Victorian Legal Services
BOARD + COMMISSIONER

Review of Lawyers' Practising Certificate Fees

Discussion Paper

Board ABN 82 518 945 610 Commissioner ABN 66 489 344 310

How to respond to this discussion paper?

This discussion paper has been prepared to assist any person interested in making comments on the potential options currently under consideration by the Board. It presents analysis and a range of options in a similar style to a regulatory impact statement (RIS), however, without a preferred option.

Public comments and submissions are now invited in response to the discussion paper. All submissions will be treated as public documents and published on the Victorian Legal Services Board and Commissioner (VLSB+C) website.

All written comments and submissions will be considered by the Board in the development of a preferred option and the accompanying RIS which is scheduled to be released in mid-2017.

Comments and submissions should be made in writing by no later than 5pm on 31 March 2017 to:

Practising Certificate Fees Discussion Paper
Victorian Legal Services Board and Commissioner
GPO Box 492
Melbourne Vic 3000

Or email: pcfeesris@lsbc.vic.gov.au

Overview

Why are fees for practising certificates being reviewed?

The *Legal Profession (Practising Certificate Fees) Regulations* 2012 are due to sunset on 30 June 2017. These Regulations set fees for practising certificates and have continued to operate despite the repeal of the *Legal Profession Act* 2004 by virtue of the *Legal Profession Uniform Law Application (Savings and Transitional) Regulations* 2015.

New Regulations need to be made under the *Legal Profession Uniform Law Application Act* 2014 (the Act) to ensure that the Victorian Legal Services Board (the Board) can continue to charge fees for practising certificates for the 2017-18 financial year and beyond.

What is the Board's role in recommending fees for practising certificates?

Under section 156(2) of the Act, regulations setting fees are made on the recommendation of the Board. In making a recommendation the Board must take into account:

- the costs of regulating different classes of legal practitioners; and
- any representations made to the Board by a local professional association regarding appropriate levels of fees for classes of Australian legal practitioners whose home jurisdiction is Victoria and who are members of that association.

In making any recommendations, the Board must set fees to recover the annual cost of legal regulation ($21 million) in a way that shares the costs equitably between the users of the system without requiring any contribution from consolidated revenue or from people who do not use legal services.

At this point, the Board has not made a decision on fee levels and will not do so until the review has concluded. As part of the review process and prior to making a formal recommendation, the Board will:

- review submissions to this discussion paper;
- develop and release a certified regulatory impact statement (RIS); and
- review submissions to the RIS following the conclusion of the mandated public consultation period as required by the *Subordinate Legislation Act* 1994 (Subordinate Legislation Act).

The Board is required to signal a preferred option for the purposes of consultation and examine the impacts of a preferred option and alternative options through the RIS. The RIS must be released for a mandatory public consultation period of at least 28 days. The Board's formal recommendation can only be made after the public consultation period concludes and the Board has considered all the feedback from submissions received.

What factors must the Board consider in recommending new fees?

In recommending new practising certificate fees, the Board must ensure that fee settings comply with the principles outlined in the Government's Cost Recovery Guidelines.[1] If the Board recommends new fee settings that do not comply, the Office of the Commissioner for Better Regulation (OCBR) will not certify the RIS. Certification of the RIS is an important step in the fee setting process as it signals to the public that the analysis underpinning the proposed fee structure is sound and in line with Government policy.

[1] The Department of Treasury and Finance, *Cost Recovery Guidelines*, January 2013 - incorporating the information formerly published in the *Guidelines for Setting Fees and User-Charges Imposed by Departments and Central Government Agencies*.

Therefore an overarching consideration of the Board is to ensure that the costs of regulating the legal profession can continue to be recovered from those who benefit from or give rise to the need for regulation without drawing on consolidated revenue.

In addition, the Board must also have regard for other principles outlined in the Government's Cost Recovery Guidelines in setting fees, including to:

- ensure the costs of legal regulation are efficient;
- ensure that the costs incurred in regulating the legal profession can continue to be recovered from the users of the system (i.e. legal practitioners and their clients) in an equitable way and one which avoids cross-subsidisation;
- ensure that the fees do not create barriers to the uptake of certain practising certificates which may lead to increased regulatory risks or unintended social outcomes. For example, barriers to entry include instances where legal practitioners are deterred from practising law or discouraged from taking out certain types of practising certificates;
- minimise the impacts on small business by ensuring sole practitioners and small law firms are not disproportionately affected by the impacts of the fees; and
- ensure that the framework for cost recovery is reliable by avoiding over-reliance on fluctuating revenue streams.

What is a regulatory impact statement?

The requirements of the Subordinate Legislation Act and the Government's approach to cost recovery and public consultation - as set out in the Victorian Guide to Regulation[2] and the aforementioned Cost Recovery Guidelines - must be followed in developing new regulations. Any regulations that will impose cumulative costs on the legal profession and their clients of more than $2 million per annum require a RIS.

The RIS process provides an opportunity to comment on proposed regulations before they are finalised. Public input provides valuable information and perspectives. The formal consultation process also enables feedback to be obtained from people who consider they are not represented by any of the professional bodies. This may include lawyers who are not members of a particular professional association and consumers of legal services who may be directly or indirectly affected by the fees that are set for practising certificates.

A RIS will be developed for the new fees and all preliminary feedback received to date, including feedback resulting from this discussion paper, will be considered in the development of the RIS. In addition to vetting a RIS for compliance with the Victorian Guide to Regulation and the Cost Recovery Guidelines, OCBR also assesses the standard and appropriateness of the analysis presented before determining if certification is warranted.

How are the costs of legal regulation currently funded?

The cost of regulating the legal profession is fully recovered from users of the system: legal practitioners and their clients. There is no contribution from the taxpayer through government appropriations, with the costs split between revenue from fees (the fee stream) and revenue from other sources into the Public Purpose Fund (PPF), primarily interest from clients' money held in solicitors' trust accounts (the interest stream).

Currently, the annual cost of legal regulation is $21 million: the fee stream contributes $7.6 million (36 per cent) to these costs with the interest stream contributing the remaining 64 per cent of funding.

[2] The Department of Treasury and Finance, *Victorian Guide to Regulation,* December 2014.

Fees are set under the following tiered structure:

- $509 for a practising certificate with authorisation to receive trust money (trust authorisation); and
- $344 for a practising certificate without trust authorisation.

There is no charge for volunteer practising certificates under the Act.

How will fees be set for the 2017-18 financial year?

It is expected that interim regulations will be made to allow the current fee structure to continue to apply to practising certificates issued for the 2017-18 financial year. The fees will be the current amount plus any annual increase that is set by the Treasurer and automatically applied to all government fees and charges.

How will fees be set for the 2018-19 financial year?

New regulations will need to be developed to set fees for the 2018-19 financial year and beyond. The release of this discussion paper is part of a consultation process prior to the Board recommending new fees through a RIS which will provide a further opportunity for consultation and comment.

As stated earlier, under the Cost Recovery Guidelines, those who benefit from regulation or give rise to it should make an equitable contribution towards the cost of that regulation. Two key groups of beneficiaries and cost recovery streams have been identified:

- legal practitioners and their clients, who contribute through the fee stream (as part of this discussion paper your feedback is sought on the extent to which legal practitioners pass through those costs to their clients); and
- clients with money held in trust (a subset of all clients) who make an additional contribution commensurate with their level of risk through the interest stream (i.e. clients' contribution through foregone interest increases in proportion with the material loss they would suffer if their legal practitioner proved to be dishonest or incompetent).[3]

To date the Board has been considering four options which are as follows:

- Option 1: 100 per cent recovery of the cost of legal regulation from the fee stream employing the existing tiered fee structure which means a higher fee would apply for legal practitioners with trust authorisation when compared to the fee payable by those without trust authorisation;
- Option 2: 100 per cent recovery of the cost of legal regulation from the fee stream using a single fee which would apply to all legal practitioners;
- Option 3: 50 per cent recovery of the cost of legal regulation from the fee stream employing the existing tiered fee structure with the remaining 50 per cent of the cost to be funded from interest foregone by clients who deposit money into trust accounts through the interest stream;
- Option 4: 50 per cent recovery of the cost of legal regulation from the fee stream by way of a single fee which would apply to all legal practitioners with the remaining 50 per cent of the cost to be funded from the interest stream.

Note: while VLSB+C data indicates that the cost of regulating practitioners with trust authorisation exceeds those without it, it does not conclusively reveal systematic variations in cost by other factors.

[3] A third cost-recovery stream includes a relatively small amount of revenue collected from law practices that are the subject of an external intervention. These practices are obliged to pay the costs associated with the external intervention process; however, in practice they rarely fulfil this obligation, as typically law practices subject to external interventions are financially insolvent or do not have the means to pay the full costs.

The problem with the current fees

When the current fees were set in 2012, the cost base was set narrowly and only included the costs of practitioner services and complaints handling. A higher fee for practising certificates with trust authorisation was set in recognition that there are a large number of complaints against practitioners with trust accounts. Since that time, the Government released new Cost Recovery Guidelines in 2013 and remade the Victorian Guide to Regulation. These new and revised guidelines make it clear that the cost base for determining the cost of regulating the legal profession in Victoria should include all regulatory costs, not just the costs incurred in issuing practising certificates and addressing complaints.

In addition, as the interest stream pays for 64 per cent of the cost of regulation, clients who place money in trust effectively cross-subsidise other beneficiaries of the regulation and those who give rise to it.

The 'base case'

As it is a requirement of a RIS, this discussion paper also considers the 'base case', which is the position if no regulations are made. If no regulations are made, the fees will expire and 100 per cent of the costs of regulation will be recovered from the interest stream. This approach is not considered as a viable option for the following reasons:

- it is not equitable as it would create 'non payers' in the system, as consumers who place their money in trust would be cross subsidising other beneficiaries of the system: practitioners and all other consumers of legal services;
- the high reliance on the interest stream would leave the system vulnerable to revenue downturns through unfavourable interest rate conditions; and
- it would also have the indirect effect of diminishing the funds available for other programs and activities that are currently reliant on funding from the PPF, including Victoria Legal Aid.

Table 1: Comparison of current fees and options

Practising certificate type	Current fee	Option 1 (100% from fees – tiered approach)	Option 2 (100% from fees – single fee)	Option 3 (50/50 equal mix – tiered approach)	Option 4 (50/50 equal mix – single fee)
Without trust authorisation	$344	$913	$1,033	$456	$517
With trust authorisation	$509	$1,623	$1,033	$811	$517
Total revenue (from fee stream)	$7.6 million	$21 million	$21 million	$10.5 million	$10.5 million

Specific stakeholder questions

In addition to inviting public comments in general, the Board is particularly interested in stakeholder feedback regarding:

- the benefits of the current approach in comparison to a single fee;
- whether different options should be developed which differentiate between fees based on lawyer type (or other category);
- the extent to which practitioners pass the costs of practising certificate fees on to their clients;
- the likely effect on practitioner and client behaviour of changes in these costs; and
- the appropriate level of contribution that should be made by the fee and interest streams.

Specific consultation questions have been included throughout this discussion paper (see Appendix 1 for a full list).

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1 About this discussion paper

Section 156(1)(b) of the *Legal Profession Uniform Law Application Act* 2014 (the Act) states that the Governor in Council may make regulations prescribing fees for Australian practising certificates.

The *Legal Profession (Practising Certificate Fees) Regulations* 2012 are due to sunset on 30 June 2017. These Regulations have continued to operate despite the repeal of the *Legal Profession Act* 2004 by virtue of the *Legal Profession Uniform Law Application (Savings and Transitional) Regulations* 2015.

Under section 156(2) of the Act, regulations setting fees are made on the recommendation of the Board. In making a recommendation, section 156(3) of the Act states that the Board must take into account:

- the costs of regulating different classes of legal practitioners; and
- any representations made to the Board by a local professional association regarding appropriate levels of fees for classes of Australian legal practitioners whose home jurisdiction is Victoria and who are members of that association.

It is proposed that the current practising certificate fees be retained for another 12 months to enable further consultation to occur. Therefore, this discussion paper presents options for setting fees for the 2018-19 financial year and beyond. In assessing these options and reviewing the existing arrangements, the paper adheres to the requirements of a RIS – including complying with the Government's approach to regulation and cost recovery – with the exception that a preferred option is not included.

A RIS – which will be prepared following the Board's review of submissions to this discussion paper - is required for any regulations that will impose cumulative costs of more than $2 million per annum. The RIS formally assesses the proposed regulations against the requirements in the Subordinate Legislation Act and the Victorian Guide to Regulation. As required under the Subordinate Legislation Act, a RIS must:

- describe the problem to be addressed by the proposed regulations (that is the need for practising certificate fees);
- set out the objectives of the proposed regulations;
- explain the effects of the proposed regulations and outline alternative approaches which would achieve the same objectives;
- assess the costs and benefits of the proposed regulations and the alternative approaches; and
- detail planned and completed consultation processes.

The Board welcomes feedback on the options and impact assessment detailed in this discussion paper with a view to using the feedback received in the development of a RIS. Stakeholders are encouraged to assess the options presented and provide comments on the merits of the options. The Board also encourages proposals for alternative options for setting fees including an analysis of why an alternative option should be considered.

2 Consultation

In September 2016, the Board commenced consultation on the setting of new practising certificate fees by inviting comment from the following professional associations:

- the Law Institute of Victoria (LIV);
- Victorian Bar (the Bar);
- Association of Corporate Counsel Australia (ACC Australia); and
- the Federation of Community Legal Centres (FCLC).

Feedback was sought from these professional associations on a number of preliminary fee options including settings that would recover 100 per cent of the costs from fees. In line with the Attorney-General's expectations, the professional associations were specifically asked for feedback about the impacts of new practising certificate fees on small law practices in Victoria.

In October 2016, additional feedback was sought from the 16 law associations formally connected with the LIV, in particular to gain further information about the impacts of new practising certificate fees on small law practices and their clients.

Formal and informal preliminary feedback received by the Board is summarised below:

- the FCLC expressed support for a greater amount of the costs of regulation being funded from fees but were concerned about the impacts of significant fee increases within the community legal sector given that the community legal sector does not have the same capacity to pass through those costs to its clients as exists for the private sector;
- preliminary feedback from one of the law associations was that it is difficult for small law practices and sole practitioners to pass on any increases in costs to their clients;
- the Bar has expressed interest in barristers being treated as a separate category given their low risk profile for regulatory action.

In addition, the LIV has expressed its concern with the options put forward to date and has asked for further consultation to be undertaken prior to the release of the RIS and subsequent consultation.

The discussion paper process will provide the professional associations with further time to assess the potential impacts of new fees on their members and make a case for alternative approaches to the setting of fees.

Public input provides valuable information and perspectives. Feedback is particularly sought from people who consider they are not represented by the bodies consulted to date. This may include lawyers who are not members of a particular professional association and consumers of legal services who may be directly or indirectly affected by the fees that are set for practising certificates or foregone interest on funds in trust.

The discussion paper will be circulated to key stakeholders and made available on the VLSB+C website during the consultation period. Consultation questions have been prepared to assist you in making a contribution to the discussion paper. A consolidated list of the consultation questions can be found at Appendix 1 to this paper and may be useful to consider in preparing a submission.

Written comments are required by no later than 5pm on 31 March 2017.

3 Background

3.1 Legislative framework

On 1 July 2015, the Legal Profession Uniform Law (Uniform Law) became the governing legislation for all lawyers in Victoria and New South Wales (NSW), replacing the Legal Profession Acts and associated regulations of those States. Its introduction represents the most significant regulatory change for lawyers in a decade and is an important step towards a national legal profession.

The Uniform Law creates a common legal services market across Victoria and NSW underpinned by a uniform regulatory system. The Uniform Law governs matters including practising certificate types and conditions, maintaining and auditing of trust accounts, continuing professional development requirements, complaints handling processes, billing arrangements and professional discipline issues.

The Uniform Law is applied in Victoria by the *Legal Profession Uniform Law Application Act* 2014 (the Act). The Uniform Law framework includes the Uniform Law; Uniform General Rules; Uniform Compulsory Professional Development (CPD); Legal Practice and Professional Conduct Rules for Solicitors; Uniform CPD and Professional Conduct Rules for Barristers; and Uniform Admission Rules.

The objectives of the Uniform Law are to promote the administration of justice and an efficient and effective Australian legal profession by:

- providing and promoting inter-jurisdictional consistency in the law applying to the Australian legal profession;
- ensuring lawyers are competent and maintain high ethical and professional standards in the provision of legal services;
- enhancing the protection of clients of law practices and the protection of the public generally;
- empowering clients of law practices to make informed choices about the services they access and the costs involved;
- promoting regulation of the legal profession that is efficient, effective, targeted and proportionate; and
- providing a co-regulatory framework within which an appropriate level of independence of the legal profession from the executive arm of government is maintained.

The Board and the Victorian Legal Services Commissioner (the Commissioner) are the local regulators responsible for regulating lawyers in Victoria. They work closely with the Legal Services Council, the Commissioner for Uniform Legal Services Regulation, the NSW regulators and the Victorian professional associations to ensure the efficient and equitable regulation of lawyers under the Uniform Law.

The Board is responsible for a range of functions, including:

- administration, management and oversight of practising certificates including grant, renewal, suspension and cancellation;
- maintenance of the register of practitioners and law practices;
- local registration of foreign lawyers;
- setting professional indemnity insurance requirements;

- administration of funds under the Uniform Law (including the Public Purpose Fund and the Fidelity Fund);
- determination of claims against the Fidelity Fund;
- administration, management and oversight of all law practice and barristers' clerks' trust accounts in Victoria;
- appointment of external interveners to law practices and applications to the Supreme Court for appointment of receivers;
- meeting the expenses of the Commissioner;
- meeting the expenses of the Victorian Civil and Administrative Tribunal (VCAT) Legal Practice List;
- the awarding of grants and the administration of a grants program; and
- the provision of funding for Victoria Legal Aid, the Victorian Law Reform Commission, the LIV and the Victorian Bar.

The Commissioner is responsible for receiving and handling all complaints made against lawyers within Victoria. In addition, the Commissioner educates the legal profession about issues of concern to the profession and consumers of legal services. The Commissioner also produces material for consumers of legal services to inform them about their rights and obligations when dealing with lawyers.

The LIV performs functions under delegations from or contracts with the Board for:

- investigation of claims against the Fidelity Fund;
- carrying out trust account investigations;
- assessment of the approved trust account course;
- auditing legal practices;
- undertaking external examinations of legal practices; and
- administering CPD requirements.

The Victorian Bar holds a delegation from the Board for administering the practising certificates of all barristers, making disqualification orders and administering CPD requirements. In addition the Victorian Bar holds delegations from the Commissioner for dealing with complaints about barristers' legal costs and disciplinary matters that arise as a result of interactions between Victorian barristers

3.2 The legal profession in Victoria

20,593 lawyers received practising certificates in Victoria in 2015-16. The following tables provide an overview of the legal profession in Victoria, including the types of practising certificates, positions held by lawyers and information about where lawyers are located throughout Victoria.

Table 2: Lawyers by practising certificate type

Practising certificate type	2014-15	2015-16
Employee[4]	7,292 (37%)	7,657 (37%)
Principal with trust authorisation	3,469 (18%)	3,490 (17%)
Principal	4,804 (25%)	4,836 (24%)
Corporate	3,533 (18%)	3,874 (19%)
Volunteer	333 (2%)	319 (1.6%)
Government[5]	-	370 (1.8%)
Barrister[6]	-	47 (0.2%)
Total	19,431	20,593

Source: Internal management reports

There were 23,069 legal positions registered in Victoria. This is higher than the total number of registered lawyers due to some lawyers maintaining positions with more than one entity. For example, a lawyer may be an employee of a law firm while also volunteering at a community legal service.

Table 3: Lawyers by position type

Position Type	2014-15	2015-16
Employee	7,413 (35%)	8,080 (35%)
Sole practitioner	5,355 (25%)	5,321 (23%)
Corporate lawyer	4,005 (19%)	3,141 (14%)
Partner	2,051 (9.5%)	2,204 (9%)
Director	1,592 (7.5%)	1,810 (8%)
Volunteer at Community Legal Service[7]	763 (3.5%)	774 (3%)
Supervising lawyer at a community legal service	112 (<1%)	124 (<1%)
Government	-	1,615 (7%)
Total	21,291	23,069

Source: VLSB+C annual reports

The majority of lawyers registered in Victoria are based in the inner city area (57 per cent) followed by the suburbs (33 per cent).

[4] This category also includes employees who have trust authorisation.
[5] A new category of Government Lawyer was introduced under the Uniform Law. Government lawyers were previously counted in the Corporate category.
[6] A new category of Barrister was introduced under the Uniform Law. Barristers were previously counted in the Principal category. This shows the number of barristers who amended or applied for a practising certificate after November 2015.
[7] This category was previously known as Community Legal Centre.

Table 4: Location of lawyers by position type

Location	Solicitors		Barristers		Total	
	2014-15	2015-16	2014-15	2015-16	2014-15	2015-16
City	9,024	9,652	1,970	1,969	10,994	11,621
Suburbs	6,330	6,725	49	61	6,379	6,786
Country	1,429	1,484	9	10	1,438	1,494
Interstate	174	184	2	2	176	186
Overseas	442	503	2	3	444	506
Total	17,399	18,548	2,032	2,044	19,431	20,593

Source: Internal management reports

3.3 What are the costs of regulating the legal profession?

An analysis was undertaken to identify the functions that arise in regulating the legal profession in Victoria to set the basis for cost recovery. Functions which are undertaken by the Board or the Commissioner or delegated to professional associations, which contribute to the regulation of the legal profession, are described below and the associated costs set out in Table 5. Two important issues to consider when setting fees to recover costs are:

- how the costs should be allocated across regulated parties; and
- determining the 'efficient' cost base to be recovered.

How should costs be distributed across regulated parties?

Ideally, the costs of each regulatory activity would be recovered directly from the person who gives rise to, or benefits from, the activity according to the level of costs incurred or benefits derived. In practice, however, making these distinctions may be difficult, inequitable, or not worthwhile. For example:

- where activities involve very similar costs for most or all regulated parties (e.g. when issuing most practising certificates), the administrative complexity and cost of making such distinctions may not be worthwhile; and
- when costs vary widely (e.g. investigating complaints against legal practitioners, which depends on the complexity of the case) or are highly unpredictable (e.g. the wide range of different types of complaints), distinctions may be difficult or inequitable.

In some cases, there are mechanisms available that could more accurately match costs to their source, such as charging consumers of legal services who make a complaint or charging legal practitioners for the cost of investigations (or a proportion or capped component of those costs). However, these mechanisms may have undesirable consequences, such as deterring clients from lodging complaints. They may also be unsuitable for other reasons – for example, it would not be appropriate to charge a legal practitioner for the costs of an investigation that found the practitioner was not at fault.

What are the efficient costs of regulation?

The Government's Cost Recovery Guidelines[8] note that fees should be set using a cost base that reflects the efficient cost of regulation. The Board considers its current costs to be efficient and has processes in place to identify further opportunities for improvement in future. This view is based on the fact that the costs associated with regulating the legal system in Victoria include costs that are:

- driven by routine or automated simple processes with limited opportunities for efficiency gains through process improvements (e.g. automated acceptance of applications for practising certificates and basic tasks undertaken to check applications as outlined below);
- subject to efficiency reviews (see, for example, changes to the way complaints are handled as discussed below); or
- incurred where activities are outsourced to other agencies (such as the LIV or the Bar) who perform the function under delegation from the VLSB+C, reflecting their particular experience in managing those activities.

Table 5: Costs of legal regulation in Victoria (by function)

Functions	2011-12 $'000	2012-13 $'000	2013-14 $'000	2014-15 $'000	2015-16 $'000	2015-16 cost per certificate
Practitioner services	3,102	3,064	2,962	2,836	3,185	$154.66
Complaint handling	8,473	8,592	8,131	7,374	6,456	$313.50
Legal expenses	2,785	1,855	1,388	1,290	1,367	$66.38
Trust account investigations - LIV	2,295	2,478	2,354	2,407	2,479	$120.38
External interventions	847	1,730	1,704	1,195	1,822	$88.48
Compliance audits[9]	-	-	-	255	187	$9.08
Other delegated functions – LIV including CPD compliance	287	286	272	278	286	$13.89
Victorian Civil & Administrative Tribunal	1,527	1,527	1,451	1,484	1,529	$74.25
Legal Services Council – Uniform Law[10]	-	-	-	219	519	$25.20
Indirect costs[11]	1905	2416	2685	3,390	3,447	$167.39
Total cost of legal regulation in Victoria[12]	21,221	21,947	20,946	20,729	21,278	$1033.26

Source: Internal management reports

[8] The Department of Treasury and Finance, *Cost Recovery Guidelines,* January 2013 -incorporating the information formerly published in the *Guidelines for Setting Fees and User-Charges Imposed by Departments and Central Government Agencies*.
[9] Funding to the LIV for compliance audits commenced in 2014-15.
[10] The first contribution made to the Legal Services Council towards the Uniform Law was in 2014-15. The *Legal Profession Uniform Law Application Act* 2014 came into effect on 1 July 2015.
[11] Indirect costs include staff costs associated with regulation and the costs of occupancy, IT, administration, depreciation, Board and Committee member fees, consultants, investment advice and auditing.
[12] The following costs are excluded from the cost of regulation (non-regulatory): Grants (VLA, VLF, VLRC and VLSB Major Grants and Projects) and related grants expenditure, legal education, Fidelity Fund claims and administration costs, VLAB costs and non-regulatory indirect costs.

Practitioner services

'Practitioner services' includes all the activities and costs involved with receiving, reviewing and processing new applications and renewals of practising certificates for legal practitioners in Victoria. The role of certifying solicitors is administered by the Board while the Bar undertakes the process for barristers as Board delegate.[13] Practitioner services also undertake activities to uphold the integrity of the trust account system by identifying non-compliance in the movement of money into and out of law practices. This is achieved by:

- ongoing monitoring of trust fund accounts and transactions; and
- reporting on bank accounts of legal practitioners without trust authorisation.

These activities aim to identify discrepancies in trust accounts. However, this regulatory oversight is not limited to legal practitioners with trust authorisation only. Other legal practitioners are also monitored to ensure they do not receive trust money without authorisation or engage in wilful non-compliance with trust account regulation through fraudulent activities in breach of the Act.

Other functions undertaken by the Board include:

- registering new law practices;
- considering applications for registration certificates for foreign lawyers; and
- considering exemption applications in relation to professional indemnity insurance, supervised legal practice, trust accounts and statutory deposit accounts.

Application and renewals process

New applications and renewals for practising certificates are submitted through VLSB+C's online portal. Since the fees were last reviewed in 2012, the responsibility for issuing practising certificates for legal practitioners (which was previously delegated to the LIV) has transferred back to the Board.

Legal practitioners renewing their practising certificate are required to log into the online portal and fill in their details, including making any necessary disclosures (see Section 4.2 for more information about the information that a legal practitioner is required to disclose).

The main period for renewal of practising certificates is from April through to June each year, although applications for grants of practising certificates can be received at any time over the course of a year. During the renewal period, VLSB+C staff take a peak number of calls and emails on a range of matters. Between 1 January and 1 August 2016, the VLSB+C handled 9,808 enquiries about matters relating to practitioner services, 536 supervised legal practice condition removal requests and 4,203 telephone enquiries specific to the renewal process.

Fee payment

Fee payment can be made by legal practitioners or their employers, either as part of the online application process or it can be processed separately. Once payment has been received, applicants with no disclosures or any other matters that require comprehensive vetting, and who have paid their professional indemnity insurance, will have their practising certificate automatically issued.

[13] As set out in Table 4, solicitors comprise 18,549 or 90.1 per cent of the 20,593 legal practitioners in Victoria in 2015/16. Barristers comprise the remaining 2,044, or 9.9 per cent of the total.

Monitoring of trust accounts

The main activities undertaken by staff in monitoring trust accounts are:

- registering trust accounts – this process includes liaising with the banks for information;
- downloading and uploading information from banks on trust accounts;
- undertaking trust interest reconciliations with banks, including following up work on trust accounts that have not been registered with the Board;
- undertaking activities in relation to the Statutory Deposit Account which includes sending out information to law practices on a quarterly basis and processing exemptions;
- responding to trust irregularity letters and other correspondence;
- registering new External Examiners; and
- meeting annual trust audit requirements – this involves auditing the 2,091 trust accounts and associated staff online and following up law practices that do not submit their details as required.

The trust account functions are conducted by three staff members who work on trust account issues full time as well as two other staff members who assist on a part-time basis. The staff skill range is VPS levels 3-4.

Cost of practitioner services per practising certificate

In 2015-16, the costs of practitioner services activities amounted to $3.185 million at an average of $155 per practising certificate issued.

Complaint handling

These are the direct and indirect costs incurred by the Commissioner in handling complaints about lawyers. These costs include staff costs, legal expenses directly related to complaints, the cost of delegating functions to the Victorian Bar and the LIV[14] and indirect costs allocated to the complaints processing function. 1,328 complaints were finalised during 2015-16.

The handling of complaints includes responding to enquiries, mediation, conciliation, dealing with disputes about costs and investigations.

Costs incurred in responding to enquiries

VLSB+C's enquiries service addresses grievances with practitioners and seeks to resolve them including through conciliation. In the event that an enquiry cannot be resolved, it provides information and guidance about the process to lodge a formal complaint. It also directs enquirers to other relevant regulatory services if they have issues that fall outside of VLSB+C's jurisdiction.

Enquiries can be made in writing, email or in person but most are made over the telephone. Senior staff are assigned to handle enquiries to ensure that the wide range of issues presented are addressed efficiently, including in relation to different areas of law and practitioners who may or may not manage trust accounts.

These staff members explain what type of complaint can be accepted, the time limitations for making a complaint and how a potential complaint will be handled. Depending on the nature of the query, the staff member may be able to offer suggestions and information to enable enquirers to resolve the issue themselves.

[14] Funding to the LIV ceased in 2013-14.

A straightforward enquiry (for example, a simple request for information) is estimated to take around 10 to 15 minutes to resolve.

Around 52 per cent of enquiries are resolved through the provision of information and no further action is required. A further 25 per cent of enquiries require extra information to enable the enquirer to resolve the issue themselves.

Around five per cent of enquiries lead to conciliated outcomes. This approach involves the staff member making further calls on behalf of the person seeking help to assist them in resolving their enquiry. For example, if a person is complaining that a lawyer is withholding their files, the staff member may contact the lawyer directly and negotiate the return of the files without the need for a formal complaint.

This approach to enquiry-handling has reduced the number of formal complaints made to the VLSB+C by nearly half in the last five years. The value of this improvement is reflected in the decline in regulatory activity undertaken to handle complaints: the cost of these activities has fallen by an average of eight per cent per year for the last three years, reducing the average cost of this activity (per practising certificate) by around $150.[15]

Costs incurred in responding to formal complaints

Formal complaints that can be addressed without the need for a formal investigation are handled by staff specialising in mediation and conciliation. The VLSB+C has two teams for dealing with complaints received by the Commissioner: the Dispute Resolution Team, which deals with civil complaints (most commonly disputes about legal costs and bills) and the Rapid Resolution Team, which primarily deals with conciliation of complaints relating to service issues.

Both teams use direct discussions with the lawyer and the complainant over the phone, in person or by email to resolve complaints.

The time it takes to finalise a complaint will vary depending on the complexity of the matters involved and the degree to which the parties participate with the Commissioner's processes. Around 45 per cent of complaints are resolved within 30 days. Examples include negotiating the return of client files and informally mediating a dispute over fees. These small scale matters are allocated to a VPS 4 or VPS 5 staff member with a manager providing oversight and final approval.

Complaints that cannot be resolved within 30 days generally fall into the following types:

- costs disputes: these may take a couple of months to resolve if initial negotiation and conciliation efforts are not successful. VLSB+C staff will need to prepare written reports to their manager for finalisation of the dispute – on average these disputes take up to 90 days to resolve; and
- conduct issues: these may take one year or longer and include more serious complaints that lead to formal investigation and, potentially other regulatory intervention by the VLSB+C such as external intervention, disciplinary action, prosecutions and removal of a legal practitioner's practising certificate.

On average around 10 to 15 per cent of complaints are protracted and result in a formal investigation. These investigations are generally still conducted by one staff member (VPS 4 or 5), although the most complicated of these cases may receive support from a paralegal (VPS 3). All investigations are overseen by a more senior manager who will provide assistance to the lead investigator.

[15] 2,039 complaints were received in 2012-13 and 2,040 complaints were finalised compared with 1,340 complaints received and 1,328 complaints finalised in 2015-16.

Where serious allegations are made and an initial review determines that disciplinary action may be warranted, the Commissioner may commence disciplinary investigations.

The Commissioner can also initiate an investigation about the conduct of a lawyer even where no complaint has been made or if a complaint has been withdrawn (own motion investigations). This is a significant consumer protection power as it enables the Commissioner to investigate conduct that is improper or unsatisfactory where clients and/or witnesses may not be sufficiently aware of how to raise a complaint, or may not wish to do so. Conduct outside of legal practice may also be deemed inappropriate.

A Commissioner-initiated investigation may be undertaken in any number of circumstances including:

- where a disciplinary complaint is withdrawn and the Commissioner considers that the investigation should continue;
- following receipt of a trust account investigation report;
- following receipt of a referral by a judge or magistrate about a lawyer's conduct in court;
- following identification of improper conduct by a lawyer in the media;
- following identification of improper conduct in an investigation by the Commissioner into some other conduct; and
- following receipt by a report from another agency, such as the Office of Public Prosecutions, about a criminal prosecution of a lawyer.

Following an investigation, the Commissioner has a range of powers. Where the Commissioner is satisfied the lawyer has engaged in unsatisfactory professional conduct, the Commissioner may:

- order a caution or a reprimand;
- order an apology;
- order the lawyer or law practice to redo the legal work at no cost, or to reduce or waive the costs for that work;
- order further training, education, counselling or supervision;
- issue a fine up to $25,000;
- recommend a condition be applied to the lawyer's practising certificate; and
- bring charges against the lawyer before VCAT.

The Commissioner may also initiate and prosecute proceedings in VCAT if satisfied the conduct may amount to unsatisfactory professional conduct or professional misconduct.

Some examples of the types of conduct that have been the subject of recent investigations include breach of trust account rules, failure to submit tax returns, practising law without a practising certificate and abuse of court processes.

The VLSB+C staff resourcing required to conduct investigations is similar to that needed to resolve protracted and complex complaints (see above) in that these investigations are typically conducted by one staff member (VPS 4 or 5), although the most complicated of these cases may receive support from a paralegal (VPS 3).

Cost of complaint handling per practising certificate

In 2015-16, the cost of complaint handling amounted to $6.46 million at an average of $314 per practising certificate issued.

Legal expenses

Legal expenses include the costs incurred by the Commissioner in securing external counsel to support investigations and prosecute disciplinary breaches. Over the last five years, legal expenses have varied from as much as $2.78 million in 2011-12 down to $1.30 million in 2014-15.

Legal expenses per practising certificate

In 2015-16, legal expenses amounted to $1.37 million at an average of $66 per practising certificate.

Trust account investigations

The Board is responsible for the oversight of all trust accounts held by law practices in Victoria. To ensure law firms comply with general trust account regulations, trust accounts are audited regularly. Trust account investigations aim to identify unusual activity in connection with money held in trust accounts.

While VLSB+C staff continue to monitor trust accounts (as described in the practitioner services section), the Board has delegated its general trust account surveillance and investigation functions to the LIV. VLSB+C staff have been working with the LIV to replace the previous approach of investigating all trust accounts at least once every five years with a risk-based scheme.

Trust account inspections are initiated by identifying issues through risk profiling of entities. Data used in profiling is drawn from reporting on complaints; trust account irregularities; failures to respond to VLSB+C requests and intelligence received from external examiners and other practitioners. In general, the following types of legal practitioners and law firms have a higher risk profile:

- sole practitioners who work in suburban areas or regional centres and maintain a large probate practice and therefore often have significant amounts of money in trust;
- new sole practitioners who are more likely to make errors through inexperience; and
- lawyers attached to multiple practices where resources are thinly stretched.

Cost of trust account investigations per practising certificate

In 2015-16, the LIV conducted 405 trust account investigations at an average cost of $6,121 per investigation or $120 per practising certificate.

External interventions

The Board can appoint external interveners in a variety of circumstances including where the Board believes that a law practice is not appropriately handling trust money, has committed a serious breach or where the practice is in contravention of the legislation. External interventions also occur when lawyers are no longer able to run their practice due to health reasons.

An external intervention requires the appointment of a supervisor, manager or receiver under Chapter 6 of the Uniform Law. The Board has the power to appoint a supervisor or manager to a law practice or to apply to the Supreme Court of Victoria for an order appointing a receiver to a law practice. The external interventions power helps to protect the interests of the general public and the trust money and property of clients.

VLSB+C's resourcing of an external intervention varies depending on the circumstances of the particular legal practitioner or law firm. In some cases, internal staff may handle the intervention, while in others the intervention will be allocated to the LIV or to an external lawyer. To ensure external interveners are appointed in a timely and efficient manner, the Board maintains a panel of experienced external lawyers ready to be engaged.

A law practice that is the subject of an external intervention is obliged to pay the costs associated with the external intervention process. However, in practice this rarely occurs, as typically a law practice subject to the external intervention is financially insolvent or does not have the means to pay the full costs. Where the expenses are not met by the law practice, the Act specifies that the expenses may be met by the PPF (see section 136(3)(v) of the Act).

There were 23 external interventions continuing or commenced over the course of 2015-16 costing an average of $79,217 per intervention. Costs of external intervention vary significantly: for example, an intervention that occurs due to the death or incapacity of a sole practitioner with only a small number of clients would not be as resource-intensive to manage as an external intervention that occurs as a result of the failure of a large law firm, particularly where that failure is the result of dishonest or incompetent behaviour. The resourcing of an external intervention is also influenced by the firm's work and location: if the law practice specialises, interveners with corresponding skills are required and any person appointed to take over the practice needs to be located within a reasonable proximity. This presents challenges for resourcing interventions in regional and rural areas.

Cost of external interventions per practising certificate

In 2015-16, the cost of external interventions amounted to $1.82 million at an average of $88 per practising certificate.

Table 7: External interventions

Type of external intervention	Continuing from 2014-15	Commenced 2015-16	Closed during 2015-16	Ongoing interventions as at June 2016
Receiverships	3	1	1	3
Managements	4	14	9	9
Supervisions	0	1	1	0

Source: VLSB+C annual reports

Compliance audits

The Uniform Law provides the Board with the power to audit law practices for their compliance with the Uniform Law. Audits may be considered where a lawyer or law practice has a complaint or conduct history that reveals an audit may be beneficial in helping to deal with systemic issues facing the law practice. The LIV performs a delegated function and receives funding to conduct compliance audits on behalf of the Board. The Board's funding of LIV for compliance audits commenced in 2014-15. Therefore, this is a new cost that has arisen since the fees were last reviewed in 2012.

Cost of compliance audits per practising certificate

In 2015-16, 26 compliance audits were commenced with 14 concluded and 12 still in progress as at 30 June 2016. These cost $187,000 at an average of $7,192 per audit or $9 per practising certificate.

Other delegated functions – LIV

All legal practitioners holding practising certificates are required to complete compulsory professional development (CPD) activities during each year of practice. The Board's powers are currently delegated to the Victorian Bar for barristers and the LIV for all other lawyers. These costs mainly cover the CPD scheme administered by the LIV, in particular audits conducted to verify compliance of CPD obligations.

Cost of CPD compliance per practising certificate

In 2015-16 the cost of CPD compliance activities amounted to $286,000, or $14 per certificate.

Victorian Civil and Administrative Tribunal (VCAT)

VCAT's Legal Practice List is responsible for the review of administrative decisions under the Uniform Law, including practising certificate determinations and the making of disciplinary orders against lawyers for unsatisfactory professional conduct or professional misconduct. The Board pays an amount each financial year to meet the expenses of VCAT in performing functions under the Uniform Law and the Act.

Cost of VCAT per practising certificate

In 2015-16, the cost of VCAT's role amounted to $1.53 million at an average of $74 per certificate.

Legal Services Council

The Legal Services Council is a five member body responsible for setting the rules and policies which underpin the Uniform Law, monitoring the overall operation of the Uniform Law framework and ensuring it is applied consistently across participating jurisdictions. The Board must contribute an amount of money determined by the Attorney-General as Victoria's contribution to the funding of the Legal Profession Uniform Framework. The first contribution to the Legal Services Council towards the Uniform Law was made in 2014-15. Therefore, this is a new cost that has arisen since the fees were last reviewed in 2012.

Cost of the Legal Services Council per practising certificate

In 2015-16 the cost of the Legal Services Council amounted to $519,000 or $25 per practising certificate.

Indirect costs

Indirect costs include staff costs associated with regulation (excluding staff costs included in practitioner services and complaints handling). They also include costs associated with occupancy, IT, administration, depreciation, Board and Committee member fees, consultants, investment advice and auditing. The VLSB+C primarily undertakes regulatory activities and accordingly, the majority of indirect costs incurred by the VLSB+C have been allocated to the cost of regulation. However, costs related to non-regulatory functions such as administering grants and providing education to the legal profession and consumers of legal services have been excluded, as have costs related to administering the Fidelity Fund.

Indirect costs per practising certificate

In 2015-16, indirect costs amounted to $3.45 million at an average of $167 per certificate.

3.4 What costs are excluded?

Funds are paid out to a number of public bodies and to fund additional activities undertaken by the Board and Commissioner that have been determined to be non-regulatory in nature. The beneficiaries of these costs are much broader than the regulated legal profession. Therefore, these costs have not been included for the purposes of assessing the basis for cost recovery and it is not proposed to recover any portion of these costs from practising certificate fees.

Table 8: Other costs (excluded from the cost of regulation)

Functions	2011-12 $'000	2012-13 $'000	2013-14 $'000	2014-15 $'000	2015-16 $'000
Grants and other payments	32,088	31,195	32,008	34,514	34,844
Payments to professional associations for non-regulatory programs	2,901	2,837	2,431	2,523	2,598
Fidelity Fund claims/costs	853	1,018	3,485	3,210	2,103
Victorian Legal Admissions Board	1,172	1,172	1,113	1,138	1,172
Indirect costs of the above functions	1,711	1,559	1,371	1,135	1,167
Total other costs	38,725	37,781	40,408	42,520	41,884

Source: Internal management reports

Grants and other payments

Funding is provided to:

- Victoria Legal Aid which is a statutory body that provides free legal information and education to Victorians as well as legal advice and representation for people who meet eligibility criteria, based on their financial situation, the nature and seriousness of their problem and their individual circumstances;
- Victoria Law Foundation which is a statutory body that delivers programs and provides legal information to help Victorians in dealing with legal issues and seeking legal help for problems; and
- the Victorian Law Reform Commission which is an independent body that develops, reviews and recommends reform of Victorian law.

The Board also operates a grants program that funds law-related services and activities for the benefit of the Victorian community. These services and activities can be for the purpose of law reform, legal education, judicial education, legal research or any other purpose which the Board considers appropriate. All grants are approved by the Attorney-General.

Payments to professional associations for legal education and non-regulatory programs

Funding is distributed to professional associations for a wide range of purposes including policy and research and delivering legal ethics training. The beneficiaries of these activities include members of the public, members of the professional associations and the broader legal profession.

Fidelity Fund claims/costs

The Fidelity Fund is managed by the Board to provide compensation to clients who have lost money or property due to the dishonest or fraudulent behaviour of a lawyer, an employee of a law practice or a barrister's clerk. The Fidelity Fund receives annual contributions from legal practitioners with practising certificates with trust authorisation, community legal services and approved clerks.

Victorian Legal Admissions Board

The Victorian Legal Admissions Board (VLAB) is established under section 19 of the Act and assesses the suitability of law graduates for admission to the Supreme Court of Victoria. Applicants are required to pay admission fees to meet the expenses of the VLAB. However, the Act also enables additional expenses that are not currently being met through admission fees to be covered.

Indirect costs

Indirect costs include staff costs, administration costs, occupancy costs and IT expenses related to the functions of administering grants, providing education to the legal profession and consumers of legal services and administering the Fidelity Fund.

3.5 Recovering the cost of regulating the legal profession

The cost of regulating the legal profession is fully recovered from those who benefit from and give rise to the system: legal practitioners and their clients. Costs are split between revenue from fees (the fee stream) and revenue from other sources, principally interest from solicitors' trust accounts (the interest stream). This revenue is paid into the Public Purpose Fund (PPF). There is no contribution from consolidated revenue or any other source of public funding and therefore non-users do not pay for the system.

Public Purpose Fund (PPF)

The Act requires the Board to maintain the PPF in three separate accounts: the General Account, the Statutory Deposit Account (SDA) and the Distribution Account. Each account's revenue (deposit) streams and funding purposes are set out in the Act.

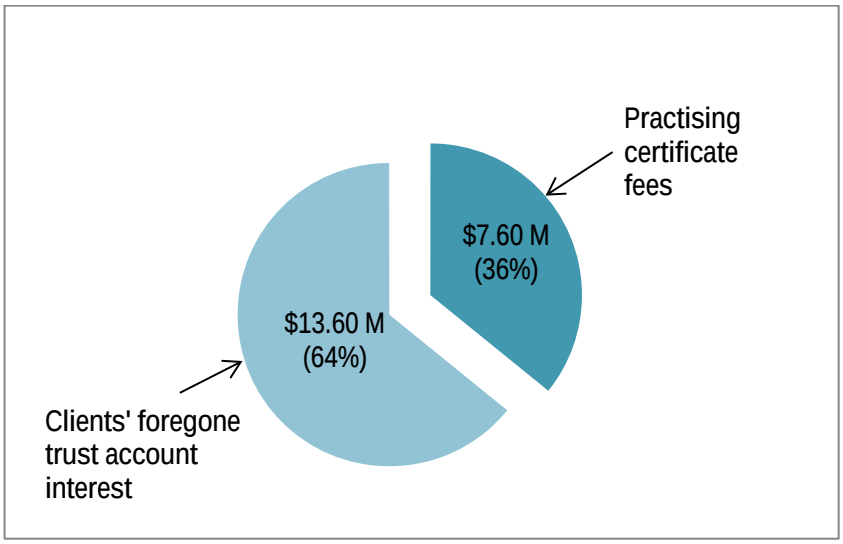
In general, the money deposited into the General Account includes revenue from fees, revenue from interest and any profits and earnings from PPF investments. Other revenue may include fines, money transferred from the Fidelity Fund and other money received by the VLSB+C that is not accredited to any of the other accounts. The General Account funds the cost of legal regulation.

If the law practice holds more than $10,000 in its trust account in one quarter, it must make a deposit into the Statutory Deposit Account in the next quarter. Amounts deposited with the Board are held on trust for the law practice and are repayable on demand. A proportion of the funds held in the account are effectively invested by the Board in accordance with the Board's Investment Policy Statement. This investment is facilitated by a financial arrangement with the Board's main banker as approved by the Treasurer.

Under the Act, 50 per cent of the surplus of the General Account at 30 June of a given year is to be transferred to the Distribution Account during the following year. Funding is provided from this account to Victoria Legal Aid, Victoria Law Foundation, Victorian Law Reform Commission and to other grant recipients for law related services and activities.

As set out in Table 5, in 2015-16 the cost of legal regulation was just over $21 million. Currently, the fee stream contributes $7.6 million (36 per cent) to these costs with the interest stream contributing the remaining 64 per cent:

Figure 1: Current annual funding sources of legal regulation in Victoria



The PPF also funds all the costs set out in Table 8 which have been excluded from the costs of regulation for the purpose of this discussion paper. The two key revenue streams are described below.

Practising certificate fees

The fee stream represents the fees paid by legal practitioners when they apply for or renew their practising certificate. Legal practitioners may pass none, some or all of these costs through to their clients through the fees they charge for legal services. This provides a key income stream into the PPF which is directly affected by the fees set through regulation. This discussion paper will examine options for setting fees that will generate varying amounts of revenue and the costs and benefits of changing those different amounts.

Trust account interest

Lawyers and approved barristers' clerks hold money in trust on behalf of their clients. Examples include money to pay for disbursements such as fees for lodging documents or payments for required reports and money paid in advance for legal services to be provided by a lawyer. It may also include money due to be received by a client from the proceeds of a court action or an estate, or required to be paid by a client as part of a property settlement.

As stated above, trust funds are kept in a separate account and subject to extensive regulation to ensure that the monies are appropriately accounted for and dealt with. Trust accounts do not earn interest for the lawyer or the client. Instead, under the Act, interest generated on funds held in trust must be paid into the PPF. Therefore, the discussion paper will not examine options for changing the amount of revenue generated by interest.

However, in examining the costs and benefits of the alternatives, the variable nature of the interest rate revenue which flows into the PPF is taken into account. This is because PPF interest income – including trust account interest – is subject to any changes made by the Reserve Bank of Australia in the official cash rate. It is, therefore, a less reliable income stream than practising certificate fees. Too heavy a reliance on trust account

interest may compromise the ability of the system to fully recover its costs (this is discussed further in Section 5.3).

Aside from providing the main source of funding for the regulation of legal professionals, interest from trust accounts also contributes to a range of grants, including to Victoria Legal Aid, Victoria Law Foundation, the Victorian Law Reform Commission and professional associations for legal education and non-regulatory programs. Therefore any amendments to practising certificate fees necessarily impact on the trust account interest available to fund these programs.

Table 9: Public Purpose Revenue

Revenue	2010-11 $'000	2011-12 $'000	2012-13 $'000	2013-14 $'000	2014-15 $'000	2015-16 $'000
Investment revenue	30,651	27,351	28,000	29,473	33,553	50,703
Interest of law practice residual trust accounts	35,953	31,730	23,360	24,473	28,473	28,369
Interest on operating accounts	711	570	467	248	471	778
Practising certificate fees revenue	4,810	4,986	5,973	6,235	6,535	7,128
Other revenue	542	1,166	534	705	472	383
Total PPF revenue	72,667	65,803	58,334	61,134	69,504	87,361

Source: VLSB+C annual reports

4 Practising certificates

4.1 Why is there a requirement to hold a practising certificate?

The legal profession plays a critical role in our society delivering economic and social benefits to clients and broader society. Lawyers help us navigate the complex rules that govern our society, gaining significant skills and expertise which they apply to the benefit of their clients.

As then NSW Supreme Court Chief Justice Spigelman stated in 2007:

> *"In all spheres of conduct it is essential that individuals and corporations know that they can pursue their lives with a reasonable degree of security both of their person and of their property. This is not possible without the active involvement of lawyers. Lawyers perform a critical role in the promotion of social order by the administration of the law in a manner which answers the fundamental requirements of justice namely, fair outcomes arrived at by fair procedures. The fairness of the procedures is as essential as the correctness or fairness of the outcomes. When people talk about having their 'day in court' this is a matter that is of significance to their sense of freedom and personal autonomy."* [16]

The requirement to hold a practising certificate is a key consumer protection aimed at ensuring that those who engage in legal practice in Victoria are competent and can meet the high ethical and professional standards demanded of those who provide legal services.

In a practical sense, clients rely on their legal practitioners to explain what is expected of them in order to comply with the law and to perform actions or create documents on their behalf that assist them in meeting their obligations or furthering their interests. Lawyers have a great deal of power in this relationship as they hold or have access to complex information that their client lacks. As a result when a client engages a lawyer they do not always have the necessary means to determine whether they are receiving an appropriate standard of service. Often a client is engaging a lawyer to assist them with complex or difficult matters that may have serious impacts for their finances, reputation or in some cases personal freedom. Therefore, when a lawyer is incompetent or acts unethically this can have significant ramifications for the particular client and has flow through effects by undermining general confidence in the legal profession.

The process of engaging a lawyer often means it is necessary for clients to hand over money to their lawyer to be held in trust on their behalf. Additional protections are built in to the system for lawyers who wish to hold trust money on a client's behalf. These additional protections ensure the client's funds are safeguarded and properly accounted for at all times, thereby ensuring that the lawyer is also protected from any perception of improper or illegal behaviour when holding a client's money. For a law practice to be authorised to operate a trust account, at least one practitioner in the law practice must hold a current practising certificate authorising the receipt of trust money.

As noted earlier, the Board is responsible for assessing and processing practising certificate applications for all Victorian registered solicitors. For Victorian barristers, the Board has delegated this function to the Victorian Bar.

[16] Access to Justice and Access to Lawyers Address by the Honourable JJ Spigelman AC Chief Justice of New South Wales to the 35th Australian Legal Convention Sydney, 24 March 2007.

4.2 What is the process for issuing a practising certificate?

A person may apply for an Australian practising certificate in Victoria provided they are an Australian lawyer,[17] have professional indemnity insurance as required by the Legal Practitioners Liability Committee and have indicated that they do not hold another Australian practising certificate that would be in force concurrently with this certificate. Anyone who wishes to obtain a practising certificate which authorises them to receive trust money must also provide evidence of completion of a Board approved trust account course of study.[18]

Section 73(1) of the Act states that an application for the grant or renewal of an Australian practising certificate in which the applicant states that Victoria is the jurisdiction in which he or she reasonably intends will be his or her principal place of practice must be accompanied by the prescribed fee for the certificate.

To apply for a practising certificate in Victoria a legal practitioner must submit an application form. This is done via the Board's online portal, *LSB Online*. In addition to the appropriate practising certificate fee the application must be accompanied by:

- the required Fidelity Fund contribution if the individual falls within one of the Fidelity Fund contributor classes;
- evidence of professional indemnity insurance;
- if the application relates to a practising certificate that authorises the receipt of trust money, evidence that the applicant has completed the Board approved trust account course of study; and
- a completed declaration.

The Board must not renew a practising certificate unless satisfied that the applicant is a fit and proper person to continue to hold a practising certificate. In considering whether a person is fit and proper, the Board may take into account any matter that it thinks appropriate, including the matters set out in the *Legal Profession Uniform General Rules* 2015 which are summarised below. The matters to be considered in relation to an application for a practising certificate are quite extensive and include consideration of whether the applicant:

- is currently of good fame and character;
- is, or has been an insolvent under administration, or a director of a company or a director or principal of an incorporated legal practice while the legal practice is or was insolvent;
- has been convicted or found guilty of an offence, and if so, the nature of the offence, how long ago it was committed and the applicant's age when the offence was committed, are considered;
- has engaged in legal practice in Australia or overseas when they were not permitted to do so, or in contravention of a condition, or engaged in legal practice in Australia while their practising certificate was suspended;
- is currently subject to an unresolved complaint, investigation, charge or order or has been the subject of disciplinary action that resulted in an adverse finding against the applicant;
- has had their name removed from a roll of Australian lawyers or a foreign roll of practitioners;
- has had their right to engage in legal practice suspended or cancelled;
- has contravened a law about trust money or trust accounts;

[17] Under the Uniform Law an Australian lawyer is defined to mean a person admitted to the Australian legal profession in a State of the Commonwealth, the Australian Capital Territory or the Northern Territory of Australia
[18] The Board has approved the LIV Trust Account Course for this purpose.

- has had a supervisor, manager or receiver appointed in relation to their legal practice;
- has been disqualified from managing a corporation or being employed by an Australian legal practitioner;
- is currently unable to carry out satisfactorily the inherent requirements of practice as an Australian legal practitioner;
- has provided incorrect or misleading information in any application for a practising certificate;
- has contravened an Australian law relating to the legal profession;
- has contravened a court or tribunal order or order of the Board or the Commissioner;
- has failed to pay a required contribution or levy to the Fidelity Fund;
- has failed to comply with a requirement relating to professional indemnity insurance;
- has failed to pay any costs or expenses for which they were liable.

A show cause event must also be disclosed and the applicant is required to provide the Board with a written statement about the show cause event and explain why, despite this, they consider they are fit and proper. Show cause events are set out in section 85 of the Uniform Law and section 86 provides that an 'automatic show cause event' refers to a bankruptcy related event, serious offence and tax offence.

The Board must consider whether the applicant is required to make contribution to the Fidelity Fund. The Fidelity Fund is managed by the Board to provide compensation to people who have lost trust money or property due to the dishonest or fraudulent behaviour. The Fidelity Fund receives revenue through its own holdings and investments as well as through annual contributions from solicitors licensed to deal with trust money, community legal centres and approved barristers' clerks.

The Board must also consider the professional indemnity insurance requirements of an applicant before renewing or issuing a practising certificate. Principal, employee and volunteer practising certificates cannot be renewed for any applicant who is not covered by professional indemnity insurance as required by the Legal Practitioners' Liability Committee (LPLC). The LPLC provides the Board with notification that a practitioner's professional indemnity insurance has been paid. The Board may also need to consider on a case by case basis whether particular individuals should be granted exemptions (for example, some practitioners engaging in pro bono work and overseas based Victorian practitioners may be eligible depending on their circumstances).

Applicants must certify to the Board that they have complied with CPD requirements which are a statutory condition of a practising certificate. A legal practitioner who certifies non-compliance is required to submit to the LIV as the Board's delegate a CPD rectification plan setting out the steps the practitioner intends to take to rectify the non-compliance within 90 days of the plan being submitted.

The onus is on each applicant to make a full and frank written disclosure of any matters that may have an impact on their fitness to practice to the Board. Disclosure will not necessarily result in a finding that a person is not fit and proper to practice as the Board has the capacity to find that a person is fit and proper where circumstances warrant such a finding. In considering a person's fitness to hold a practising certificate where a suitability matter is disclosed, the Board may give consideration to the honesty, open candour and frankness demonstrated by that person. Open and frank disclosure is likely to be viewed favourably, while a failure to disclose may adversely reflect on a person's fitness to practice.

The following table shows the growth in the number of practising certificates being issued per year since practising certificate fees were last set in 2012.

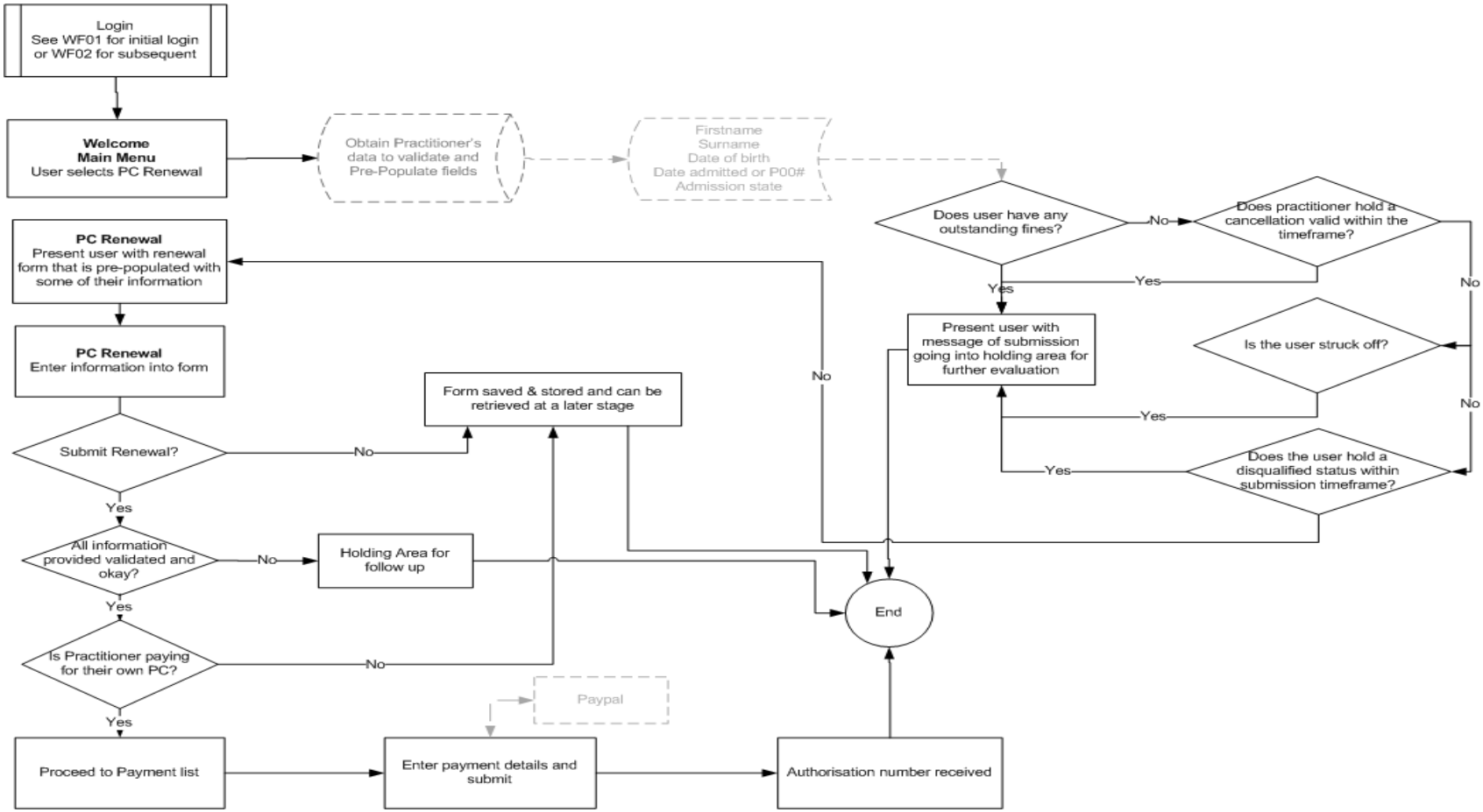
Table 10: Lawyers by practising certificate fee type

Year	With trust authorisation	Without trust authorisation	Volunteer	Total number of practising certificates issued	% Change
2015-16	3,516	16,366	377	20,259	4.3%
2014-15	3,469	15,629	333	19,431	3.8%
2013-14	3,476	14,948	303	18,727	3.2%
2012-13	3,459	14,418	277	18,154	4.0%
2011-12	3,477	13,731	245	17,453	

Source: VLSB+C annual reports

The renewal period for the 2016-17 practising year ran from 21 March to 30 June 2016. Of all lawyers who held practising certificates as at 30 June 2016, over 99 per cent had applied online to renew their practising certificate by the closing date. The process for renewing a practising certificate via *LSB Online* is set out in Figure 2 below.

Figure 2: Practising certificate renewal process



5 Overview and analysis of the base case (no fees)

The Victorian Guide to Regulation stipulates that a RIS must consider the 'base case', which is the position if no regulations are made. To assist stakeholders understand the base case, this section of the discussion paper discusses the problems that may arise if no fees are charged for practising certificates. If no regulations are made, fees will expire and 100 per cent of the costs of regulation will be recovered from the interest stream.

If no fees were set for practising certificates, then regulation of the legal system would be entirely funded by users of legal services who place funds to be held in trust by their lawyer. The problem (or the reason why this scenario is considered undesirable) is that the funding for regulation of the legal system in Victoria would be relatively:

- inequitable, because legal practitioners who give rise to the need for regulation and some beneficiaries of regulation of legal services would not contribute to the costs of that regulation;
- inefficient, because there would not be a cost-reflective price signal to lawyers about the regulatory risks their activities created (although the current cost of a practising certificate suggests that the consequences of this inefficiency are likely to be small); and
- ineffective, because there is a risk that declining interest rates could constrain the interest available to fund regulation of the legal system and meet other services funded from the interest stream (such as Victoria Legal Aid).

Each of these issues is discussed in more detail below and for which stakeholder feedback is sought.

Equity

If fees were not charged, clients of practitioners with trust authorisation would be paying for all of the costs of regulating the legal system through interest foregone on funds held in trust. On the other hand, practices that are not authorised to manage trust accounts would not be contributing at all to the costs of regulating the legal system and neither, therefore, would their clients (based on the assumption that some or all of the cost of the fee may be passed on), even though they directly benefit from that regulatory activity. This would not be equitable because some of the beneficiaries of regulation of legal services would not bear any of the costs of that regulatory activity.

Among those who would be contributing to the cost of regulation, clients with larger sums held in trust will pay more (through larger sums of foregone interest) than those with smaller sums held in trust. Given that those with larger sums held in trust have more to gain from a well-regulated system, this approach is considered to be equitable.

Consultation questions

1. Who, in your view, is receiving the primary benefits of legal regulation in Victoria?
2. Who, in your view, gives rise to the need for legal regulation in Victoria?
3. How can fees be structured to fairly share the costs between the beneficiaries of regulation including the legal profession itself?
4. What do you think the split between the fees and interest streams should be?

Efficiency

If lawyers are not charged a fee for their practising certificate, they do not receive a price signal that reflects the cost of regulating their profession, which is a result of activities undertaken to monitor and mitigate the risks that the provision of legal services by legal practitioners may give rise to.

In theory, where such costs are not clearly signalled or borne by the regulated party, there may be an oversupply of legal services. Individuals may choose to obtain a practising certificate even if they do not require one. For example, if there were no fees for practising certificates, individuals qualified as Australian lawyers but working in other fields and not practising law, may decide to apply for one, unnecessarily increasing the cost of regulation.

In practice, it is not clear if the presence or absence of practising certificate fees would have a substantial effect on the supply of legal services, given that:

- options considered in this discussion paper price the fees for a practising certificate in the range from $456 through to $1,623;
- lawyers may pass these costs through to their clients as part of the charges for their services;
- lawyers will achieve tax relief by legitimately claiming the fee as a business expense; and
- even if lawyers cannot pass their costs through to their clients, a fee of $456 to $1,623 is unlikely to have a substantial effect on a practitioner's decision to practice law, compared to the much larger start up and fixed costs associated with practising law.

Consultation questions

5 What price signal should be sent to lawyers about the costs of regulating their sector?

6 What impact could the options discussed in this paper have on the supply of legal services?

7 How do legal practitioners build the costs of regulation into the price they charge for their services?

Please provide data, if possible, to support your assertions.

Effectiveness

In the base case, the effectiveness of the regulatory system would be contingent upon the use of PPF interest revenue to fund regulatory activity. Relying exclusively on the interest stream to fund legal regulation in Victoria could risk compromising the effectiveness of the regulatory system (and, as a result, the integrity of the legal system) because during periods when interest rates are low, available funding from the interest stream can fall, and could fall below the total cost of regulating the legal system. For this reason all the options considered in the next section of this paper involve raising revenue from fees to fund all, or at least some of the costs of regulation.

Consultation question

8 How should the volatility of revenue sources be considered by the Board when setting fees? Please give reasons for your view.

6 Options for setting new fees

6.1 What factors are considered in setting new fees for practising certificates?

In recommending new practising certificate fees, the Board must ensure that fee settings comply with the principles outlined in the Government's Cost Recovery Guidelines. If the Board recommends new fee settings that do not comply, the Office of the Commissioner for Better Regulation (OCBR) will not certify the RIS. Certification of the RIS is an important step in the fee setting process, as it signals to the public that the analysis underpinning the proposed fee structure is sound and in line with Government policy.

Therefore, an overarching consideration of the Board is to ensure that the cost of regulating the legal profession can continue to be recovered from those who benefit, or give rise to, the need for regulation without drawing on consolidated revenue.

The Cost Recovery Guidelines state that regulatory fees should be set on a full-cost recovery basis to ensure that efficiency, effectiveness and equity objectives are met.[19] In practice this means setting and collecting fees to cover the costs of regulating the legal profession in Victoria - as outlined in Section 3.3 - including the issuing of practising certificates, monitoring compliance, investigations, external interventions and responding to complaints.

Additionally, the Board needs to assess whether there are benefits to third parties or other social policy and equity considerations that would mitigate against the fee stream recovering the costs that legal practitioners give rise to, leaving the interest stream available to be put to other uses such as grants. In particular, where an option may significantly increase the price of legal services, or reduce the availability of legal services, it may not be appropriate.

The Board must also have regard for other principles outlined in the Cost Recovery Guidelines in setting fees, including to:

- ensure that the costs incurred in regulating the legal profession can continue to be recovered from the users of the system (i.e. legal practitioners and their clients) in an equitable way;
- ensure that the fees do not create barriers to the uptake of certain practising certificates which may lead to increased regulatory risks or unintended social outcomes. For example, barriers to entry include instances where legal practitioners are deterred from practising law altogether or taking out certain types of practising certificates;
- minimise the impacts on small business by ensuring sole practitioners and small law firms are not disproportionately affected by the impacts of the fees; and
- ensure that the framework for cost recovery is sustainable by avoiding over-reliance on fluctuating revenue streams.

[19] The Department of Treasury and Finance, *Victorian Guide to Regulation*, 2014, p. 32.

The practising certificate fees will potentially apply to all legal practitioners in Victoria who are required to hold a practising certificate, namely:

- principals of a law practice who are authorised to receive trust money;
- principals of a law practice who are not authorised to receive trust money (including barristers);
- employees of a law practice;
- corporate legal practitioners; and
- government lawyers.

Currently, practising certificates are categorised into three types for the purposes of fees:

- practising certificates with trust authorisation;
- practising certificates without trust authorisation; and
- volunteer practising certificates which do not attract a fee.

Legal practitioners receiving trust money must maintain a practising certificate with trust authorisation. The system established by the Act seeks to ensure that trust money and trust accounts are adequately supervised and managed by the law practice and its employees. Therefore, it is a consideration that fees should not be set so high as to deter legal practitioners from applying for, or renewing, a practising certificate with trust authorisation when they need such authorisation because they receive trust money (for example, transit money during a conveyancing transaction).

Consideration must also be given to ensuring that the fees do not create a barrier to entry to the legal profession. In general, fees set too high for practising certificates without trust authorisation might make it financially difficult for new practitioners to enter the legal profession and may also discourage some existing practitioners from renewing their practising certificate – in particular legal practitioners with lower levels of remuneration, for example, part-time legal practitioners, junior legal practitioners and those operating in rural and regional Victoria.

A high fee also has the potential to discourage small law practices, including sole practitioners, from maintaining a practising certificate with trust authorisation, in turn leaving them vulnerable to not being paid for billed work and potentially reducing their areas of practice.

There may also be greater regulatory risk, as some practitioners may consider practising outside of their practising certificate conditions, exposing them to disciplinary action and their clients to increased risk as they would not necessarily be aware of the limitations on lawyers' capacity to receive trust money and lack of regulatory protection from the Fidelity Fund.

The impacts on small business are specifically considered (see Section 7), in particular the impacts for sole practitioners and small law practices.

Finally, when setting fees, the Board must also consider the volatility of the interest stream as a revenue source (the risks of relying too heavily on the interest stream are discussed in this section below).

Assumptions

In analysing the options for, and the effects of, setting fees for practising certificates the Board has:

- assumed that legal practitioners may pass through none, some or all of the costs; and
- taken the position that as an aggregate, those contributing to the cost of regulation through fees benefit no more and no less from the regulation than those contributing through foregone interest.[20]

Consultation question

9 What is your view of the assumptions made by the Board in analysing the options in this discussion paper?

The Board welcomes feedback on the assumptions, and in particular, any supporting data or analysis that stakeholders may have to support their view.

Charging fees - factors taken into account when considering options

The options outlined in this discussion paper could result in an estimated additional hourly cost for legal practitioners and their clients ranging anywhere from 25 cents to $2.27 depending on factors like whether the legal practitioner has trust authorisation and how many hours they worked.

According to the Victorian Guide to Regulation, general government policy is that fees should be set on a full cost recovery basis to avoid cross-subsidisation.[21] Compared to the base case of not charging any fees, recovering 100 per cent of the costs of legal regulation through fees for practising certificates would result in:

- a more equitable funding arrangement because all legal practitioners, who give rise to the need for regulation, and all clients would contribute to the cost of regulating legal services (rather than only those clients who place money in trust accounts);
- a more efficient funding arrangement because legal practitioners would receive a signal about the risks that their activities create (and the regulatory activity undertaken to mitigate those risks); and
- a more effective funding arrangement because there would be certainty that regulatory activities required to mitigate risks posed by legal practitioners would be adequately funded.

Direct effects of charging fees

The setting of new fees for practising certificates may have a range of direct effects or unintended consequences on the behaviours of legal practitioners and clients, including:

- creating an incentive for practitioners to practise law in other jurisdictions where practising certificates are cheaper (if practitioners are unable to pass costs through to their clients and/or to the extent that the difference between practising certificate costs is substantial and is a major factor in their choice of where to practise);
- increasing the cost of legal services for users of those services and so deterring some people from using legal services;
- increasing the cost of legal services for the 'missing middle' – the majority of low and middle income earners who would not qualify for legal aid (see discussion below under the risks of relying too heavily on fees for more information about the 'missing middle');

[20] This assumption is underpinned by the view that while the costs of regulation can be quantified, it is not possible to assign a dollar value to the benefits of regulation.
[21] The Department of Treasury and Finance, *Victorian Guide to Regulation*, 2014, p. 32.

- increasing the cost of legal services by more for sole practitioners than for larger firms (to the extent that larger firms are able to disperse the costs of practising certificates across a larger number of clients and/or staff); and
- creating an incentive for sole practitioners and small firms to avoid using trust accounts or operating without trust authorisation (to the extent that the cost of a practising certificate with trust authorisation exceeds the benefits to the practitioner of maintaining a trust account).

Consultation questions

10 Do you agree with the list of potential unintended consequences outlined above? Please give reasons for your view.

11 Are there other direct effects that may arise from increases in practising certificate fees, and how should these be avoided or mitigated?

The risk of relying too heavily on the interest stream

As has been discussed earlier, the requirement that money be placed in trust is set through the primary legislation, as are the requirements that the interest that accrues from trust money flows into the PPF. Therefore, revenue generated by the interest stream will not be affected by the level at which practising certificate fees are set. However, this stream can be volatile because of changes in interest rate levels. Currently, there is around $1.8 to $2 billion in trust accounts. Therefore, a rate cut of 0.5 per cent removes $9 to $10 million annually from that revenue stream. Historically low interest rates have affected the amount of revenue earned from interest over the last five years and there is potential for less revenue to flow into the interest stream over the next 10 years.

Therefore, placing too much dependence on the interest stream to fund all, or the majority of the costs incurred in regulating the legal profession, may result in reduced revenue for grants and other public uses. Alternatively, setting a fee ensures there is a consistent contribution from the fee stream towards the cost of regulation.

Whether a full cost recovery approach relies exclusively on fee revenue, or a mix of fee revenue and trust account interest revenue, will not affect a person's decision to place their money in trust with a lawyer. Although people who place their money in trust forego the interest that is earned on that money, this would not be a factor in their original decision to engage a lawyer. However, the fees a person must directly pay to receive legal services may be a factor in determining which lawyer they engage or if they engage a lawyer at all.

Funding arrangements for non-regulatory legal services (e.g. Victoria Legal Aid, Victoria Law Foundation) are not the subject of this discussion paper as practising certificate fees do not directly contribute to the amount of revenue available for these services. However, as any fee (or increase in current fees) for practising certificates will have the indirect effect of increasing funds available in the interest stream to cover the cost of these other services, views are sought on these issues from stakeholders.

Consultation question

12 How much significance should the Board place on ensuring there is sufficient revenue to fund non-regulatory legal services (e.g. Victoria Legal Aid) when setting fees for practising certificates?

The risk of relying too heavily on the fee stream

Any increase in fees paid for a practising certificate must be absorbed by the law practice or passed onto clients through an increase in legal fees. Fee increases are likely to comprise a greater percentage of annual revenue for sole practitioners and small law practices than larger firms.

If costs are passed through to clients, it may deter some people who need a lawyer from engaging one, leading to greater levels of self-representation or people failing to obtain advice before making important decisions. There is growing evidence that the high price of legal services means that many Australians find it difficult to pay for a lawyer for anything but the most basic legal services. As noted by Community Law Australia in its 2012 report *Unaffordable and out of reach: The Problem of Access to the Australian Legal System:*[22]
"It is impossible to plan for when legal issues might arise. People don't budget for legal fees for issues like marriage breakdown, unfair dismissal, eviction, discrimination, getting ripped off or debt problems."

The Productivity Commission in its 2014 *Inquiry into Access to Justice Arrangements Report*[23] highlighted what it termed the 'missing middle', the majority of low and middle income earners who would not qualify for financial assistance to meet their legal costs but would have limited capacity for managing large and unexpected legal costs. Therefore, consideration is required to ensure that any fee increase does not place an unfair burden on sole practitioners and small law practices or alternatively, the 'missing middle' in meeting the costs of legal services.

Choosing between a single fee or higher fee for trust authorisation

Charging a single fee recognises that all legal practitioners give rise to the need for regulation and benefit from having strong and robust trust accounting regulation in Victoria. It also ensures that the fees do not provide any disincentives to legal practitioners maintaining particular types of practising certificates.

However, in cases where different types of regulatory activity or different types of legal practitioner give rise to substantially different costs, it may be preferable to charge fees on a commensurate basis. For example, if one type of legal practice or practitioner poses different risks or requires greater regulatory activity, then charging a higher fee for their practising certificates would be more equitable (because users of higher risk legal services would contribute a greater cost) and more efficient (because different practitioners would receive a clearer price signal about the regulatory risks of their activities).

When the current Regulations were made five years ago, the decision was made to charge a higher fee for lawyers who were authorised to work with trust accounts. This decision was made on the basis that a large proportion of regulatory costs were directly attributable to regulated lawyers with trust authorisation, including a large proportion of complaints received. In theory, this approach is more efficient because it sends a more cost-reflective price signal to those practitioners who are responsible for a large proportion of regulatory costs (and recovers the cost of that activity either from the practitioners or their clients).

In practice, however, charging a higher fee for legal practitioners with trust authorisation may disadvantage smaller firms for whom a single practising certificate with trust authorisation is a larger component of costs than for larger firms that are able to distribute the costs of a single practising certificate across numerous other employees. It also may not account for the regulatory effort required to identify practices without trust account authorisation that manage trust account money in defiance of the legislation. Finally, it may not reflect the benefits received by all legal practitioners – including those without trust account authorisation – from upholding the integrity and reputation of the profession through the prevention of trust account non-compliance.

[22] www.communitylawaustralia.org.au, p 4.
[23] http://www.pc.gov.au/inquiries/completed/access-justice/report Report 72 2014, Productivity Commission, p 20. The Productivity Commission estimated that only 8 per cent of households would qualify for legal aid.

As a result, the different prices may not result in costs being borne by those who genuinely gave rise to the regulatory risk.

The following tables provide data on the numbers of legal practitioners who held practising certificates with trust authorisation. The first table shows there has been a steady increase in the number of practising certificates without trust authorisation since the fees were set five years ago. In contrast, the number of practising certificates with trust authorisation has remained pretty static at between 3,400 and 3,500 legal practitioners.

Table 11: Practising certificates with and without trust authorisation (percentage change)[24]

Year	With trust authorisation	% Change	Without trust authorisation	% Change
2015-16	3,516	1.4	16,366	4.7
2014-15	3,469	-0.2	15,629	4.6
2013-14	3,476	0.5	14,948	3.7
2012-13	3,459	-0.5	14,418	5.0
2011-12	3,477		13,731	

Source: VLSB+C annual reports

It is unclear whether the current higher fee that applies to practising certificates with trust authorisation already plays a role in influencing some legal practitioners not to maintain a practising certificate with trust authorisation. However, given that the current fee is $509 (a difference of $165 from a practising certificate without trust authorisation), it is unlikely to be a major factor in influencing practitioner decision-making. There are also alternative feasible explanations for the low growth in certificates with trust authorisation – for example, it is possible that the number of legal practitioners with trust authorisation is sufficient to meet the demand for services involving the receipt of trust money. Stakeholder views are sought in relation to these points.

Consultation questions

13 What is your view on the benefits and disadvantages of a single fee versus a higher fee for trust authorisation?

14 What is your experience of practising certificates with trust authorisation in relation to sole practitioners and small law practices? Do small firms see benefits in having practising certificates with trust authorisation and would a high fee discourage them from obtaining one?

6.2 Current fees – what are they and why should they change?

Currently, the fee for a practising certificate in Victoria under the Regulations is 36.50 fee units ($509) for a practising certificate with trust authorisation and 24.71 fee units ($344) for a practising certificate without trust authorisation.

Section 73(5) of the Act states that a fee or surcharge is not payable for an Australian practising certificate that authorises the holder to engage in legal practice only as a volunteer at a community legal service or otherwise on a pro bono basis.

[24] Note that this table excludes volunteer practising certificates so the total number of practising certificates in this table does not equate to the total practising certificates issued in each year.

The Regulations reduce the amount of the fee payable for practising certificates that are applied for after 1 October of a financial year. The table below outlines the reduced fees that are payable for the 2016-17 financial year.

Table 12: Practising certificate fees for 2016 -17 practising year

Practising certificate type	Application received 1 July – 30 September	Application received 1 October – 31 December	Application received 1 January – 31 March	Application received 1 April – 30 June
Principal of a law practice authorised to receive trust money (includes Foreign practitioners)	$509	$382	$254	$127
Principal of a law practice not authorised to receive trust money (includes barristers & Foreign practitioners)	$344	$258	$174	$86
Employee of a law practice authorised to receive trust money	$509	$382	$254	$127
Employee of a law practice not authorised to receive trust money	$344	$258	$172	$86
Corporate legal practitioner	$344	$258	$172	$86
Government legal practitioner	$344	$258	$172	$86
Volunteer at a community legal service / pro bono	Nil	Nil	Nil	Nil

The Act establishes that late fees are payable if existing legal practitioners based in Victoria fail to renew their practising certificate by 30 April. These fees are:

- a surcharge of 25 per cent of the prescribed fee for an application made on or before 31 May; and
- a surcharge of 50 per cent of the prescribed fee if the application is made after 31 May.

The Act also states that a person who applies for a practising certificate in the first three months of a financial year must pay a surcharge of 200 per cent of the prescribed fee if they held a practising certificate in Victoria immediately before the end of the previous financial year. However, the surcharge will not apply if the person provides a statutory declaration stating that they have not engaged in legal practice since the end of the previous financial year and explaining why they have changed their mind about continuing to practice. Under section 73(4), the Board has the capacity to refund all or part of a surcharge if it considers there are special circumstances.

Fees are usually set for a 10 year period; however, practising certificate fees have been reviewed and new fees set three times within the last 10 years, in 2007, 2010 and more recently in 2012. This is largely the result of the significant changes that have occurred over that time in the regulation of the legal profession.

When the fees were last set in 2012, the Board recommended that they be in place for a period of five years due to the level of uncertainty that existed at the time about the cost of regulation under the national scheme. It was thought at the time that reviewing the fees within five years would provide sufficient time for the Uniform Law to come into operation, thereby providing a clearer indication of the cost of regulation under the national framework. This decision followed an earlier decision in 2007 to set fees for a three year period following the introduction of the *Legal Profession Act* 2004 and a similar desire to ensure that the fees properly reflected the costs of the new regulatory environment.[25]

Why should the current fees change?

When the current fees were set in 2012, the cost base was set narrowly and only included the costs of practitioner services and complaints handling. A higher fee for practising certificates with trust authorisation was set in recognition that there are a large number of complaints against practitioners with trust accounts. Since that time, the Government released new Cost Recovery Guidelines in 2013 and remade the Victorian Guide to Regulation. These new and revised guidelines make it clear that the cost base for determining the cost of regulating the legal profession in Victoria should include all regulatory costs, not just the costs incurred in issuing practising certificates and addressing complaints.

Under the current arrangements, fee revenue pays for $7.6 million (36 per cent) of the costs of regulation and interest foregone from clients' trust accounts pays for the remaining 64 per cent. As stated in Section 6.2, the Board must have regard for the Cost Recovery Guidelines in setting new fees. According to those guidelines, the current fee settings are incompatible with key principles contained in those guidelines on the grounds that they are:

- inequitable, because legal practitioners who give rise to the need for the regulation of legal services and some beneficiaries of that regulation (clients without trust accounts) contribute just 34 per cent to the cost of regulation and are therefore subsidised by clients with money in trust accounts, who currently contribute 64 per cent though foregone interest;
- inefficient, as legal practitioners meet significantly less than half the cost of legal regulation, the current settings do not send a cost-reflective price signal to them about the regulatory risks their activities create; and
- ineffective, because two-thirds of the funding of legal regulation relies on foregone trust account interest and so there is a risk that declining interest rates could constrain the amount available to fund other services from the interest stream (such as Victoria Legal Aid).

Consultation question

15 What are your views on the advantages and disadvantages of the current fee settings?

[25] Interim regulations were also put in place in 2010 – these regulations did not require a RIS.

What are the impacts of the current fees?

The cost per-hour-worked of the current practising fees for practitioners, firms and the consumers of legal services is estimated in the tables below. Additionally, the fees as a percentage of annual income are set out. Given the variations in practitioners' earnings, the following types of practitioners and firms have been assessed:

- sole practitioners working part time, full time and with and without trust account authorisation;
- legal practitioners working as employees at community legal services;
- small and medium sized legal firms; and
- large legal firms.

The following assumptions, qualifications and observations apply to the examples included in the tables:

- full time practitioners work 38 hours per week for 48 weeks in a year;
- the percentage of practitioners with trust account authority in legal firms equals the 2015-16 average of 18 per cent across the sector;
- the hourly rates cited are conservative estimates only; and
- a legal practitioner working for a community legal service or within government cannot pass on the cost of the fee to clients.

Table 13: Estimated effects on sole practitioners of current fees

	Hours worked per week	Hourly rate	Annual revenue	Hourly cost of fee	Fees as % of annual revenue
Part time	15	$60.00	$43,200	$0.48	0.80%
Part time – trust account authorised	15	$60.00	$43,200	$0.71	1.18%
Full time	38	$60.00	$109,440	$0.19	0.31%
Full time -trust account authorised	38	$60.00	$109,440	$0.28	0.47%

Table 14: Estimated effects on law firms of current fees

	Practitioners without trust account authorisation	Practitioners with trust account authorisation	Hours worked per week	Hourly rate	Annual revenue $'000	Hourly cost of fee	Fees as percentage of revenue
SME	16	4	38	$80	$2,920	$0.20	0.26%
Large	82	18	38	$100	$18.240	$0.20	0.20%

Table 15: Estimated effects on community and public sector employee practitioners of current fees

	Hours worked per week	Hourly rate*	Annual income	Hourly cost of fee	Fees as % of annual income
Community – part time	15	$40.00	$28,800.00	$0.48	1.19%
Public sector – part time	15	$50.00	$36,000.00	$0.48	0.96%
Community –full time	38	$40.00	$72,960.00	$0.19	0.47%
Public sector – full time	38	$50.00	$91,200.00	$0.19	0.38%

Direct effects of fees (unintended consequences)

The examples in Tables 13-15 estimate that under the current fee system, the cost of practising certificate fees range from just $0.19 to $0.71 per hour worked. It is therefore unlikely that any of the negative direct effects (unintended consequences) of fees set out on page 36 - such as increasing legal practitioners' costs to the extent that they may be encouraged to move jurisdiction – apply under the current settings.

6.3 Options for 100 per cent recovery through revenue from fees

Two options recovering the full cost of legal regulation through revenue from practising certificate fees (i.e. the fee stream) are set out below:

- 100 per cent recovery of the cost of legal regulation using the existing fee structure - that is, a higher fee for practising certificates with trust authorisation (Option 1); and
- 100 per cent recovery of the cost of legal regulation from fees by charging a single fee for all practising certificates (Option 2).

Option 1 would retain the current fee structure. Practising certificates with trust authorisation would continue to attract a higher fee than other practising certificates. The additional amount paid by legal practitioners with trust authorisation would cover the costs of trust account investigations.

Option 2 sets a flat fee that would apply to all practitioners irrespective of the type and conditions of their practising certificate. Under this approach, the costs of legal regulation would be equally shared across all practitioners. Under this approach, legal practitioners would pay the same fee for a practising certificate irrespective of whether or not they had trust authorisation.

Table 16: Full cost recovery options (comparison with current fees)

Practising certificate type	Current fee	Proposed fee Option 1	Proposed fee Option 2
With trust authorisation	$509	$1,623	$1,033
Without trust authorisation	$344	$913	$1,033

As mentioned in Section 6.1, recovering 100 per cent of the cost of regulation through fees, rather than relying on any revenue from interest withheld from clients' trust money, would comply with government policy. It would also have the effect of freeing up around $14 million to fund other services - such as Victoria Legal Aid. However, it may also result in the types of undesirable direct effects of charging fees set out in Section 6.1: for example it may be incompatible with the Cost Recovery Guidelines' principle that fees should not be set at levels that deter existing suppliers from continuing to offer services, or that create barriers to new entrants. This would be an unwelcome outcome for suppliers and consumers of legal services, given that a well-functioning legal system requires that an appropriate number of practitioners are certified to receive trust account money. In particular, it would affect practitioners whose remuneration is not as high – for example those in the community sector, rural and regional practices and those who work on a part-time basis.

Specific analysis of Option 1 – tiered fees

Legal practitioners with trust authorisation would pay more in practising certificate fees meaning that their clients would potentially contribute a greater proportion towards the costs of the system (if some or all of those costs were passed through by the legal practitioner). The additional contribution made by clients of legal practitioners with trust authorisation acknowledges that these clients benefit to the greatest extent from regulation. However, under Option 1, the cost of a practising certificate with trust authorisation would effectively triple in price from $509 to $1,623. An increase of this nature may be a disincentive to existing practitioners who maintain trust accounts to continue to hold practising certificates with trust authorisation. This would be particularly relevant for sole practitioners: in the example set out in Table 17 below, a part time sole practitioner with trust account authorisation would incur an extra cost of $2.27 per hour under this option and the $1,623 fee would represent 3.78 per cent of their annual earnings. As noted earlier, some or all of this extra cost may be passed onto clients. Alternatively, sole practitioners may absorb the cost. This is a particular concern given that there are a large number of small law practices and sole practitioners in the legal profession.

Table 17: Estimated effects on sole practitioners of full recovery through fees – tiered fee structure

	Hours worked per week	Hourly rate	Annual revenue	Hourly cost of fee	Fees as % of annual income/revenue
Part time	15	$60.00	$43,200	$1.29	2.15%
Part time – trust account authorised	15	$60.00	$43,200	$2.27	3.78%
Full time	38	$60.00	$109,440	$0.51	0.85%
Full time -trust account authorised	38	$60.00	$109,440	$0.90	1.49%

Table 18: Estimated effects on law firms of full recovery through fees – tiered fee structure

	Practitioners without trust account authorisation	Practitioners with trust account authorisation	Hours worked per week	Hourly rate	Annual revenue $'000	Hourly cost of fee	Fees as % of revenue
SME	16	4	38	$80	$2,920	$ 0.58	0.72%
Large	82	18	38	$100	$18,240	$ 0.58	0.58%

Table 19: Estimated effects community and public sector employee practitioners of full recovery through fees – tiered fee structure

	Hours worked per week	Hourly rate	Annual income	Hourly cost of fee	Fees as % of annual income
Community – part time	15	$40.00	$28,800.00	$1.29	3.22%
Public sector – part time	15	$50.00	$36,000.00	$1.29	2.58%
Community – full time	38	$40.00	$72,960.00	$0.51	1.27%
Public sector – full time	38	$50.00	$91,200.00	$0.51	1.02%

Table 20 shows that the bulk of practising certificates with trust authorisation were maintained by sole practitioners and small law practices during 2015-2016. Table 21 shows a specific breakdown for sole practitioners during the same year.[26]

Table 20: Practising certificates with trust authorisation held in law practices based on size (shading indicates law practices that meet the definition of small business)

Size of law practice	Practising certificates with trust authorisation
<2	403
2-6	3098
7-11	120
12-16	82
17-21	37
22-26	40
27-31	23
32-36	17
37-41	13
42-46	16
47-51	4
52-56	9
57-61	8
62-66	5
67-71	5
72-76	2
77-81	5
82-86	-
87-91	13
97-101	11
>102	321

Source: Internal reports

[26] As a practitioner may hold multiple practising certificates in a year, the total numbers in Tables 20 and 21 are likely to be higher than the total number of practitioners.

Of the small businesses that employ fewer than 22 staff, some businesses comprise sole practitioners with other employees, namely other legal practitioners employed by a sole practitioner. Table 21 shows this subset of sole practitioners.

Table 21: Practising certificates with trust authorisation sole practitioners

Size of law practice (sole practitioner)	Practising certificates with trust authorisation
<2	316
2-6	960
7-11	12
12-16	3

Source: Internal reports

Specific analysis of Option 2 – single fee

Despite the removal of a higher fee for practising certificates with trust authorisation under Option 2, the level of the single fee may also deter potential new and existing, low-paid lawyers from practising. This in turn may have flow through effects to areas of the law where the pay scales are not as high (e.g. community sector, rural and regional practices). Sole practitioners and small law firms are likely to be placed at a disadvantage as the fee would represent a higher percentage of their annual income than larger firms. In small law practices, the fees imposed under this option would represent a higher percentage of annual income than larger firms, and would lead to an estimated cost per-hour-worked of $1.46 for part time sole practitioners as can be seen in Table 22.

Table 22: Estimated effects on sole practitioners of recovery through fees – single fee

	Hours worked per week	Hourly rate	Annual income /revenue	Hourly cost of fee	Fees as % of annual income/revenue
Part time	15	$60.00	$43,200	$1.46	2.43%
Part time – trust account authorised	15	$60.00	$43,200	$1.46	2.43%
Full time	38	$60.00	$109,440	$0.58	0.96%
Full time -trust account authorised	38	$60.00	$109,440	$0.58	0.96%

Table 23: Estimated effects on law firms of recovery through fees – single fee

	Practitioners without trust account authorisation	Practitioners with trust account authorisation	Hours worked per week	Hourly rate	Annual revenue $'000	Hourly cost of fee	Fees as % of revenue
SME	16	4	38	$80	$2,920	$0.58	0.72%
Large	82	18	38	$100	$18,240	$0.58	0.58%

Table 24: Estimated effects on community and public sector employee practitioners of recovery through fees – single fee

	Hours worked per week	Hourly rate	Annual income	Hourly cost of fee	Fees as % of annual income
Community – part time	15	$40.00	$28,800.00	$1.46	3.65%
Public sector – part time	15	$50.00	$36,000.00	$1.46	2.92%
Community – full time	38	$40.00	$72,960.00	$0.58	1.44%
Public sector –full time	38	$50.00	$91,200.00	$0.58	1.15%

6.4 Options for 50 per cent recovery through revenue from fees

Two further options have been developed which use a mix of revenue sources to fund the costs of legal regulation. Under each of these options, the fee stream would generate revenue to meet 50 per cent of the costs of legal regulation with the remaining 50 per cent of the cost funded from interest. These options are:

- 50 per cent recovery of the cost of legal regulation from the fee stream, employing the existing tiered fee structure, with the remaining 50 per cent of the cost funded from interest foregone by clients, who deposit money into trust accounts, through the interest stream (Option 3); and
- 50 per cent recovery of the cost of legal regulation from the fee stream, by way of a single fee which would apply to all legal practitioners, with the remaining 50 per cent of the cost to be funded from the interest stream (Option 4).

Option 3 would retain the current fee structure. This option is the closest option to the current arrangements as it delivers full cost recovery through a mix of revenue from fees and trust account interest with a tiered fee structure. However, under this option the level of recovery from the fee stream would increase from 36 per cent to 50 per cent. Practising certificates with trust authorisation would continue to attract a higher fee than other practising certificates. The additional amount paid by legal practitioners with trust authorisation would cover the costs of trust account investigations.

Option 4 sets a flat fee that would apply to all practising certificates. As a result legal practitioners would pay the same fee for a practising certificate irrespective of whether or not they had trust authorisation. In a comparable way to Option 3, this option would share the costs evenly between the fee and interest streams.

Table 25: Options for full cost recovery through revenue from fees and trust account interest (comparison with current fees)

Practising certificate type	Current fee	Proposed fee Option 3	Proposed fee Option 4
With trust authorisation	$509	$811	$517
Without trust authorisation	$344	$456	$517

In comparison to the current arrangements, recovering 100 per cent of the costs of regulation evenly between the fee and interest stream would be:

- more equitable, because legal practitioners who give rise to the need for the regulation of legal services and some beneficiaries of that regulation (if fees are passed through to clients) would pay 50 per cent of the costs of regulation and clients with money in trust accounts would pay the remaining 50 per cent though their foregone interest;
- more efficient, as legal practitioners would be sent a price signal that more accurately reflected the regulatory costs their activities create; and
- more effective, because fee revenue - a stable funding stream – would comprise a greater share of the revenue required to fund the regulation (50 per cent).

While recovering 50 per cent of the cost of legal regulation through fees is more equitable, efficient and effective (when applying the Cost Recovery Guidelines) than under the existing arrangements, it is also less likely to result in the negative effects associated with 100 per cent recovery through fees. For example, it is unlikely that sole traders without trust authorisation would be deterred from practising law given that their fees would rise from the estimated $0.19 per-hour-worked currently, to either $0.25 under Option 3 (see Table 25) or $0.29 under Option 4 (see table 29).

The 50 per cent contributed by those consumers who place their money in trust reflects that they are a subset of consumers of legal services who have more invested (in some cases significant amounts of money) and therefore, bear more risk than other consumers of legal services should their legal practitioner prove to be dishonest or incompetent.

Setting the fees to recover 50 per cent of the total revenue would benefit small business more than larger firms (in comparison to Options 1 and 2 - which recover 100 per cent of the costs through fees) as it is assumed that small businesses have lower billings per practitioner, and therefore more difficulty in spreading the costs of practising certificate fees across their client base. This is confirmed by the small business impact assessment in Section 7 which indicates that the cumulative impacts for small business of the changes are best met by Options 3 and 4.

Option 3: 50 per cent cost recovery from fees – existing tiered fees

Under this approach, fees for practising certificates with trust authorisation would increase to $811 while fees for practising certificates without trust authorisation would be priced at $456. While fees for legal practitioners without trust authorisation would be the lowest under this option, practitioners with trust authorisation would be disadvantaged compared to Option 4's single fee. As illustrated in Table 26, part time practitioners would be particularly affected: they would incur an estimated cost of $1.13 per-hour-worked to hold a practising certificate with trust authorisation and the fee of $811 would represent almost two per cent of their annual income.

While the proposed increase would not be as significant as those proposed under options that propose to recover 100 per cent of the cost from fees, the increase of $308 on the fees paid by practitioners with trust authorisation in 2015-2016 may potentially act as a deterrent and decrease the number of practitioners with trust authorisation.

Additionally, clients who place their money in trust would potentially be disadvantaged compared to Option 4's single fee. In the instances that practitioners pass on some, or all of the fee, clients with money in trust accounts would not only pay for 50 per cent of the costs of regulation through their foregone interest but would also contribute through higher legal fees, compared to Option 4. Therefore Option 3 would result in clients with money in trust subsidising other groups and potentially paying too great a proportion of the costs of regulation.

Table 26: Estimated effects on sole practitioners of equal mix of revenue from fees and interest - tiered

	Hours worked per week	Hourly rate	Annual income /revenue	Hourly cost of fee	Fees as % of annual income/revenue
Part time	15	$60.00	$43,200	$0.64	1.07%
Part time – trust account authorised	15	$60.00	$43,200	$1.13	1.89%
Full time	38	$60.00	$109,440	$0.25	0.42%
Full time -trust account authorised	38	$60.00	$109,440	$0.45	0.75%

Table 27: Estimated effects on law firms of equal mix of revenue from fees and interest - tiered

	Practitioners without trust account authorisation	Practitioners with trust account authorisation	Hours worked per week	Hourly rate	Annual revenue $'000	Hourly cost of fee	Fees as % of revenue
SME	16	4	38	$80	$2,920	$0.29	0.36%
Large	82	18	38	$100	$18,240	$0.29	0.29%

Table 28: Estimated effects on community and public sector employee practitioners of equal mix of revenue from fees and interest - tiered

	Hours worked per week	Hourly rate	Annual income	Hourly cost of fee	Fees as percentage of annual income
Community – part time	15	$40.00	$28,800.00	$0.64	1.61%
Public sector – part time	15	$50.00	$36,000.00	$0.64	1.29%
Community	38	$40.00	$72,960.00	$0.25	0.64%
Public sector	38	$50.00	$91,200.00	$0.25	0.51%

Option 4: 50 per cent cost recovery from fees – single fee

Pricing the fee stream at 50 per cent of the full cost of regulation decreases the risk of practising certificate fees being placed at too high an entry point for new and lower-paid lawyers. The single fee does not provide a disincentive for sole practitioners and small law businesses to invest in practising certificates with trust authorisation. This has flow through effects as sole practitioners and small law practices may be more likely to consider using trust accounts or increasing the number of legal practitioners at their firm with trust authorisation.

The effects of practising fees on legal practitioners, firms and the consumers of legal services under Option 4 have been estimated and are represented in the tables below:

Table 29: Estimated effects on sole practitioners of equal mix of revenue from fees and interest – single fee

	Hours worked per week	Hourly rate	Annual revenue	Hourly cost of fee	Fees as % of annual income/revenue
Part time	15	$60.00	$43,200	$0.73	1.22%
Part time – trust account authorised	15	$60.00	$43,200	$0.73	1.22%
Full time	38	$60.00	$109,440	$0.29	0.48%
Full time -trust account authorised	38	$60.00	$109,440	$0.29	0.48%

Table 30: Estimated effects on law firms of equal mix of revenue from fees and interest – single fee

	Practitioners without trust account authorisation	Practitioners with trust account authorisation	Hours worked per week	Hourly rate	Annual revenue $'000	Hourly cost of fee	Fees as % of revenue
SME	16	4	38	$80	$2,920	$0.29	0.36%
Large	82	18	38	$100	$18,240	$0.29	0.29%

Table 31: Estimated effects on community and public sector employee practitioners of equal mix of revenue from fees and interest – single fee

	Hours worked per week	Hourly rate	Annual income	Hourly cost of fee	Fees as % of annual income
Community – part time	15	$40.00	$28,800.00	$0.73	1.82%
Public sector – part time	15	$50.00	$36,000.00	$0.73	1.46%
Community – full time	38	$40.00	$72,960.00	$0.29	0.72%
Public sector – full time	38	$50.00	$91,200.00	$0.29	0.58%

6.5 Other potential options

Options that vary fees according to characteristics other than if a practitioner manages trust account funds or not have not been developed for this discussion paper. The Board does not currently have sufficient data to demonstrate that there is a systematic variation in the costs of issuing practising certificates, or undertaking other regulatory activity, based on any other factors such as:

- location (e.g. urban vs rural);
- seniority or experience of practitioners; or
- firm size (e.g. sole practitioner vs large firm).

The options also do not distinguish between barristers and solicitors; however, stakeholder suggestions and feedback are welcomed on approaches that would establish a new, variable fee structure.

In addition, while there are systematic variations in the volume of complaints associated with different types of law (e.g. criminal vs commercial vs family) - and therefore their associated costs - at this stage, the Board has not included options that charge different fees based on the type of law being practised. This is because higher levels of complaints do not necessarily indicate greater regulatory risk; however, feedback on this position is also welcomed from stakeholders.

Consultation questions

16 Should the Board be considering other options for the setting of fees based on different criteria? Please share your views and in particular outline your rationale and supporting data for a different approach.

7 Considerations for small business

As small business is often disproportionately affected by regulation, the Government believes it is important that the impacts on small business be an explicit consideration of any regulatory intervention.

The definition of a small business is one that contains 20 employees or less. As can be seen from the table below, the majority of the legal profession in Victoria consists of businesses that meet the definition of a small business.

Table 32: Size of law practices in Victoria

Type of law practice	Number of practitioners in the practice[27]							Total
	1	2-3	4-5	6-10	11-20	21-40	>40	
Community legal practice	6	8	6	10	13	11	8	62
Foreign law practice	20	2	1	1	0	0	0	24
Government employer	28	33	12	16	18	6	13	126
Incorporated legal practice	695	385	144	112	58	19	4	1,417
Law firm	10	75	39	48	23	14	28	237
Non legal employer	700	280	72	67	29	5	4	1,157
Sole practitioner	4,945	337	60	19	4	0	0	5,365
Unincorporated legal practice	10	4	0	2	6	0	6	28
TOTAL	6,414	1,124	334	275	151	55	63	8,416

Source: Internal data

The following table breaks down the data further to demonstrate that all law practices that employ barristers would fall within the small business definition.

Table 33: Size of law practices in Victoria – barristers

Type of law practice	Number of barristers[28]		Total
	1	6-10	
Community legal practice	2	1	3
Incorporated legal practice	1	0	1
Sole practitioner	2,015	0	2,015
Total	2,018	1	2,019

[27] This includes partners, directors, legal practitioner employees, sole practitioners, volunteers at community legal services, corporate legal practitioner employees and supervising legal practitioners (does not include any non-legal employees).
[28] This includes partners, directors, legal practitioner employees, sole practitioners, volunteers at community legal services, corporate legal practitioner employees and supervising legal practitioners

It cannot be assumed that every law practice maintains a trust account. This is because there are more law practices than there are legal practitioners with practising certificates authorising the keeping of trust accounts.

Therefore, for the purposes of this analysis, the number of small law practices with a practitioner with trust authorisation is estimated to be 50 per cent. This estimate was reached by dividing the number of legal practitioners with trust authorisation by the number of law practices excluding barristers. A further adjustment was made on the assumption it is likely that larger law firms may have more than one legal practitioner with trust authorisation.

Without exact data on the size of all small law practices in Victoria, it is difficult to estimate the total cost to small law practices and their clients arising from the different options. However, it is possible to estimate a range of the total cost based on the available data. These ranges are set out below and are based on the assumption that one person in 50 per cent of all small law practices has a practising certificate with trust account authorisation.

Table 34: Range of estimated total costs to small law practices[29] and their clients

Option 1 – Full cost recovery from fees (tiered fees)	Option 2 – Full cost recovery from fees (single fee)	Option 3 – Mix of revenue (tiered fees	Option 4 – Mix of revenue (single fee)
$7.8 million – $11.4 million	$8.7 million – $12.7 million	$3.9 million - $5.8 million	$3.6 million - $5.6 million

Likewise for the purposes of estimating the cost for sole practitioners, it was estimated that 50 per cent of sole practitioners would have trust authorisation. This is likely to be a conservative estimate. Following these assumptions, it was estimated that Option 4 was the best alternative for sole practitioners as the total costs across all sole practitioners were $2.6 million.

Table 35: Estimated total costs to sole practitioners and their clients

Option 1 – Full cost recovery from fees (tiered fees)	Option 2 – Full cost recovery from fees (single fee)	Option 3 – Mix of revenue (tiered fees	Option 4 – Mix of revenue (single fee)
$6.3 million	$5.1 million	$3.1 million	$2.6 million

As Options 1 and 3 propose tiered fees, a range of costs was estimated. The lower end of the range assumes that the small law practice does not operate a trust account and therefore, none of the legal practitioners have practising certificates with trust authorisation. The higher end of the range assumes that only one legal practitioner would have a practising certificate with trust authorisation. While this may be a conservative assumption for some of the larger small law practices (i.e. those with 11-20 employees may have more than one legal practitioner with trust authorisation), it was determined overall to be an appropriate assumption given the small number of legal practitioners with trust authorisation relative to the overall numbers of legal practitioners.

As can be seen from the following table, using these assumptions, Option 3, which would recover 50 per cent of costs from the fee stream using a tiered fee structure, has the smallest cost burden for smaller law practices, provided that they either do not operate a trust account or only have one legal practitioner authorised to accept trust monies. This may lead to more small law practices and sole practitioners deciding to structure their affairs to avoid setting up trust accounts or not authorising sufficient legal practitioners within their business, in turn increasing the level of regulatory risk. This analysis also demonstrates that larger law practices that structure themselves with only one legal practitioner authorised to deal with trust accounts are advantaged by the alternatives that charge a higher fee for trust authorisation.

[29] Excluding sole practitioners and barristers

Table 36: Estimated costs arising from each of the options for small law practices (per annum)

Size of law practice (number of practitioners)	Estimated costs per small law practice per annum[30]			
	Option 1 – Full cost recovery from fees (tiered fees)	Option 2 – Full cost recovery from fees (single fee)	Option 3 – Mix of revenue (tiered fees)	Option 4 – Mix of revenue (single fee)
1	$913-$1623	$1,033	$456-$811	$517
2	$1,826-$2,536	$2,066	$912-$1,267	$1,034
5	$4,565-$5,275	$5,165	$2,280-$2,635	$2,585
10	$9,130-$9,840	$10,330	$4,560-$4,915	$5,170
20	$18,260-$18,970	$20,660	$9,120-$9,475	$10,340

The impacts for barristers have also been calculated. Given that barristers do not hold trust authorisation, this analysis demonstrates that Option 3 would be the most favourable option for barristers and their clients.

Table 37: Estimated total costs for barristers and their clients

Option 1 – Full cost recovery from fees (tiered fees)	Option 2 – Full cost recovery from fees (single fee)	Option 3 – Mix of revenue (tiered fees)	Option 4 -Mix of revenue (single fee)
$1.8 million	$2.1 million	$0.9 million	$1.0 million

Overall Option 4 generates the lowest total costs for small business and their clients with estimated total costs ranging between $7.2 million to $9.2 million.

Table 38: Range of estimated total costs to small business (includes sole practitioners, barristers and small law practices)

Option 1 – Full cost recovery from fees (tiered fees)	Option 2 – Full cost recovery from fees (single fee)	Option 3 – Mix of revenue (tiered fees)	Option 4 – Mix of revenue (single fee)
$15.9 million-$20 million	$15.9 million-$19.9 million	$7.9 million-$9.8 million	$7.2million – $9.2 million

Consultation questions

17 What are your views of the assumptions used to calculate the small business impacts?

18 Do you agree with the conclusions reached regarding the potential impacts for small business? Please provide reasons for your response.

[30] This table assumes small law practices pay for the cost of employee practising certificates.

8 Practising certificate fees in other jurisdictions

The following table sets out fees charged in other jurisdictions for practising certificates.

Jurisdiction	Fees
Australian Capital Territory	Solicitors *Restricted* Private: $798 In house: $798 Government: $556 Non- ACT: $426 Volunteer: nil *Unrestricted* Private: $1,247 In house: $1,101 Government: $785 Non- ACT: $773 Volunteer: nil Barristers *Silk:* $3,340 *Junior 13+ years:* $2,662 *Junior 6-12 years*: $2,215 *Junior 3-5 years:* $1,510 *Junior 1-2 years:* $1,210 *Readers:* $482 *Government and statutory office holders:* $537

Jurisdiction	Fees
New South Wales	Solicitors $370 Barristers *Silk* CBD: $6,246 Regional: $4,370 Statutory office holder: $1,475 *Junior 5+ years* CBD: $2,330 Regional: $1,629 Statutory office holder: $896 *Junior 2-5 years* CBD: $828 Regional: $577 Statutory office holder: $828 *Junior 1-2 years* CBD: $257 Regional: $193 Statutory office holder: $257 *Readers:* CBD: $176 Regional: $156 *Academic* CBD: $570 Regional: $570
Northern Territory	Solicitors *Unrestricted:* $1610 *Restricted:*$1449 *Community legal centre (unrestricted)*:$115 Barristers *Unrestricted:* $1610 *Restricted:*$1449

Jurisdiction	Fees
Queensland	Solicitors *Principal:* $916 *Non-principal:* $458 Barristers *Silk:* $4,200 *12 Years +:* $1,877 *10 Years +:* $1673 *9 Years :* $1,521 *8 Years :* $1,380 *7 Years:* $1,234 *6 Years:* $1,094 *5 Years:* $942 *4 Years:* $790 *3 Years:* $649 *2 Years:* $509 *1 Year:* $362 *Less than 1 Year:* $216 *Employed Bar* *Silk* $444 *Junior* $126 *Political* $37

Jurisdiction	Fees
South Australia	Solicitors $595 Barristers $595
Tasmania	Solicitors *Principal:* $1,153.62 *Employee:* $861.39 *Corporate:* $442.17 *Locum:* $300 *Community Legal Centre:* $119.34 Barristers $442.17
Western Australia	Solicitors $1,250 Barristers $1,250

9 Appendix 1: Consultation Questions

1. Who, in your view, is receiving the primary benefits of legal regulation in Victoria?
2. Who, in your view, gives rise to the need for legal regulation in Victoria?
3. How can fees be structured to fairly share the costs between the beneficiaries of regulation including the legal profession itself?
4. What do you think the split between the fees and interest streams should be?
5. What price signal should be sent to lawyers about the costs of regulating their sector?
6. What impact could the options discussed in this paper have on the supply of legal services?
7. How do legal practitioners build the costs of regulation into the price they charge for their services?
8. How should the volatility of revenue sources be considered by the Board when setting fees? Please give reasons for your view.
9. What is your view of the assumptions made by the Board in analysing the options in this discussion paper?
10. Do you agree with the list of potential unintended consequences outlined above? Please give reasons for your view.
11. Are there other direct effects that may arise from increases in practising certificate fees, and how should these be avoided or mitigated?
12. How much significance should the Board place on ensuring there is sufficient revenue to fund non-regulatory legal services (e.g. Victoria Legal Aid) when setting fees for practising certificates?
13. What is your view on the benefits and disadvantages of a single fee versus a higher fee for trust authorisation?
14. What is your experience of practising certificates with trust authorisation in relation to sole practitioners and small law practices? Do small firms see benefits in having practising certificates with trust authorisation and would a high fee discourage them from obtaining one?
15. What are your views on the advantages and disadvantages of the current fee settings?
16. Should the Board be considering other options for the setting of fees based on different criteria? Please share your views and in particular outline your rationale and supporting data for a different approach.
17. What are your views of the assumptions used to calculate the small business impacts?
18. Do you agree with the conclusions reached regarding the potential impacts for small business? Please provide reasons for your response.