



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: heather.moore@legalservicescouncil.org.au
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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 Lucy Kelley, Policy Lawyer, at lkelly@nswbar.asn.au.

Yours sincerely,



Gabrielle Bashir SC

President

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