

## Notes for Completing the Standard Costs Disclosure Document (Family Law)

(Legal Profession Act 2004 NSW as amended by the Legal Profession Amendment Act 2006, the Legal Profession Further Amendment Act 2006; the Legal Profession Regulation 2005 as amended by the Legal Profession Amendment Regulation 2007)

The client should be informed in any covering letter accompanying the disclosure document that any estimates provided are only estimates and not a quotation and, therefore, subject to change.

The disclosure document and the costs agreement apply to law practice/client retainers in the NSW jurisdiction as well as in the federal courts. They are also applicable in Family Law Act matters in the Family Court where the retainer was entered into, or a fresh application was filed, on or after 1 July 2008.

Disclosure must also be made to associated third party payers. Please see ss. 302 and 318A. Disclosure is only to the extent that it is relevant to the costs payable by the third party payer.

Disclosure of costs and other matters as required under the Legal Profession Act 2004 must be made in writing before or as soon as practicable after, the law practice is retained (s. 311). There is no provision for acceptance of the disclosure in the Act. Disclosure is merely a notification. An offer must be made to enter into a costs agreement (ss. 322(2) and 322(3)). The disclosure document can be included as an annexure to the costs agreement.

The regulations may provide additional information to be included in a disclosure document. The Regulations have provided 2 Forms: Form 2 entitled: Form of disclosure of costs to client, which must accompany the disclosure document, and Form 3 entitled: Form of Notification of Client's Rights, which must accompany the bill of costs.

### Exceptions to disclosure requirements

Disclosure is not required for 'sophisticated clients'. A 'sophisticated client' is defined in the Act in s. 302. (Please see s. 312 for a full list of exceptions.) However, please note that sophisticated clients are entitled to progress reports, reasonable information and a bill of costs and can also negotiate a costs agreement (s. 312(5)).

Disclosure is not required in matters where total legal costs, excluding disbursements, are not likely to exceed the prescribed amount (\$750.00 exclusive of GST)). The client may agree in writing to waive the right to disclosure, where a principal of the law practice has considered previous disclosures and relevant circumstances, and determines further disclosure is not warranted. The law practice should keep a record of any such determination and subsequent agreement.

**Clause 1:** Complies with the GST legislation.

**Clause 2:** Complies with s. 309(1) (a). If hourly rates are to be charged then these are to be charged on the basis of minimum units (e.g. a 6 minute unit), rather than the actual time taken. This should be expressly noted in the disclosure document. If this has not been done, the authorities suggest that the practitioner will only be able to charge for the actual time spent.

**Clause 2.1.3:** There are no exceptions to disclosure even where fixed costs apply. Where fixed costs apply, cls. 2.1.1, 2.1.2, and 2.2 should be deleted.

**Clause 3:** Complies with s. 309(1)(c). If it is not possible to provide a total costs estimate, this section requires that a range of estimates should be given (cl. 3.2.) The range must cover the totality of the work, as it is not possible as under the former legislation to provide estimates at later stages. The costs are GST exclusive in cl. 3.2 because at this early stage you may not know which disbursements attract GST. Section 309(1)(c) also requires that an explanation should be provided of the major variables that will affect the calculation of these estimates. Clauses 3.2.1 – 3.2.3 provide for this information. For example, in litigation matters: change in length of trial; number of interlocutory applications; number and location of witnesses; change in solicitor/counsel on the other side; and so on. You may provide additional information where relevant.

**Clause 4:** Complies with s. 309(1)(d).

**Clause 5:** Complies with s. 309(1)(e) of the Act. If interest is to be charged, the tax invoice must state this, including the rate of interest. Clause 110A of the Regulation, (as amended), governs the rate of interest. The Cash Rate Target specified by the Reserve Bank of Australia sets the allowable maximum interest. Clause 110A permits a law practice to charge the Cash Rate Target plus 2%, applicable at the time a tax invoice is issued. This is the maximum rate of interest which can be charged. The Cash Rate Target can be accessed at the Reserve Bank's website: [www.rba.gov.au](http://www.rba.gov.au). It is found under the caption 'Statistics' on the Bank's Home page.

Interest can be charged 30 days after giving a lump sum bill, even though the client is subsequently given, on request, an itemised bill (s. 321(5)). (Please see ss. 332A and 333.)

**Clause 5.2:** This is inserted to cover the possibility that the client may be required to borrow funds which may be Litigation Lending, at which time they would be advised as to the availability of independent legal advice. This disclosure is to prevent complaints by clients that they were not given any notice that this was a possibility. This clause can be omitted if a requirement to borrow funds is not a possibility.

**Clause 6:** The Form has omitted to mention mediation, which is a mandatory disclosure requirement. We have included it in this clause.

**Clause 7:** Complies with s.309(1)(h). Please choose the relevant alternative.

**Clause 8:** Complies with s. 309(1)(b)(iv) and (s. 316) of the Act. This clause imposes an obligation on the law practice to inform the client of any substantial change to anything, which is required to be disclosed to the client (as soon as practicable after the law practice becomes aware of the changes). Examples of changes which must be disclosed are:

- change of practitioner dealing with the matter within the firm must be disclosed to the client
- change of practitioner or counsel for the other party
- Counsel's advice.

In litigation matters changes which must be disclosed are:

- change in length of trial
- number of interlocutory applications
- offers of compromise
- number and location of witnesses.

See also s. 317 of the Act.

**Clause 9:** Complies with s. 310. Please ensure that the other law practice (Barrister) discloses relevant information to you as required under section 310(a), (c) and (d). If disclosure is made to you by the other law practice, that law practice would look to you for payment of costs. Remember you have only 60 days from receipt of the Bill of Costs to make an application for assessment (s. 351).

**Clause 10:** Deals with disclosure of costs in litigious matters or if the matter may become litigious.

**Clauses 10.2 and 10.3:** Need to be completed, setting out the potential range of costs bearing in mind the discretion in Family Court proceedings as set out in 10.1.

The accompanying Form (provided under cl. 109A) contains other information regarding choice of law. Please read the Fact Sheets entitled: Legal Fees – Your Right to Know and Your Right to Challenge Legal Costs.

Please note that the law practice cannot charge for the preparation of disclosure documents, costs agreements and bills of costs (s. 319(2)).

Be warned that non-disclosure of any of the matters referred to above would mean a breach of the disclosure requirements (s. 317). The penalties are:

- the law practice cannot sue for recovery of costs
- the client need not pay the costs until they have been assessed
- the costs of the assessment would be borne by the law practice
- the probability of being reported to the Legal Services Commission by a costs assessor – (see ss. 317(4) and 393(2)).

Other matters you may wish to consider:

- arrangements for paying counsel's fees
- an indemnity for counsel's fees
- security for your fees
- written Authority to receive money
- written Authority to pay disbursements
- recommending independent legal advice, where relevant.

If you choose to include special clauses, which you have drafted in the costs agreement, you should make sure the agreement is signed by the client to ensure its validity.