

Pricing Practice

Exploring Costs in Victorian Legal Services

A Report for the Victorian Legal Services Board + commissioner

Executive Summary

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The office of Victoria Law Foundation is on the traditional lands of the Wurundjeri people of the Kulin Nation. We acknowledge their history, culture and Elders past and present.

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Executive Summary

Lawyers' matter scoping and billing practices are central to the cost and market for legal services. As a result, they have a direct relationship with access to justice. Lawyer communication with clients about these practices is a major driver of client understanding and agency in the service relationship. This communication is also an important aspect of the quality of legal services and has a direct bearing on consumer experience. Nevertheless, the issue of costs communications, the efficacy of current regulatory requirements in respect of costs, and the influence of pricing models on the accessibility of legal services remains an under-developed area of research.

In light of this, this exploratory research was commissioned by the Victorian Legal Services Board + Commissioner (VLSB+C) to examine the factors that influence the pricing of legal services, how practitioners communicate with clients regarding anticipated costs, and how service costs and cost communications affect the lawyer-client relationship. This study sheds light on these issues through qualitative analysis of interviews with 17 practitioners working in the area of wills and estates, and family law. These practitioners worked across metropolitan and regional settings, within large firms and as sole practitioners, and employed fixed fee, value, retainer, and hourly rate pricing models. This Summary outlines the principal findings and recommendations that emerged from this project.

Pricing models and billing

Time remains a central measure for price setting, even among practitioners who offer fixed fees and value pricing. As a result, fixed fee services are often constrained to matters where it is possible to predict the time involved in completing a matter. The centrality of time to pricing also limits the potential for clients to negotiate on price.

- Practitioners used a variety of pricing models to cost their legal services, including charging according to hourly rates, the Practitioner Remuneration Order or Court Scales, charging fixed fees for specific packages of legal services, and charging according to other models such as value-based pricing or subscription-based retainers.
- Despite some evidence of a shift away from hourly rates, the basis on which prices are set remains largely rooted in practitioners' time. As such, factors, which extend the length of time a matter takes, play into pricing decisions. These include the internal circumstances of a case and the relationship between the parties concerned, as well as external factors beyond a practitioner's control, such as whether the other side is represented, and the approach taken by that representative.

- Among those interviewed, fixed fee models were typically reserved for transactional matters where practitioners could be confident in the accuracy of their initial estimation of the likely time and effort involved with resolving a matter. Hourly rate models were typically used for matters that were less easily contained or contingent on other parties or circumstances, such as matters involving negotiations or litigation.
- With time remaining a central factor in the quantification of costs for those working under hourly rates and fixed fees, there is little scope for clients to negotiate on price, save where it results in work being excluded from the scope of a matter.
- The requirement to inform clients of the right to negotiate appeared largely hollow in practice. Practitioners are almost always resistant to negotiation efforts and indeed, in many cases set out that they do not negotiate. This is true even where their cost disclosure says otherwise.

Practitioners identified several barriers to adopting alternative pricing models. Some of these barriers appeared to be predicated on a misunderstanding of the way in which different models operated and what they required from practitioners.

- Where value pricing had been trialled by current hourly rate and fixed fee practitioners, it had been directed at clients described as 'high value'. This, and other concerns expressed in respect of value pricing, may point to a misunderstanding of the way in which the value pricing model might operate.
- Some hourly rate practitioners did not have a thorough understanding of how fixed fee pricing should operate. Many rejected it on the basis that a 'one size fits all' approach to pricing services is unrealistic and unviable, despite fixed fee practitioners in the sample rarely taking this approach themselves.

Practitioners adopted a range of strategies to prevent bill-shock and support clients experiencing financial difficulty. However, the range of available billing and pricing options were constrained due to practitioners' aversions to assuming financial risk, uncertainty as to when a bill can be rendered, and their willingness to adopt alternative approaches.

- Many practitioners operated a trust account as a means of collecting payment from clients, but there were a range of alternative payment arrangements instituted, particularly for clients who presented with, or later faced, financial difficulties.
- Many practitioners undertook regular billing of clients as a means of securing income and to reduce the risk of 'bill-shock' and potential cost disputes at the end of a matter. Itemisation of bills was common, although the level of detail within these bills varied.

Choosing a lawyer

Practitioners observed that clients lack the capacity to adequately assess the value of services in light of their costs, and often presented with misconceptions as to the likely cost of services.

- Practitioners reported that the pricing expectations of clients' differed depending on their needs, circumstances, and prior experience of engaging with professional services. Most clients presented with inaccurate expectations about how much legal services cost and how matters may be priced and charged. Due to the nature of legal services as credence goods (a good in which the utility is difficult or impossible for the consumer to evaluate even after consumption) clients face significant challenges assessing the value of services.
- Some practitioners observed that clients often relied on heuristics when deciding between service providers. This included assuming high cost or personal rapport with a practitioner was a guarantee of quality, or seeking the lowest cost service to the exclusion of other considerations.

Although practitioners reported some clients 'auditioning' them as part of an effort to shop-around, this was relatively uncommon. Indeed, many practitioners used the first meeting or the stages prior to it, to perform their own screening/auditioning processes.

- First meetings served as a key stage, after which clients decided whether to proceed with instruction, and lawyers determined whether particular clients were desirable from a business perspective.
- In most cases, lawyers were hesitant to pursue business from clients who were particularly price-sensitive, due to a perceived risk that cost disputes were more likely to arise. As such, practitioners employed several 'filtering' mechanisms – such as charging for the first meeting – to weed out clients who were either incapable or unwilling to engage their services at a certain price.

Estimating and communicating anticipated costs

Practitioners took different approaches to scoping an 'estimate of total legal costs' as required under the Legal Profession Uniform Law Act 2014 (Vic) ('LPUL'). Drawing on the LPUL guidance, practitioners in the sample operated under the assumption that this estimate should constitute a 'single figure'. However, the scope of this 'single figure' and the contingencies that were factored in, varied by practitioner. This can result in highly unrealistic 'worst case scenario' estimates. This variation also limits the ability of clients to make price comparisons across providers.

- In practice, the scope of an estimate varied from client to client and practitioner to practitioner. Some practitioners produced a figure that represented costs to trial, some defined a 'matter' only in relation to the immediate steps to be taken, others chose an approach somewhere between the two.
- This variation was magnified by the contingencies or adverse events that a practitioner factored into their 'single figure' estimates, and whether they assumed a best-case or worst-case scenario. Often these approaches were driven by a practitioner's understanding of what the LPUL required of them, though strategic motivations were also reported.
- There is a need for greater clarity and possibly, standardisation of what is expected of practitioners. At present, it does not appear that the 'single figure' estimate simplifies costs for clients, but rather achieves the opposite. Further, depending on how a 'single figure' is calculated and the extent to which it includes costs for risks that are unlikely to eventuate, it may serve to dissuade some from pursuing their rights, due to the fear of costs.

Efforts to contextualise a 'single figure' estimate through the provision of cost breakdowns risk increasing the cognitive burden for clients, particularly given that many practitioners already feel that clients do not engage fully with cost disclosure documents given their length and complexity.

- 'Single figure' estimates were usually accompanied (in verbal or written format) by a price range which reflected a more realistic assessment of the scale of costs, or provided a breakdown of costs for different stages. The simultaneous use of ranges and single figures arguably increases the cognitive burden for clients, and detracts from the intention of the 'single figure' estimate as the headline cost estimate.
- This cognitive burden was widely viewed as being exacerbated by the additional information that practitioners provide in their cost disclosures to appropriately caveat and condition their own costs. For this reason, practitioners observed accessibility and engagement challenges in relation to disclosure. At the same time, there was reluctance to remove this content, for fear that it may lead clients to misinterpret a 'single figure' as a fixed quote for services.

Controlling, monitoring and updating costs

Practitioners were aware of the requirement to limit actions which might increase legal costs and were often proactive in attempting to mitigate these risks up-front.

- When initially scoping a matter, practitioners often factored in a range of possible risks that if they were to come to bear, would lead to increased costs for the client.
- Practitioners also took a range of strategies to control the costs incurred by clients during their matter. In the context of negotiation/litigation, this included pushing a matter to the next stage where the other side was not seen to be engaging on a bona fide basis.
- At the same time, efforts to curtail costs were capable of being frustrated by external factors such as inexperienced opposing practitioners, uncooperative parties on the other side, emotional responses from the client themselves, or changes to court requirements. These factors were seen as increasing costs in an unanticipated or uncontrollable way.

For many practitioners, costs were a continued part of any strategic decision-making process and were a matter of ongoing discussion with clients. The accuracy of the 'single figure' estimate was actively monitored throughout, with updated disclosures where necessary. However, this necessity varied based on the nature of the 'single figure' estimate provided.

- Many practitioners incorporated cost-benefit analyses into decisions about whether to take particular actions to progress a matter and raised these considerations with clients.
- Practitioners consistently monitored the accuracy of the original estimate provided at the outset of a matter, with some relying on automated reminder systems integrated into client management software, and others on manual systems involving a periodic review of the files.
- There remains uncertainty regarding the effectiveness of the updated disclosures requirement, given the propensity of some practitioners to give higher, 'worst-case scenario' estimates from the outset.
- There is a lack of consistency regarding the methods used to communicate updated cost disclosures, and it remains unclear as to whether all methods are compliant with the LPUL requirements.

Conclusions and recommendations

The Efficacy of the LPUL Requirements

The requirement to provide a cost estimate was seen by practitioners as an important catalyst for ensuring that upfront conversations with clients about costs took place. Practitioners viewed this requirement favourably, and considered that it had improved cost transparency in the legal services sector.

- There was a general view that being able to provide a 'range', as under the previous regime, was preferable to having to provide a single figure.
- The LPUL requirements, whilst onerous insofar as they prompted a firm to introduce new practice management systems and placed greater emphasis on producing an initial estimate of costs and updating that estimate, were not perceived as substantially different to the existing requirement to supply cost information to the courts.

The LPUL requirement to provide an 'estimate of total legal costs' (AKA a 'single figure estimate') may not be operating to enhance costs transparency in the manner intended.

- The requirement to provide a 'single figure' estimate, which considers 'all the circumstances and the most likely outcome', enabled practitioners to adopt different approaches when scoping litigation. This has the effect of reducing rather than enhancing transparency. This inconsistency – to the extent that it exists beyond our sample – is likely to impair clients' ability to engage in price comparisons.
- For negotiation/litigation matters where hourly rates are used, it may be more informative for clients to be provided with an estimated minimum and maximum expenditure for each stage of a matter through to litigation. This might include standardised conditions such as: optimistic (contingencies not included), realistic (likely contingencies included), and conservative (worst-case scenario) as well as standardised inclusions/exclusions for each of the foregoing (**Recommendation 1**). While this may enhance the ability of clients to engage in cost comparisons across providers, we note that such a change would impose an increased administrative burden on practitioners, and this needs to be weighed against the fact that many clients appear not to read cost disclosures.
- Given the requirement to submit a schedule of costs to the courts, more could be done to explore how this data could be used to develop an evidence-informed understanding of anticipated and actual costs from the weight of information held by courts (**Recommendation 2**).

The obligation under the LPUL to minimise a client incurring unnecessary costs should be considered in parallel with courts' case management duties and powers.

- Practitioners generally saw their obligations as being focused on completing work efficiently and providing sound advice to clients that made clear the cost implications of certain decisions. Cost discussions were intricately interlinked with strategic discussions with clients about the progress of their case.
- Practitioners also recognised that courts play an important role in the cost control processes, however there was a general view that courts did not use their powers effectively in this regard.
- There is a need to consider how the LPUL requirements dovetail with the courts' case management duties (**Recommendation 3**).

The form in which some practitioners provide updated cost disclosures may not comply with the LPUL requirements. Further, the approaches taken to producing a 'single figure estimate' may obviate the need for updated cost disclosures.

- Some practitioners included updated estimates alongside the regular bills that they issued to clients, although it is not clear whether these were accompanied by the required wording. Given this, there may be benefit in clarifying and reminding practitioners as to the form that updated cost disclosures must take (**Recommendation 4**) and/or further investigating the extent of any non-compliance in this space (**Recommendation 5**).
- The fact that some lawyers may over-scope the 'single figure' at the outset of a case may undermine the requirement to provide an updated disclosure. It is necessary to address this reality as part of any change emerging from recommendations 1 and 2 above (**Recommendation 6**).

The client's right to a negotiated cost agreement is not realised in practice.

- At present it is not clear whether the requirement to include a statement on negotiation – as set out by the LPUL – is intended to encourage more competitive pricing in legal services, or whether it is an effort to encourage clients to exercise agency over the selection of services.
- If the latter, it may be more appropriate for this entitlement to be articulated explicitly, rather than couching it within 'a right to negotiate', and further research to explore how this entitlement may be operationalised in practice, would be beneficial (**Recommendation 7**).

Improving Support for Legal Practitioners

It is unclear how reliable fixed fees are in practice.

- Practitioners offering fixed fees reserved the right to apply and recover additional costs as set out in relevant cost disclosure and agreement documents. Among those interviewed, this right was only exercised where the nature of the work had clearly changed. However, some practitioners in the sample raised anecdotal evidence of fixed fees being used by practitioners to induce clients into instructing them when they had no intention of fixing the fee.
- To the extent that this practice is widespread, it undermines cost transparency and as such is an issue that warrants continued monitoring/further research (**Recommendation 8**).

There remain misconceptions regarding what various pricing models require of practitioners and the client groups for which they are most appropriate.

- There is merit in further exploring how value-pricing is operating in practice, as well as the segment of the market it is currently serving, with a view to identifying barriers to adoption (**Recommendation 9**).
- Concerns regarding the indeterminate scope of matters presents a barrier to the adoption of fixed fee pricing. Some practitioners operated under the assumption that a fixed fee required set prices for certain types of work, rather than operating as a price-cap on a bespoke-priced matter. This coupled with misconceptions regarding elements of value pricing, suggest that practitioners would benefit from greater clarity as to the operation of these pricing models (**Recommendation 10**).

Practitioners produce their own written cost disclosures and cost agreements which can be complex and difficult for clients to understand.

- Whilst some practitioners provided a breakdown of the scale of likely costs for each stage of a matter (particularly litigation), in addition to a 'single figure' estimate, this varied according to the approach that a practitioner took to scoping a matter.
- Practitioners expressed concern that despite the importance of the document(s), clients do not read them, or where they do, they do not take note of specific components.
- While some individual practitioners took innovative approaches to talking clients through these documents, using visual tools, and employing 'touchpoints' to reiterate key information, this practice is the exception rather than the norm. Other practitioners actively encouraged clients to disregard parts of their agreement and focus on the price ranges they provided verbally, or in writing, in the form of cost breakdowns.

- Practitioners questioned whether all the prescribed information for cost disclosure documents was necessary, and whether flexibility could be introduced to enable them to provide information to a client in other ways. Practitioners were hesitant about providing less information, due to fears of non-compliance with the LPUL, or exposing themselves to cost disputes further down the line.
- Further guidance for practitioners and further research directed at enhancing the design of exemplar cost agreements and disclosures that prioritise client comprehension, would be beneficial (**Recommendation 11**).

Improving Public Capability to Evaluate Legal Costs

For clients, making an accurate assessment of what constitutes value for money and/or being able to meaningfully compare fees remains extremely difficult.

- Soliciting prices from more than one potential supplier is time and (potentially) cost intensive for consumers who must have multiple initial consultations with different practitioners to gather price information. This may impede efforts to stimulate competition in the market for legal services.
- Practitioners observed that most clients presented with an inaccurate understanding of how legal fees are costed and unrealistic expectations of the totality of costs.

Given the complexity associated with comparing credence goods across providers, it may be less important to promote price competition and more important to ensure that irrespective of what services cost, they meet minimum levels of quality.

- This reinforces the continuation of independent mechanisms that assist clients to evaluate the quality of the product they are getting, as well as further investigation into which tools will assist clients to compare the more opaque dimensions of competence, capacity, experience, and trustworthiness across service providers (**Recommendation 12**).

Additional public legal education information may help clients to better understand the cost information supplied to them.

- Appendix A sets out advice drawn from discussions with practitioners that could be integrated into VLSB+C's existing Public Legal Education material (**Recommendation 13**).

General Observations of Good Practice

The study revealed several instances of good practice directed at enhancing transparency and assisting clients to stay abreast of cost accruals. These included:

- Regular billing cycles as a means by which to prevent bill-shock and keep clients informed as to how fees are accruing against the single total figure estimate that they are given.
- Raising the matter of costs directly with a client at the initial interview, clarifying exclusions and inclusions associated with a particular fixed fee matter or 'single figure' estimate, and providing price breakdowns in respect of complex or multistage work.
- Setting clear boundaries to help clients understand the professional parameters of the service being provided.
- The adoption of digital tools designed to regularly track billing against the 'single figure' estimate supplied.

These approaches may be suitable to include within the good practice guidance material produced by stakeholders (**Recommendation 14**).

Gaps in the Knowledge Base and Avenues for Future Research

In addition to the proposals for research set out in the recommendations above, further research to examine the issue of pricing from the client perspective and beyond the areas of wills and estates and family law is needed. Research of this nature will help regulators achieve a fuller appreciation of the factors that affect costs and consumers' understanding of legal costs (**Recommendation 15**).

