the price certainty determinant,  $\beta_1$ .

38. The reduction in percentage change in demand for legal practitioner services is estimated as:

$$\% \text{ reduction in the demand for legal practitioner services} = (\beta_1 \times \gamma) + (\beta_1 \times \delta)$$

Where:

$\beta_1$	= the elasticity coefficient for price certainty
$\gamma$	= the % reduction in the volume of standard cost disclosure forms required (going from \$750 to \$1,500), and
$\delta$	= the % reduction in the volume of full cost disclosure forms required (going from \$3,000 to \$5,000).

Red tape burden and regulatory inefficiency of current thresholds

39. As discussed earlier, the desire to increase transparency and improve allocative efficiency in the market with costs disclosure requirements needs to be weighed up against the red tape cost on law practices (i.e., regulatory inefficiency costs). This has been used as a key argument for changing thresholds or simplifying requirements.<sup>17</sup>
40. The indicative costs of disclosure for a simple matter where a standard costs disclosure form can be used is estimated to be typically between \$86.30 and \$172.60 for 15 to 30 minutes of work (where paralegals or administrative staff are assumed to do half the work).<sup>18</sup> Some standard costs disclosure forms are also noted to result in some cases only 5 minutes of work and in other cases hours of work, however the magnitude of this remains unknown.<sup>19</sup> The estimate for direct red tape costs of threshold requirements,  $R$ , becomes:

$$R = (S \times hrs_S \times hrly\ cost_S) + (F \times hrs_F \times hrly\ cost_F)$$

Where:

- $S$  = the annual volume of standard costs disclosure forms  
 $F$  = the annual volume of full costs disclosure forms  
 $hrs_S$  = the hours required to complete a simple costs disclosure form  
 $hrs_F$  = the hours required to complete a full costs disclosure form  
 $hrly\ cost_S$  = average hourly cost of providing standard costs disclosure forms (\$345.20)  
 $hrly\ cost_F$  = average hourly cost of providing full costs disclosure forms (\$345.20<sup>20</sup>)

Current thresholds and equity impacts on small law practice

41. Threshold requirements and levels result in equity issues for small businesses<sup>21</sup>, in that the relative cost of providing information falls disproportionately on small businesses. This is a key argument to increase thresholds (i.e. increasing thresholds would reduce the red tape costs of disclosure requirements for legal practices, especially small ones).<sup>22</sup>
42. To measure the degree of inequity, the proportion of small law practices as a percentage of all law firms  $\tau$ , would need to be measured and compared against  $\alpha$ , the ratio of cost of preparing simple and complex costs disclosure forms for small to large law practices. This comparison will allow the determination of just *how disproportionate* costs are such that the ratio of small to large firms  $\tau$  is indeed less than  $\alpha$ . The formula for  $\alpha$  becomes:

$$\alpha = \frac{[(S_S \times hrs_S \times hrly\ cost_S) + (F_S \times hrs_F \times hrly\ cost_F)]}{[(S_L \times hrs_S \times hrly\ cost_S) + (F_L \times hrs_F \times hrly\ cost_F)]}$$

Where:

- $\alpha$  = the ratio of cost of preparing simple and complex costs disclosure forms for small to large firms  
 $S_S$  = the annual volume of standard costs disclosure forms for small firms  
 $S_L$  = the annual volume of standard costs disclosure forms for large firms  
 $F_S$  = the annual volume of full costs disclosure forms for small firms  
 $F_L$  = the annual volume of full costs disclosure forms for large firms

<sup>17</sup> Legal Services Council (May 2023) Consultation paper on costs disclosure thresholds

<sup>18</sup> Legal Services Council (May 2023) Consultation paper on costs disclosure thresholds

<sup>19</sup> Legal Services Council (May 2023) Consultation paper on costs disclosure thresholds

<sup>20</sup> Based on findings from consultation of the Legal Services Council review that full disclosure is the same amount of work for lawyers as standard form disclosure (see Legal Services Council (May 2023) Consultation paper on costs disclosure thresholds)

<sup>21</sup> According to the ABS these would be businesses with less than 20 employees and include non-employing businesses (see <https://www.abs.gov.au/ausstats/abs@.nsf/DOSSbyTopic/297DB51F08B97920CA256BD000281897?OpenDocument> (accessed 20 May 2023))

<sup>22</sup> Though it should be noted that the burden on small business may be justified, given that the clients of small firms are particularly likely to benefit from costs disclosure.

- $hrs_S$  = the hours required to complete a simple costs disclosure form
- $hrs_F$  = the hours required to complete a full costs disclosure form
- $hrly\ cost_S$  = average hourly cost of providing standard costs disclosure forms (\$345.20), and
- $hrly\ cost_F$  = average hourly cost of providing full costs disclosure forms (\$345.20)

#### Equity impacts of changing thresholds on low income/vulnerable clients

43. As discussed in paragraph 37, clients faced with the potential prospect of bill shock will drop out of the market with a change in lower and upper thresholds depending on the sensitivity of potential clients to the price certainty determinant of demand,  $\beta_1$ . However, the size of this coefficient will vary depending on the socioeconomic status of clients, with higher income and medium income clients likely to have lower sensitivity, and lower income clients likely to have a higher sensitivity, to price certainty. Measuring the equity impact on lower income clients requires distinguishing the sensitivity coefficient for price certainty between different groups. It would also require understanding the share of standard and full costs disclosure forms amongst the three groups, i.e. high, medium and low-income clients.
44. Looking at the percentage reduction in demand to the percentage share of forms received by different income groups can be used to estimate for which groups the burden of changing thresholds is likely to be greater. The following ratio can be estimated to discern equity impacts on different income groups:

$$T^y = \frac{(\beta_1^y \times \gamma) + (\beta_1^y \times \delta)}{H^y}$$

Where:

- $T^y$  = the ratio of the % reduction in demand for legal practitioner services to the share of total costs disclosure forms received by high/medium or low-income groups, y
- $\beta_1^y$  = the elasticity coefficient for price certainty for high/medium or low-income groups, y
- $\gamma$  = the % reduction in the volume of standard cost disclosure forms required (going from \$750 to \$1,500)
- $\delta$  = the % reduction in the volume of full cost disclosure forms required (going from \$3,000 to \$5,000)
- $(\beta_1^y \times \gamma) + (\beta_1^y \times \delta)$  = the % reduction in the demand for legal practitioner services for high/medium or low-income groups, y
- $H^y$  = the share of total costs disclosure forms received by high/medium or low-income groups, y

#### General comments

45. We make the following general comments in relation to the consultation paper:
  - a) Regarding the impact of price and cost increases on the cost of providing legal services (page 8) we reiterate that the costs of legal services are opaque and can vary markedly between traditional and more innovative firms. It is quite possible that costs can and should have fallen since 1997, given the productivity gains possible through better use of technology. The consumer price index is not the only measure that should be considered in how the cost of providing legal services has changed.
  - b) Page 11 states 'not all complaints which involve a costs issue are about disclosure'. This is correct, however, we note that our Root Causes of Costs Complaints analysis suggests that very often in a costs complaint, it is not clear what the client is getting for the costs estimated. That is, there may have been technical compliance with disclosure obligations, but the disclosure provided has not given a client a reasonable idea of what they are paying for.

- c) On page 12, it is suggested that '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'. In our view, this does not support an argument for no or reduced disclosure obligations; rather, it supports the argument for better disclosure focussing on what consumers need to know.
- d) Also on page 12, we do not consider that 'the legislative requirement that practitioners charge fair and reasonable fees, combined with an accessible regulator and resolution processes' is a substitute for disclosure obligations. These requirements exist in the legislation for different reasons. It is by far preferable for no dispute over costs to arise than for consumers to have dispute resolution mechanisms that they may or may not be equipped to utilize (or which may be illusory for certain cohorts).
- e) Ideally, we would support disclosure from \$0 (Option L1) with one simple, short and accessible disclosure form for most matters outlining potential legal costs and other matters of critical importance to consumers.

### Responses to Questions 3 – 6

- 46. Our view is that the standard costs disclosure forms could be improved. We suggest that changes to reflect a project management approach to the provision of legal services would be most useful. The forms could also be made more visually appealing, perhaps by incorporating the use of diagrams, and taking a user centred design approach to redrafting the forms that focuses on the primary audience for the information (i.e. potential clients). Supplementary guidance and tools to assist lawyers to categorise their existing cases, scope their work practices and price their services more accurately would also improve their ability to provide useful disclosure.
- 47. In response to Question 4:
  - a) In principle, we do not oppose including trustees in bankruptcy, overseas-registered foreign practices, corporations whose shares (or a majority of whose shares) are held beneficially for the Commonwealth or a State or Territory, or large charitable and not-for-profit organisations from being included in the list of commercial or government clients to whom costs disclosure provisions do not apply. However, the consultation paper does not contain sufficient information about the rationale for such changes to assist us in forming a view. Therefore, we would appreciate further information about these categories before forming a final position.
  - b) Subject to further supporting information being provided, we do not support the inclusion of credit licensees being included in the list of commercial or government clients. Credit licensees can include owners of small business, e.g. mortgage brokers, and it is not clear why such individuals should not benefit from disclosure.
  - c) We do not support including high net worth individuals in the list of commercial and government clients. The monetary thresholds set out in the **Corporations Act 2001** have been in place for over 20 years, and it can no longer be assumed that a client with net assets of at least \$2.5 million is sophisticated, noting that such assets may include the family home and superannuation. Furthermore, a person may have high net worth but still be in need of protection due to a specific vulnerability (e.g. poor physical or mental health, cognitive incapacity, age). Even in the absence of vulnerability it is our view that individual consumers deserve disclosure, as a person's financial assets do not necessarily reflect their level of sophistication.
- 48. We suggest that current guidelines on costs estimates be reviewed to reflect the findings of the Monash Business School and Victorian Law Foundation's recent research for VLSB+C, which will be published shortly. Preliminary findings from that survey suggest that amendments are needed to clarify whether disclosure should be based on a likely estimate or 'worst case scenario'. A copy of the interim report is attached for your consideration in confidence (**Attachment A**).
- 49. In relation to Question 5, we would support either option R1 (improved guidance for barristers on record-keeping) or R2 (new rule for barristers, requiring retention of disclosure documents for seven years in direct access matters).

Conclusion

50. We thank the Legal Services Council for the opportunity to comment on the consultation paper and hope that our comments will be taken into consideration. [REDACTED] Manager Policy and Regulatory Strategy, would be pleased to discuss any aspect of this submission in further detail, or provide additional information if required. [REDACTED] can be contacted by email at [REDACTED] or by telephone on [REDACTED].

Yours faithfully



Fiona McLeay  
**Board CEO & Commissioner**