

**Regulatory Impact Statement
for the proposed
Legal Profession (Practising Certificate Fees)
Regulations**

10 January 2012

The Regulatory Impact Statement (RIS) for the proposed *Legal Profession (Practising Certificate Fees) Regulations* has been prepared in accordance with the requirements of the **Subordinate Legislation Act 1994**.

Public comments and submissions are now invited in response to the proposed Regulations. Comments and submissions should be made in writing by no later than 5.00pm on **Monday, 20 February 2012** to:

Regulatory Impact Statement for the proposed Legal Profession (Practising Certificate Fees) Regulations
2012

Legal Services Board

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Please note that all comments and submissions will be treated as public documents.

Executive Summary

This Regulatory Impact Statement (RIS) has been undertaken to assess the impact of the proposed *Legal Profession (Practising Certificate Fees) Regulations* (the Regulations). The proposed Regulations will take effect from 1 July 2012 and will be in force for a period of five years.

The Regulations will address the issue of determining appropriate practising certificate fees for legal practitioners in Victoria. The current practising certificate fees are as follows:

- \$412 for a practising certificate with trust authorisation
- \$256 for a practising certificate without trust authorisation

These fees have been in place since 1 July 2008 and have not increased since that time. The Legal Services Board (LSB) is responsible for the regulation of the legal profession in Victoria. One of its functions involves recommending practising certificate fees to the Governor-in-Council. In making its recommendation, the LSB must consult with the professional associations on the appropriate fee levels for the profession.

Through the RIS process, the LSB has considered the level of costs that should be recovered through the practising certificate fees. It is government policy that fees should generally be set at the full cost recovery level. Practising certificate fees have never been set on a cost recovery basis. This is because the cost of the legal regulatory system is met entirely by practising certificate fees and a fund managed by the LSB known as the Public Purpose Fund (PPF). The funds in the PPF are primarily derived from the interest on trust money held by solicitors on behalf of legal clients. The unique funding arrangements of the PPF ensure that the shortfall in the cost of regulation is recovered through other revenue sources such as the interest on trust money and the LSB's investment activities. The *Cost Recovery Guidelines* state that there are situations where it may be desirable to recover at less than full cost. Due to the funding arrangements of the regulatory system, this principle may apply to the LSB in setting new practising certificate fees for the legal profession.

In setting the fees, the LSB was also required to take into account proposed draft legislation prescribing a uniform system for the regulation of the legal profession in Australia. Draft legislation was agreed to by COAG and several jurisdictions in October 2011. However, at the time of preparing the RIS, details relating to the commencement and implementation of the national model were still unknown. It is anticipated that the individual jurisdictions will be responsible for recommending practising certificate fees for legal practitioners under the national system. In light of the proposed national model, the RIS recommends that the Regulations be made for a shorter time frame, to enable time for the national scheme to settle, thereby providing a clearer indication of the cost of regulation under the new system.

Recommended fee increase

The LSB assessed several options for the fees and is recommending that practising certificate fees should be set at the following levels:

- 36.50 fee units (\$446) for a practising certificate with trust authorisation
- 24.71 fee units (\$302) for a practising certificate without trust authorisation¹

The fees will recover the costs associated with issuing practising certificates and complaints handling, which is approximately \$5.4 million. The LSB has recommended this option as the preferred option for the following reasons:

- although this option is not entirely consistent with the Government's policy on absolute full cost recovery, the fees will cover 67% of costs identified as relevant regulatory costs
- the fees under this option will generate an additional \$600,000 in income for the PPF, which can be directed towards purposes such as legal aid and legal education
- the proposed fee increase is relatively insignificant in comparison to the fees under option 2, which is full cost recovery
- the fees will be the second lowest of the other states and territories, behind the fees for solicitors in NSW
- the fee structure is identical to the one that is currently in place, which means the level of compliance amongst the profession is likely to be high, and

¹ The Treasurer has set the value of a fee unit at \$12.22 for financial year 2011-12.

- this option produced the most balanced approach through the multi-criteria analysis. The two full cost recovery options (one applying a different fee for certificates with and without trust authorisation, and one imposing a single practising certificate fee) were also assessed in the multi-criteria analysis. These options (option 2 and 5a) rank closely with the preferred option (option 3). It should be noted that the rankings of the options may alter if different judgments were applied to the scores.

If adopted, the proposed Regulations will take effect on 1 July 2012 and will be in force for a period of five years, which will enable sufficient time for the national system to settle. The fees will be assessed at the end of the five year period to determine the appropriate level for practising certificate fees under the national framework. The fees will be subject to an annual automatic indexation, which will be calculated based on the fee units applicable at the time the applicant is applying for the practising certificate. In addition, the fees will be pro-rated on a quarterly basis.

As noted above, it is Government policy that regulatory fees should generally be set on a full cost recovery basis. Where full cost recovery is not adopted, reasons must be given for the departure from this policy. The Act permits the cost of regulation to be covered by the PPF. Accordingly, the PPF will meet the regulatory costs which are not recovered through the proposed practising certificate fees.

The current practising certificate fee Regulations recover approximately \$4.8 million in revenue for the PPF. The proposed Regulations will recover an additional \$600,000 in revenue from practising certificate fees. This is shown in the following table.

Level of cost recovery under current fees	Level of cost recovery under proposed fees	Variance
\$4.8 million	\$5.4 million	\$600,000 (12.5%)

Net present value of the proposed Regulations

Based on the annual cost of \$5.4 million of issuing practising certificates and handling complaints, and assuming a five year period for the proposed Regulations with an opportunity cost of capital of 3.5%, the total base cost of \$27.42 million has a net present value of \$24.752 million.

Objectives of the proposed Regulations

The objective of the proposed practising certificate fee Regulations is to fund the efficient and equitable regulation of the legal profession.

Affected groups

The Regulations will primarily affect legal practitioners practising in Victoria who will be required to pay the fee when applying for or renewing their practising certificates for the 2012-13 practising year. As the proposed fees represent a small increase on the current fees, the impact is likely to be insignificant. Legal consumers may also be affected by the Regulations as practitioners are likely to pass on the fee increase to consumers through their legal fees; however the impact will be very minor as the fee increase is only slight.

Consultation

In accordance with the *Legal Profession Act 2004*, the LSB is required to consult with the professional associations in recommending new practising certificate fees for the Victorian legal profession. The LSB distributed copies of the draft RIS to the Law Institute of Victoria, Victorian Bar, Australian Corporate Lawyers Association and the Federation of Community Legal Centres and sought their feedback on the document and an indication of their preferred option. Their feedback was presented to the LSB in making its decision about the preferred option. The LIV, Bar and ACLA indicated that recovering the cost of complaints handling and issuing practising certificates was also their preferred option. A 28 day consultation period will take place once the RIS has been finalised, which is in accordance with the consultation requirements prescribed in the *Subordinate Legislation Act 1994*. The RIS will be circulated to key stakeholders and available on the LSB's website during the consultation period.

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1 Nature and extent of the problem

1.1 The legal profession in Victoria

The legal profession in Victoria is comprised of approximately 16,700 legal practitioners, of which 90% practice as solicitors and 10% practice as barristers. Approximately 90% of practitioners are based in metropolitan or suburban areas while 7% are located in regional and rural areas. The remaining 3% reflect practitioners that are overseas or interstate. Close to 35% of the legal profession occupy a position as a legal practitioner employee, while 27% occupy a position as sole practitioner. Figure 1.1 shows the breakdown of legal practitioners by position type.

Figure 1.1: Practitioners by position type

Position Type	2010-11
Legal practitioner employee	6,219 (35%)
Sole practitioner	4,693 (27%)
Legal practitioner employee – corporate	2,947 (17%)
Legal partner	1,701 (10%)
Legal director	1,121 (6%)
Volunteer at Community Legal Centre	678 (4%)
Supervising legal practitioner	95 (1%)
TOTAL	17,454 (100%)*

*The total number of legal practitioner positions is greater than the total number of practitioners because practitioners can maintain positions with more than one entity. For example, a practitioner may occupy a position as an employee of a law firm while maintaining a volunteer position with a community legal centre at the same time.

1.2 Requirement to hold a practising certificate

To engage in legal practice in Victoria, legal practitioners are required to hold a current local or interstate practising certificate.

This requirement does not apply to:

- a person acting in the course of their employment with the Crown or a public authority (this includes government lawyers in Victoria)
- a person who prepares an AWA or certified agreement on behalf of a party or proposed party to the agreement
- a person who appears in a court or tribunal by leave of the court
- an Australian-registered foreign lawyer who practises foreign law
- incorporated legal practices or community legal centres that engage in practice in accordance with the *Legal Profession Act 2004* (the Act), or
- in other circumstances authorised by Victorian or Commonwealth legislation.²

Practising certificates are valid from the date specified until the end of the financial year in which it is granted. Practising certificates are required to be renewed on an annual basis, where the practitioner intends to engage in legal practice in the subsequent financial year.

1.3 Practising certificate fees

When applying for or renewing a practising certificate, legal practitioners must submit an application form and pay the relevant fee to the Legal Services Board (LSB). The current practising certificate fees are:

- \$412 (for a practising certificate authorising the receipt of trust money), and
- \$256 (for a practising certificate without trust authorisation).

There are four types of practising certificates: principal, employee, corporate and volunteer. There is no charge for practising certificates obtained only for the purpose of volunteering at a community legal centre, as stipulated in section 2.4.9(4A) of the Act.

Fees for practising certificates issued for part of a year are pro-rated on a quarterly basis.

² Section 2.2.2(2) of the *Legal Profession Act 2004*.

1.4 Current practising certificate fees

In accordance with the Act, the Governor-in-Council may make regulations in respect of practising certificate fees for the legal profession³. The Act stipulates that practising certificate fees are to be made on the recommendation of the LSB, and in doing so the LSB must take into account the cost of regulating different classes of legal practitioners. The Act also states that the LSB must consult with the professional associations on the appropriate fee levels for the profession.

The last Regulatory Impact Statement (RIS) completed in relation to practising certificate fees was prepared for the *Legal Profession (Practising Certificate Fees) Regulations 2007*. When setting the 2007 fees, the LSB resolved to set them for a period of three years. This was due to the fact that the regulatory system was in a period of transition following the introduction of the 2004 regulatory framework, making the cost of regulation under this new system largely unknown. The LSB set the fees for a period of three years in order to allow the regulatory system time to settle, therefore providing a clearer indication of the cost of regulation under the new framework⁴. Prior to this, practising certificate fees had not increased since 1997.

1.5 National Legal Profession Reform Project

On 29 April 2009, the Council of Australian Governments (COAG) agreed that draft legislation providing uniform laws in relation to legal profession regulation in Australia should be prepared. This uniform legislation is designed to more efficiently regulate the legal profession, particularly in relation to admissions and practising certificates, trust accounts, cost disclosure and billing, consumer complaints handling and professional indemnity and fidelity insurance.

By early 2010, considerable work on this project had been carried out; however, a number of key policy issues remained unresolved, including the structure and commencement date of the new system had not been made. In light of this uncertainty, the LSB sought an exemption from setting new practising certificate fees. An exemption was granted, which meant that the 2007 regulations, which expired on 30 June 2011, were subsequently replaced with the *Legal Profession Practising Certificate Interim Regulations 2010* to apply to the 2011-12 practising year. The interim regulations will expire on 30 June 2012.

On 19 October 2011, the Federal Attorney-General announced that the National Legal Profession Reform Project had been agreed to by a number of jurisdictions and COAG. The Attorney-General also announced that Victoria would be responsible for passing legislation enacting the national scheme. At present, not all the details concerning the new model have been finalised. These details will be confirmed when the enacting legislation is passed by the Victorian Parliament. The LSB must now recommend new Regulations in respect of practising certificate fees for 2012-13 and beyond.

1.6 Rationale for government intervention

Governments generally impose regulations to reduce the risk of harm on consumers or the community. In this regard, one objective of the legal regulatory system is to reduce the risk of harm to consumers of legal services by providing a structure that promotes high ethical standards and minimises the risk of harm to consumers. On economic efficiency grounds, there is justification for costs to be recovered from those who give rise to regulatory activity.

1.7 Risk of non-intervention

If the proposed Regulations are not adopted then the short fall in the cost of regulation would be subsidised through the Public Purpose Fund (see explanation on page 9), which would consequently affect the level of funding available for purposes such as legal aid, law reform and legal education.

1.8 The legal regulatory system in Victoria

The Act provides the framework for the legal regulatory system in Victoria. The Act commenced on 12 December 2005 and replaced the previous regulatory regime underpinned by the now repealed *Legal Practice Act 1996*. A number of agencies are responsible for performing regulatory functions prescribed in the Act; however, the principal bodies responsible for regulatory functions under the Act are the LSB and

³ In accordance with section 7.2.17(2)(b) of the *Legal Profession Act 2004*.

⁴ Regulatory Impact Statement for the proposed *Legal Profession (Practice Certificate Fees) Regulations 2007*.

Legal Services Commissioner (LSC). A description of these bodies and the functions which they perform is outlined below.

Legal Services Board

The LSB is responsible for performing a range of functions including:

- issuing, renewing, suspending, imposing conditions upon and cancelling practising certificates
- setting professional indemnity insurance requirements
- maintaining the Register of Legal Practitioners and Law Practices, and the Register of Disciplinary Action
- administering funds set out under the Act
- monitoring, inspecting and investigating legal practitioners' trust accounts
- investigating and determining claims against the Legal Practitioners' Fidelity Fund
- appointing and/or conducting external interventions of law practices
- making and approving legal profession rules
- prosecuting breaches of the Act
- managing and determining a range of exemptions from requirements under the Act
- conducting applications for removal of legal practitioners' names from the Supreme Court roll, and
- making grants to enhance the legal system, legal services and legal education.

Legal Services Commissioner

The LSC's primary responsibility is to receive, investigate and resolve complaints about lawyers in Victoria. In addition to its complaints handling and disciplinary functions, the LSC is responsible for educating the legal profession about issues of concern to the profession and legal consumers. The LSC also has a role in educating the community about the rights and obligations that flow from the lawyer-client relationship. The LSB and LSC are separate agencies, each performing their own unique functions; however, as prescribed by the Act, the Legal Services Commissioner is also the Chief Executive Officer of the LSB. This arrangement is designed to assist the two bodies in working very closely together.

Victorian Civil and Administrative Tribunal (VCAT) Legal Practice List

The Legal Practice List is administered by VCAT and is responsible for, among other things, dealing with civil (costs) disputes between clients and legal practitioners, making disciplinary orders in relation to charges brought by the LSC against legal practitioners and reviewing decisions made by the LSB in relation to the issuing, renewing, cancellation or suspension of practising certificates. The VCAT Legal Practice List replaced the Legal Profession Tribunal.

Council of Legal Education and the Board of Examiners

The Council of Legal Education and Board of Examiners are responsible for regulating admission to the Victorian legal profession. Specifically, the Council is responsible for determining the requirements for admission, approving law courses and practical legal training providers and assessing the qualifications of overseas practitioners. The Board of Examiners determines the eligibility of individual applicants for admission to the legal profession.

Legal Practitioners' Liability Committee (LPLC)

The LPLC provides professional indemnity insurance (PII) for the legal profession in Victoria. Law practices must maintain PII with the LPLC unless an exemption is granted by the Board.

Professional associations

The Law Institute of Victoria (LIV) and Victorian Bar (Bar) are professional associations that represent the interests of solicitors and barristers in Victoria. With the approval of the LSB, the LIV and Bar may make legal profession rules for Victorian legal practitioners. The Act gives the LSB and LSC power to delegate some regulatory functions to the professional associations. The LIV and Bar had responsibility for performing a number of regulatory functions under the previous regime. Given this expertise, the LSB and LSC consider these bodies well placed to assist the LSB and LSC in carrying out certain legal regulatory tasks. The LSB and LSC therefore delegate some regulatory functions to these bodies. For example, the LSB has delegated the function of issuing, renewing and cancelling practising certificates to both organisations. Similarly, the LSC delegates the investigation of certain complaints to both organisations.

1.9 The regulatory system under the national model

Although the national model has been agreed to by COAG, details relating to the implementation, commencement date and structure of the national model are yet to be confirmed. It is therefore difficult to determine the cost of legal regulation under the national scheme. However, draft legislation released during the consultation process revealed that the structure of the national system may be similar to the regulatory framework that is currently in place in Victoria. Regulations are usually in force for a period of ten years; however, due to the level of uncertainty surrounding the proposed national law, the LSB believes it would be appropriate to set the practising certificate fee Regulations for a period of five years, which will enable the national scheme sufficient time to settle, thereby providing a clearer indication of the cost of regulation under the national framework.

1.10 Purpose of the regulatory system

The dual objectives of the regulatory system are to ensure the protection of consumers of legal services and that legal practitioners comply with their professional and fiduciary responsibilities, maintain high standards of professional conduct and provide quality services to legal consumers.

1.11 Funding of the Victorian regulatory system

The cost of the legal regulatory system is met entirely by practising certificate fees and the Public Purpose Fund (PPF), with no additional contribution from consolidated revenue.

The PPF provides funding for a range of purposes including:

- covering the operating costs of the LSB, LSC, VCAT Legal Practice List, Council of Legal Education and Board of Examiners
- the delivery of legal education by the professional associations
- legal aid, and
- other law related services and activities.⁵

Operation of the PPF

The funds in the PPF are primarily derived from the interest on trust money held by solicitors on behalf of their clients. Trust money is money entrusted to a legal practitioner or law practice by a client in the course of or in connection with the provision of legal services.

To comply with the Act, legal practitioners must deposit trust money into a trust account that is held with one of nine banks nominated as an approved deposit-taking institution by the LSB. The banks pay all interest earned on money held in legal practitioners' trust accounts into the PPF. The Act gives the LSB power to invest this money to generate further income for the PPF.

In 2010-11, the income generated through trust money and the LSB's investment activities accounted for approximately 90% of the PPF's total revenue. Practising certificate fees accounted for approximately 8% of the PPF's total revenue, generating approximately \$4.8 million in revenue for the PPF. This money is pooled with other PPF income, such as fines paid by legal practitioners arising out of disciplinary orders made by VCAT. Figure 1.2 shows the income deposited into the PPF over a five year period.

Figure 1.2 Public Purpose Fund revenue

Activity	2006-07 \$'000	2007-08 \$'000	2008-09 \$'000	2009-10 \$'000	2010-11 \$'000
Interest on solicitors' trust accounts and investment activities	72,771	83,493	59,499	47,397	70,178
Practising certificate fees	3,166	3,295	4,461	4,607	4,810
Other	1,086	1,272	1,783	2,128	2,190
Total	77,023	88,620	65,743	54,132	77,178

Source: LSB annual reports

⁵ Part 6.7 of the Act contains the legislative provisions relevant to the PPF.

1.12 The problem - setting new practising certificate fees

This RIS aims to address the problem of determining appropriate practising certificate fees for legal practitioners in Victoria. Part of the problem involves setting practising certificate fees at a level that ensures legal practitioners are making an appropriate contribution to the cost of regulation. Cost-recovery is important for equity and efficiency reasons. When designed and implemented appropriately, the adoption of cost recovery has the potential to advance efficiency and equity objectives. Achieving these goals is important, not only from a government perspective, but also because of the benefits provided to businesses and the community as a whole⁶.

The practising certificate fees will potentially apply to all legal practitioners in Victoria who are required to hold a practising certificate. In setting the fees, the Board must take into account the cost of regulating different classes of legal practitioners. Currently, legal practitioners are classified into the following categories:

- principal of a law practice authorised to receive trust money
- principal of a law practice not authorised to receive trust money (including barristers)
- employee of a law practice
- corporate legal practitioner, and
- volunteer at a community legal centre.

Practising certificates are categorised into three types: practising certificates with trust authorisation, practising certificates without trust authorisation and volunteer practising certificates, which do not attract a charge

A range of factors must be taken into account in determining practising certificate fees for the profession. One issue involves ensuring that the fees are not set at a level that may potentially discourage practitioners from holding a practising certificate with trust authorisation. This type of practising certificate authorises legal practitioners to receive and handle trust money. The number of practitioners maintaining this type of practising certificate has decreased slightly in the last five years. For example, in 2010-11, 3,463 practitioners held a practising certificate with trust authorisation. This is compared with 3,504 in 2006-07. Although this decrease is slight, there has been no notable increase in the number of practitioners choosing to maintain this practising certificate. For example, the number of legal practitioners in Victoria increased from 13,724 in 2006-07 to 16,727 in 2010-11. However, the number of practitioners holding a practising certificate with trust authorisation did not experience the same level of growth in this period. The reasons for the lack of growth in this area are unknown.

To obtain a practising certificate with trust authorisation, practitioners must hold a principal practising certificate and complete a trust account course through the LIV. The LSB has heard anecdotally that some law practices will take out only one practising certificate with trust authorisation for a senior practitioner as a means of minimising their operational costs. The LSB believes it is important that an adequate number of practitioners maintain a practising certificate with trust authorisation in a law practice to ensure that trust money and trust accounts are adequately supervised and managed by the law practice and its employees.

A high fee level also has the potential to discourage small law practices, including sole practitioners, from maintaining a practising certificate with trust authorisation. If this occurred, then these practitioners would be prohibited from carrying out legal work involving the receipt of trust money. This gives rise to greater regulatory risk, for example, some practitioners may consider practising outside of their practising certificate conditions. This also raises issues about access to legal services for consumers who would be limited in the number of practitioners who could carry out legal work involving trust money.

Accordingly, it is important that the practising certificate fees are set at a level which encourages practitioners to continue to maintain a practising certificate with trust authorisation. This issue will be explored further during the consultation period. The issue of why the number of practising certificates with trust authorisation has not increased over the last five years will also be considered. Figure 1.3 shows the number of practising certificates issued over a five year period by practising certificate type.

⁶ DTF Cost Recovery Guidelines May 2010, pg 7.

Figure 1.3 Number of practising certificates issued by practising certificate type

Year	With trust - \$412	Without trust (includes principals not authorised to receive trust money, barristers, employees and corporate legal practitioners) - \$256	Volunteer - No charge	Total no. of practising certificates issued
2010-11	3,463	13,059	205	16,727
2009-10	3,435	12,384	209	16,028
2008-09	3,397	11,827	147	15,371
2007-08	3,481	10,652	99	14,232
2006-07	3,504	10,139	81	13,724

Source: LSB annual reports

Another issue of concern involves ensuring that the fees remain competitive in comparison to the other jurisdictions. Practising certificate fees vary between the jurisdictions, with NSW charging the lowest fee of \$230 for solicitors with more than two years legal experience, and the highest fee of \$5,940 for CBD based silks. Victoria currently charges the second lowest fee for solicitors, behind NSW. Setting the fees at a competitive level has the potential to entice those practitioners who may be contemplating an interstate move to seek legal employment in Victoria. Adopting a low fee also has the potential to encourage interstate practitioners appearing in Victoria on a regular basis to apply for a Victorian practising certificate. Currently, interstate practitioners can practise in Victoria without holding a Victorian practising certificate. However, for consumer protection reasons, the LSB would encourage these practitioners to hold a Victorian practising certificate. The LSB has limited authority with respect to practitioners practising in Victoria on an interstate practising certificate. If these practitioners held a Victorian practising certificate, then they would be bound by the rules and regulations of the Victorian framework. Interstate practitioners may be inclined to apply for a practising certificate in Victoria if the fees were set at a reasonable level.

Consideration must also be given to ensuring that the fees do not create a barrier to entry to the legal profession. Fees set too high might make it financially difficult for new practitioners to enter the legal profession. The fee might also discourage part-time and casual practitioners from seeking casual legal work, as their earnings may not justify paying a significant fee for maintaining a practising certificate. Raising the funds to pay for the practising certificate fee may also prove difficult for new or part-time practitioners. Rural practitioners whose wages may be lower than their CBD counterparts may also struggle to pay a fee that is set at a high level.

1.13 Cost of regulation

The Department of Treasury and Finance (DTF) *Cost Recovery Guidelines* state that regulatory fees and user charges should be set on a full cost-recovery basis because it ensures that both efficiency and equity objectives are met⁷. Practising certificate fees have never been set on a cost recovery basis. The 1997 Regulations for example, set the fees to recover the costs incurred by the professional associations for issuing practising certificates and complaints handling only. Additionally, in 2010-11, the income generated through practising certificate fees recovered approximately 28% of the cost of regulation. The unique funding arrangements of the PPF ensure that the shortfall in the cost of regulation is recovered through other revenue sources such as the interest on trust money and the LSB's investment activities. If the fees are not set at an appropriate level, then any shortfall in the costs would be met by the PPF, and may therefore reduce the level of funding available for other purposes also funded through the PPF: for example, legal aid and legal education for the legal profession and the community.

The *Cost Recovery Guidelines* state that there are situations where it may be desirable to recover at less than full cost⁸. Due to the funding arrangements of the regulatory system, this principle may apply to the LSB in setting new practising certificate fees for the legal profession. It should also be noted that although legal practitioners are the target of the regulatory system, an objective of the regulatory system is to ensure the protection of consumers of legal services, who are ultimately the beneficiaries of a well-regulated profession.

⁷ DTF Cost Recovery Guidelines May 2010, pg 7.

⁸ DTF Cost Recovery Guidelines May 2010, pg 7.

1.14 Analysis of the previous RIS

The LSB last prepared a RIS when making the *Legal Profession (Practising Certificate Fees) Regulations 2007*. Through this process, the LSB resolved to make the regulations for a period of three years. This decision was made on the basis that the regulatory system was in a period of transition following the introduction of the new framework and the cost of regulation under this new framework was unknown. The LSB agreed to make new regulations (and prepare a new RIS) when sufficient data was available.

The 1997 Regulations set practising certificate fees at a level which recovered the costs incurred by the LIV and Bar for issuing practising certificates and handling complaints. The 2007 Regulations implemented a CPI catch up from the 1997 Regulations. Under the new system, the allocation of these functions has changed significantly, with most complaint handling functions now being the responsibility of the LSC. Accordingly, the LSB must now assess whether this basis for the setting of practising certificate fees is still appropriate and relevant.

Complaints handling

Under the regulatory framework that preceded the *Legal Profession Act 2004*, the LIV and Bar were responsible for receiving and handling complaints about legal practitioners. Under the current system, all complaints must be received by the LSC. The LSC makes the decision whether to delegate the matter to the professional associations or handle the matter internally. This change in process has resulted in the professional associations handling fewer complaints. For example, in 2004-05, the professional associations handled 69% of the total number of complaints about lawyers. In 2010-11, the professional associations handled only 12% of the total number of complaints. This reflects consumer expectations that complaints made against legal practitioners will be managed by an authority independent of the profession. Consequently, the reduction in the number of complaints being handled by the professional associations has led to a reduction in the amount of funding provided to the LIV and Bar to cover the costs of complaints handling. The LSC has a service level agreement in place with the LIV which stipulates that a minimum of 200 complaints are to be referred to the LIV per annum. The LSC's arrangement with the Bar does not prescribe the minimum number of complaints to be delegated to the Bar, however the number of complaints received relating to barristers is quite low. In 2010-11, a total of 105 complaints related to barristers. Because of the significant capacity of the Bar Ethics Committee to deal with complaints and investigations, the LSC tries to refer as many complaints as possible to the Committee for investigation. The number of complaints delegated to the professional associations is expected to increase in future years. The amount of funding distributed to the professional associations for complaint handling functions may therefore increase.

Figure 1.5 Complaints delegated to the professional associations

	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11
LIV & Bar	2,030	2,036	2,007	1,808	506	506	390	278	124	168	234

Sources: LSC and Legal Ombudsman Victoria annual reports

Figure 1.6 Funding distributed to the professional associations for complaint handling functions

Year	Funding to LIV \$	Funding to Bar \$
2010-11	755,000	88,149
2009-10	735,000	59,087
2008-09	1,381,633	27,561
2007-08	1,687,529	76,183
2006-07	1,915,019	282,400

Source: LSB annual reports

Practising certificates

The LSB has delegated the function of the issuing of practising certificates to the LIV and Bar. As indicated in Figure 1.7, the number of practising certificates issued to legal practitioners has increased slightly over the last five years, which has resulted in a minor increase in the costs associated with this function.

However, the LSB anticipates that the costs associated with the issuing of practising certificates will gradually decrease due to the launch of a new system developed by the LSB, which enables legal practitioners to apply for and renew their practising certificates online. The LSB launched its web-based practising certificate application and renewal system known as *LSB Online* in March 2011. Approximately 4,000 legal practitioners renewed their practising certificates for 2011-12 using this online system and it is expected that uptake will increase as practitioners become more aware of the benefits and convenience of the online renewal process. This will significantly reduce the time and cost associated with manual processing of applications, which is currently undertaken by the professional associations. Accordingly, the amount of funding distributed to the professional associations for issuing practising certificates may also decrease. The LIV and Bar should still play a role in assessing the suitability and fitness of practitioners applying for practising certificates as delegate of the LSB.

Figure 1.7 No. of practising certificates issued

Year	No. of practising certificates
2010-11	16,727
2009-10	16,028
2008-09	15,371
2007-08	14,232
2006-07	13,724

Source: *LSB annual reports*

Figure 1.8 Funding distributed to the professional associations for issuing practising certificates

Year	Funding LIV	Funding to Bar
2010-11	\$807,000	\$112,000
2009-10	\$786,000	\$51,000
2008-09	\$864,000	\$102,000
2007-08	\$732,000	\$186,000
2006-07	\$641,000	\$164,000

Source: *LSB annual reports*

1.14 Recovery of costs for other legal regulatory functions

There are other activities which are included in the cost of legal regulation, for example:

- trust account investigations
- external interventions, and
- the operating costs of the LSC, LSB, VCAT Legal Practice List and Board of Examiners/Council of Legal Education.

The recovery of the costs associated with performing these functions through the practising certificate fees is considered in this RIS.

1.15 Previous practising certificate fees

The 2007 Regulations implemented a CPI catch up from the 1997 Regulations. The 1997 Regulations set fees at \$320 for practising certificates with trust authorisation, \$200 for practising certificates without trust authorisation and \$160 for first time applicants. Practising certificate fees remained at this level for a ten year period. The fact that a CPI catch up was implemented in 2007 meant that the cost base of the regulatory system was not taken into account. In recommending new fees, the Board must now consider the cost base of the regulatory system under the 2004 framework.

2 Objective of the proposed practising certificate fees regulations

2.1 The objective

The objective of the proposed practising certificate fee regulations is to fund the efficient and equitable regulation of the legal profession.

2.2 Cost recovery

The *Cost Recovery Guidelines* state that regulatory fees should be set on a full cost-recovery basis because it ensures that both efficiency and equity objectives are met. The *Cost Recovery Guidelines* state that where full cost recovery is not consistent with other policy objectives of the Government, then it may be appropriate to adopt a partial cost-recovery option.

2.3 Reason for preparing a RIS

The *Subordinate Legislation Act 1994* prescribes that a RIS must be prepared in respect of a proposed statutory rule or amendment. An exemption from preparing a RIS can be sought if it can be demonstrated that the proposed regulations are not likely to impose 'a significant economic or social burden on a sector of the public'. A significant economic burden is generally considered to be \$500,000 or more per annum⁹. This threshold is indicative only. In this case, the proposal to make regulations in respect of practising certificate fees for the Victorian legal profession is considered to impose a significant economic burden on legal practitioners. The LSB is therefore required to prepare a RIS to assess the impacts of the proposed regulations.

2.4 Authorising legislation

In accordance with the Act, the Governor-in-Council may make regulations in respect of practising certificate fees for the legal profession¹⁰. The Act stipulates that practising certificate fees are to be made on the recommendation of the LSB, and in doing so the LSB must take into account the cost of regulating different classes of legal practitioners.

⁹ See paragraph 228 of the *Subordinate Legislation Act 1994* Guidelines, available at: [http://vcec.vic.gov.au/CA256EAF001C7B21/WebObj/VGRAppendixE\(PDF\)/\\$File/VGR%20Appendix%20E%20\(PDF\).pdf](http://vcec.vic.gov.au/CA256EAF001C7B21/WebObj/VGRAppendixE(PDF)/$File/VGR%20Appendix%20E%20(PDF).pdf)

¹⁰ In accordance with section 7.2.17(2)(b) of the *Legal Profession Act 2004*.

3 Options for achieving the objective

This step in the RIS process involves identifying and considering options that could feasibly achieve the objective of the proposed Regulations. A number of options have been considered for addressing the objective specified in Chapter 2. These options are discussed below.

3.1 The base case

The Victorian Guide to Regulation prescribes that the base case must be considered as one of the options in the RIS process. The base case assesses the situation as if the regulations did not exist. The base case in this RIS assumes that legal practitioners are not required to pay a practising certificate fee. The LSB would therefore abolish practising certificate fees and subsidise the cost of regulation through other sources of income in the PPF. While the PPF generates sufficient funds to cover the entire cost of legal regulation, the abolition of practising certificate fees would affect the level of funding available for other activities and purposes also funded through the PPF, such as, legal aid, law reform and legal education.

3.2 Recovery of the cost of issuing practising certificates and complaints handling

The fees could be set to recover the costs associated with the issuing of practising certificates and complaints handling undertaken by both the LSC and the professional associations. As previously noted, in 1997, the practising certificate fees were set to recover the costs incurred by the professional associations in issuing practising certificates and handling complaints. With the introduction of the new regulatory framework, these activities have changed significantly with the LSC now handling a majority of complaints internally. Accordingly, it may be appropriate to recover the costs incurred by both the LSC and the professional associations in performing this function.

This option was explored in the 2007 RIS, which considered whether it would be appropriate for the cost of complaints handling to be recovered through practising certificate fees as any shortcomings in lawyers' service provisions often give rise to complaints. The LSC has power to handle two types of complaints – civil complaints and disciplinary complaints. Civil complaints relate to a dispute about legal costs or a financial loss as a result of a lawyer's actions. A disciplinary complaint raises allegations about a lawyer's professional conduct. Mixed complaints contain both a civil and disciplinary complaint. Figure 3.1 shows the number of complaints received by the LSC over a three year period by complaint type.

Figure 3.1: Number of complaints received

Year	Civil complaints	Disciplinary complaints	Mixed complaints	Total
2010-11	812	992	180	1,984
2009-10	568	1,094	549	2,211
2008-09	539	1,196	322	2,057

Source: LSC Annual Reports

It was noted in the 2007 RIS that many complaints are dismissed by the LSC as they are considered to be vexatious, misleading or not amounting to a disciplinary breach. This is still the case in many complaints received by the LSC. As shown in Figure 3.2, in 2010-11, the LSC formed the view in only 11% of cases that VCAT would be likely to find the practitioner guilty of a disciplinary breach, and in 26% of cases that VCAT would be unlikely to find the practitioner guilty of a disciplinary breach. In 12% of cases, the LSC determined that the complaint lacked legal substance and therefore dismissed the complaint. Accordingly, it may be unreasonable to expect the legal profession to pay for the cost of complaint handling if a majority of complaints do not lead to disciplinary action by the regulator.

Figure 3.2: Disciplinary complaint outcomes

Disciplinary complaint outcomes	2008-09	2009-10	2010-11
LSC formed view that VCAT likely to find lawyer guilty of a disciplinary breach	77 (7%)	64 (7%)	152 (11%)
LSC formed view that VCAT unlikely to find lawyer guilty of a disciplinary breach	345 (31%)	254 (28%)	338 (26%)
Complainant satisfied with lawyer's explanation and withdrew complaint	161 (15%)	211 (23%)	333 (25%)
Complaint made out of time	16 (2%)	5 (1%)	14 (1%)
Complaint made before (or subject of another complaint)	23 (2%)	18 (2%)	15 (1%)
Complaint did not contain enough information	1 (1%)	0	0
Complainant failed to provide further information when requested	108 (10%)	75 (8%)	48 (4%)
Complaint lacked legal substance etc	170 (15%)	104 (11%)	157 (12%)
Complaint about lawyer/client relationship and duties but made by third party (eg. not the client)	30 (3%)	26 (3%)	36 (3%)
LSC formed the view that complaint required no further investigation	43 (4%)	67 (7%)	172 (13%)
Complaint not one that the LSC has power to deal with	115 (10%)	89 (10%)	47 (4%)
Lawyer deceased	1 (1%)	2 (1%)	1 (1%)
Lawyer ill health or not located	11 (1%)	8 (1%)	2 (1%)
Closed due to ongoing proceedings	No data	No data	7 (1%)
Total	1,101	923	1,322

Source: LSC Annual Reports

However, resolving and dismissing complaints still involves effort and resources. For example, in 2010-11, the LSC had power to handle 605 of the 812 civil complaints received, of which the LSC assisted the parties to resolve the dispute in 473 (78%) cases (see figure 3.3 below). The LSC recently introduced a new process for dealing with complaints where it is evident that the issues raised in the complaint would not amount to a disciplinary breach. This new process involves the LSC using informal dispute resolution to assist the complainant and lawyer to reach a satisfactory outcome. The previous process of the LSC involved investigating or dismissing the complaint. As this initiative is relatively new, the LSC has only recorded one year's worth of data for this process. The data indicates that of the 2,609 complaints finalised by the LSC in 2010-11, approximately 45% were finalised through this process. Figure 3.2 reveals that in a quarter of disciplinary complaints resolved in 2010-11, the complainant was satisfied with the lawyer's explanation and withdrew their complaint. The LSC believes this result reflects the efforts of the new complaint handling process. Therefore, the conclusion may be made that although a majority of complaints do not result in the LSC taking disciplinary action against the practitioner, the LSC is providing a service that involves assisting the practitioner and complainant to resolve their issues.

Figure 3.3: Outcomes of civil complaints where the LSC had power to handle the complaint

Civil dispute outcomes where the LSC had the jurisdiction to handle the disputes	2008-09	2009-10	2010-11
Dispute settled between lawyer and client	234 (73%)	218 (78%)	473 (78%)
Dispute was unable to be settled and parties were advised of their right to apply to VCAT	87 (27%)	60 (22%)	132 (22%)
Total	321	278	605

Source: LSC Annual Reports

Another reason for recovering the cost of complaints handling is that the cost of performing this function accounts for a significant proportion of the total cost of regulation. It may therefore be considered appropriate that the legal profession contributes to the cost of this function.

The fees under this option could be structured based on those with trust authorisation and those without trust authorisation. This is because there is evidence which suggests that trust money issues feature commonly in complaints to the LSC. As shown in Figure 3.4, the issue of trust money has featured in the top three issues commonly complained about to the LSC in the last three years. The number of complaints which raise trust issues may in fact be higher than the 133 listed in the table below as some of the complaints may have been categorised under costs/bills because trust money also relates to this issue.

Figure 3.4: Top six issues in complaints received by the LSC

Nature of Allegation	2008-09	2009-10	2010-11
Costs/Bills	938	1030	838
Negligence – including bad case handling	444	623	369
Trust money – including failure to account, mismanagement of funds	134	169	133
Dishonest/ Misled	137	152	131
Documents – including retention and lost	90	134	108
Communication with client – including failure to return calls, give progress reports	192	171	102

Source: LSC Annual Reports

3.3 Full cost recovery

In accordance with the *Cost Recovery Guidelines*, full cost recovery of regulatory fees must be considered as an option in the RIS process. The *Guidelines* state that regulatory fees and user charges should be set on a full cost-recovery basis because it ensures that both efficiency and equity objectives are met. Historically, practising certificate fees have never been set to recover the full cost of regulation. This option would see the entire cost of legal regulation recovered through practising certificate fees, which includes the cost of trust account investigations, complaints handling and issuing practising certificates. This option is similar to the above; however the cost of trust account investigations is also recovered through the fees, along with costs incurred by the LSB for performing other general regulatory functions including processing forms relating to trust accounts, statutory deposit accounts and reports from approved external examiners.

Legal practitioners authorised to operate a trust account are subject to trust account investigations. Trust account investigations are conducted to ensure legal practitioners and law practices maintain their trust accounts in accordance with the general trust account regulations. Investigations can be conducted on referral from a complaint received by the LSC or on the recommendation of the Board. The investigations aim to identify unusual activity in connection with money held in trust accounts. Investigations usually involve analysing trust account records and interviewing the law practice or practitioner associated with the trust account. Approximately 1,800 legal entities currently maintain trust accounts in Victoria. The LSB has delegated the function of trust account investigations to the LIV. The LIV conducts approximately 400 investigations per annum. In 2010-11, the total costs associated with trust account investigations was approximately \$2.2 million. Under this option, these costs will be borne only by those practitioners maintaining a practising certificate with trust authorisation.

3.4 Recovery of the cost of issuing of practising certificates

This option will recover the costs incurred by the professional associations through the issuing of practising certificates. Only one fee will apply as there is no difference in the cost of processing the different types of practising certificates. Costs incurred by the LSB for carrying out practising certificate related functions will also be recovered under this option.

3.5 Charging a single practising certificate fee

A single practising certificate fee could be charged under the full cost recovery option and recovery of the costs of issuing practising certificates and handling complaints. Currently a higher fee is charged for practising certificates with trust authorisation because handling trust money and maintaining a trust account give rise to more regulatory activities. Although the authority to handle trust money is granted to the holder of the practising certificate, the trust account is in fact linked to the law practice rather than the individual legal practitioner, therefore the conclusion can be made that in the case of a law practice, the whole firm benefits from having access to the trust account. This supports the notion that the cost of regulating trust accounts, and practitioners with trust authorisation, should be shared equally amongst the legal profession as opposed to being borne solely by practitioners with a trust authorisation practising certificate.

3.6 Structuring practising certificate fees based on years of legal experience and location

The practising certificate fees could be structured based on the amount of legal experience of the practitioner and their location. Practising certificate fees for Queensland and New South Wales barristers are currently structured in this way. For example, New South Wales silks pay a higher fee than junior barristers while a lower fee applies for barristers undertaking the readers' course or those employed as academics. The fees are broken down further within these categories based on location of practise. For example, the fee for CBD based silks is \$5,940, while regional based silks pay a fee of \$4,155.

Implementing a similar fee structure in Victoria is not considered a feasible option because there is limited evidence to suggest that barristers give rise to greater regulatory risk or effort than solicitors. In order to identify the level of risk associated with the number of years of legal experience of barristers, the LSB would be required to undertake a detailed assessment, which would be a costly and time-consuming exercise that would only add to the cost of regulation. This information is not easily identifiable through the complaints handling function as the LSC's complaints database does not capture the years of legal experience of the practitioner who is the subject of the complaint.

In general, the number of complaints received in relation to barristers is small, which may be proportionate to the number of barristers in Victoria. In 2010-11, there were 1,896 barristers registered in Victoria. Of the 1,984 complaints received in 2010-11, 105 (5%) related to barristers. Anecdotally, Victorian silks do not attract more complaints in proportion to other lawyers.

Structuring the fees relative to the years of legal experience of the practitioner also assumes that the practitioner earns a higher income than less experienced practitioners. Some part-time or casual practitioners who earn less than those practitioners with the same amount of legal experience working on a full-time basis, may cease practising due to the high fee.

While it is acknowledged that charging discounted rates can promote the uptake of legal positions in rural and regional areas, it is considered reasonable that rural and regional practitioners pay the same fee as CBD based practitioners because a large proportion of complaints received by the LSC relate to lawyers in these areas. In 2010-11, approximately 64%¹¹ of complaints received by the LSC related to practitioners in rural and regional areas. This high number of complaints is not necessarily a reflection of the conduct of these practitioners, rather, it reflects the type of legal work undertaken which gives rise to the complaints. It is assumed that local residents make up the primary client base of rural and regional practitioners and therefore, in most cases, the legal work would involve areas of law which relate to the personal affairs of the client, for example family law, property law and probate and estate. These areas of law generally give rise to a high proportion of complaints to the LSC. In a majority of the complaints, the underlying issues relate to the outcome achieved in the legal matter rather than the legal service provided.

Overall, these differential fee structures would be difficult for the LSB and its delegates to administer. The LSB would be required to change its processing structures to incorporate these variables into the practising certificate granting and renewals process. In relation to the location of the practitioner, some lawyers practise across multiple offices in metropolitan and rural areas, which would create difficulty in determining the appropriate fee payable by any individual practitioner.

The *Cost Recovery Guidelines* state that fees should be structured so they are simple to understand. The Guidelines state that 'complex structures may lead to confusion and high levels of evasion'. The current fee structure is simple and straightforward in that only two fees are applied based on those with trust authorisation and those without trust authorisation. It should also be noted that the fees have been structured in this way since 1997; therefore, adopting a consistent structure for the proposed Regulations will result in a higher compliance rate.

3.7 Reduced fee for legal practitioners subject to supervised legal practice

Consideration may be given to charging a reduced fee for legal practitioners who are subject to the supervised legal practice arrangements. The Act imposes a condition on each local practising certificate that the holder is subject to a period of supervised legal practice after receiving his or her first practising certificate. Supervised legal practice also applies to interstate and international practitioners who engage in legal practice in Victoria. The required period is post-admission and is calculated in accordance with the *Legal Profession Regulations 2005 (Vic)*. The period is generally 18 months to two years, or more if supervision has been undertaken on a part-time basis.

It is assumed that practitioners who are subject to supervised legal practice arrangements pose a lower risk to consumers because the type of work delegated to them may be less complex, and their work will be

¹¹ This figure has been derived from the LSC Complaints Management System and is on postal address details provided. Those with DX postal details are not included in this figure.

reviewed by a senior practitioner. In New South Wales, a reduced fee currently applies to legal practitioners who have been admitted to practice for a period of two years or less. The fee is \$70 less than the full fee.

Although these practitioners may pose a lower risk to consumers, they give rise to additional regulatory activities. For example, the LIV as the LSB's delegate, processes applications for the removal of the supervised legal practice condition from practising certificates. The LSB also has the responsibility of considering and granting exemptions from the supervised legal practice requirements. It is therefore considered reasonable that lower risk practitioners are charged the same fee to cover the costs associated with performing these activities.

3.8 Charging a reduced fee, or no fee, for community legal centre lawyers and legal aid lawyers

A reduced fee, or even no fee, could be charged for legal practitioners employed by community legal centres and Victoria Legal Aid. Because these practitioners perform an important function in providing legal advice to disadvantaged members of the community, as a matter of public policy and goodwill, the LSB may reduce or waive the fee entirely for these practitioners. There are approximately 532 lawyers employed at community legal centres and Victoria Legal Aid offices across Victoria. These practitioners comprise approximately 3% of the legal profession. The money used by the organisations to cover practising certificate fees may be better directed towards providing legal assistance or education to the community. However, the funding that would be used to cover their fees would need to be subsidised through the PPF, which may affect the level of funding that is normally provided to these organisations for legal aid and legal grants. It should also be noted that there is no difference in the costs associated with regulating community legal centre and legal aid lawyers.

3.9 Practising certificate fees in other states

In setting practising certificate fees for Victorian practitioners, it is worthwhile considering the structure of the practising certificate fees in the other jurisdictions. Figure 3.5 shows the breakdown of practising certificate fees in the other states and territories.

Figure 3.5: Practising certificate fees in other jurisdictions

State/ Territory	Classes	Variables	Fee ranges
New South Wales	Solicitors and Barristers	- Location - Period of post-admission - Employment type	\$156 to \$5,940
Queensland	Solicitors and Barristers	- Location - Period of post-admission - Employment type	\$192 to \$760
South Australia	Solicitors	Nil	Standard fee of \$524
Western Australia	Solicitors	Nil	Standard fee of \$1,000
Northern Territory	Solicitors and Barristers	Restricted or unrestricted	\$1,260 to \$1,400
ACT	Solicitors and Barristers	- Employer - Period of employment - Restricted or unrestricted	\$459 to \$2,295
Tasmania	Solicitors	- Employment type	\$404 to \$1,055

As indicated in the table above, a number of states have structured the fees for barristers according to years of legal experience and location. The LSB believes these structures would be difficult to administer. South Australia and Western Australia offer a less complex regime as only one fee applies. The implementation of a single fee is considered as one of the options in Chapter 4. See page 42 for further information on the level of fees in the interstate jurisdictions.

3.10 The identified options

The LSB has identified the following options for achieving the objectives:

- Option 1: The base case – no practising certificate fees
- Option 2: Full cost recovery
- Option 3: Recovery of the cost of issuing practising certificates and complaints handling
- Option 4: Recovery of the cost of issuing practising certificates

Option 5: Single fee for full cost recovery and issuing practising certificates and complaints handling

The costs and benefits of these options are assessed in Chapter 4.

The LSB did not consider structuring the fees based on the years of legal experience and location to be a feasible option as there is limited evidence available which indicates that barristers pose a greater regulatory risk than solicitors. As previously noted, approximately 5% of complaints made to the LSC relate to barristers. Furthermore, there is insufficient data which supports the notion that more experienced practitioners pose a greater regulatory risk. Administering a fee structure by years of legal experience and location may pose some difficulties for the LSB and its delegates, particularly where practitioners practise across multiple offices. Retaining a fee structure that is similar to the current model is highly favoured as it is simple in that only two fee types apply. Furthermore, this structure has been in place and operating effectively since 1997.

Implementing a reduced fee for practitioners subject to the supervised legal practice arrangements is not considered a feasible option because although these practitioners may pose a lower regulatory risk due to the supervisory arrangements, the level of work that is required in regulating these practitioners justifies the additional fee. For example, the LIV processes applications for the removal of the supervised legal practice condition from practising certificates on the behalf of the LSB. In addition, the LSB considers applications for exemptions from the supervised legal practice requirements.

Charging a reduced fee for community legal centre lawyers and legal aid lawyers is not considered a viable option because the money that would be used to subsidise the practising certificate fees for these practitioners may affect the level of funding already provided to these organisations for purposes such as legal aid and legal grants.

3.11 Other issues

Implementation

Regulations are usually set for a period of ten years; however, in light of the impending national legal profession reforms, the LSB believes it would seem reasonable to set the proposed Regulations for a shorter time frame. Accordingly, the proposed Regulations will be in force for a period of five years commencing on 1 July 2012, which will allow for a period of transition under the new framework and the collection of four years of data on the cost of regulation under the national system.

Automatic indexation

It is Victorian Government policy that fees which are payable to the Public Account are to be subject to automatic indexation¹². The legal profession practising certificate fees are not bound by this policy because the fees are not payable to the Public Account; however, to ensure the practising certificate fees continue to adequately meet the cost of regulation, the LSB believes the fees should be subject to an annual increase.

The *Monetary Units Act 2004* allows for fees to be fixed by reference to a fee 'unit' that can be indexed each year by the annual rate. The annual rate determines the adjustment of a fee unit for the following financial year. The annual rate is set by the Treasurer, who then publishes the new fee units in the Government Gazette. The indexed fees take effect from 1 July in the following financial year¹³.

The applicable practising certificate fee will be calculated by reference to the fee units applicable at the time that the applicant is applying for a practising certificate, not the fee units applicable in the financial year in which the certificate will be in force. Thus, those who apply and pay for a practising certificate for the upcoming financial year will pay a fee calculated by reference to the fee units applicable in the current financial year. Those applying for a certificate to be in force in the current financial year will pay a slightly higher notional fee (notional because of the pro rata reduction) than those who applied in the previous financial year, as the fee units will have increased at the commencement of the financial year. Applications for a practising certificate for the 2011-12 financial year made before 1 July 2012 will pay the current fee.

¹² *DTF Cost Recovery Guidelines, May 2010*, pg 39.

¹³ *DTF Cost Recovery Guidelines, May 2010*, pg 40.

Pro rating of fees

The proposed Regulations also explain in clearer terms how the pro rated fee is applied, by specifying the percentage discount that is applied to the fees according to the quarter in which the practising certificate comes into force.

- a practising certificate issued in the September quarter will require the full relevant prescribed fee to be paid
- a practising certificate issued in the December quarter will require 75 per cent of the relevant prescribed fee to be paid;
- a practising certificate issued in the March quarter will require 50 per cent of the relevant prescribed fee to be paid;
- a practising certificate issued in the June quarter will require 25 per cent of the relevant prescribed fee to be paid.

There is a risk with such an approach that the fee paid by a practitioner applying mid-way through the year will not cover the costs of issuing the certificate. However, this will not be the case in this instance, as the costs of issuing the practising certificate make up less than 15 per cent of the costs being recovered. As such, even practitioners applying in the last quarter of a financial year, who pay 25 per cent of the relevant prescribed fee, will fully cover the costs of issuing the practising certificate and will contribute an amount to cover the costs of other regulatory activities.

4 Costs and benefits of the options

4.1 Assessment of the costs and benefits of the options

This chapter analyses the costs and benefits of the options identified in chapter 3 as potential options for achieving the objective. As is standard in economic cost benefit analysis, only benefits and costs which have an impact on efficient resource allocation, in terms of either the size of the legal profession, or the allocation of resources within it, are analysed. Therefore transfers between legal practitioners and consumers are not counted as part of the analysis. For example, any increase in the practising certificate fees may be transferred from legal practitioners to consumers of legal services. These are not counted as benefits or costs unless they change the demand for, or supply of, legal services.

4.2 Cost base

In determining the basis of cost recovery, a review was undertaken to identify the costs that arise from the need to regulate the legal profession. Figure 4.1 shows the breakdown of the cost of the regulatory system over a five year period.

Figure 4.1 Cost of legal regulation in Victoria

Function	2006-07 (\$'000)	2007-08 (\$'000)	2008-09 (\$'000)	2009-10 (\$'000)	2010-11 (\$'000)
Issuing practising certificates – LIV	641	732	864	786	807
Issuing practising certificates – Bar	164	186	102	51	112
Trust account investigations	2,202	2,458	2,025	2,155	2,214
LSC complaint handling	2,128	2,172	2,994	4,067	4,160
Issuing practising certificates - LSB	210	335	329	370	420
Other regulatory functions - LSB	229	313	355	401	454
External interventions	1,164	1,355	1,454	1,267	1,335
VCAT Legal Practice List	1,451	1,477	1,342	1,146	1,382
Board of Examiners/Council of Legal Education	548	845	1,500	1,128	1,132
Payments to professional associations for programs (s6.7.14)	2,519	2,955	2,858	2,391	2,728
Payments to professional associations for education programs	0	0	28	144	161
<i>Indirect costs</i>					
LSC indirect costs	3,222	4,404	3,336	2,934	3,393
Operating costs of the LSB	1,315	2,145	2,053	2,314	2,623
Investigations and legal expenses	838	668	294	814	1,164
Occupancy	621	353	413	384	455
IT expenses	674	611	460	500	561
Administrative	473	473	451	647	663
External auditing	52	49	53	58	60
Internal auditing	45	98	79	106	67
Total	18,496	21,629	20,991	21,663	23,891

Source: LSB annual reports

An analysis was carried out to determine which of the above costs should be recovered through the practising certificate fees. Through this analysis, it was determined that costs associated with the following functions should not be passed on to the profession:

- *LSC indirect costs, operating costs of the LSB and other indirect costs of the LSB i.e. occupancy, IT and administrative expenses*

The LSB and LSC incur some indirect costs in performing their regulatory functions, for example, administrative costs, IT expenses and occupancy costs. Section 6.7.6 of the Act stipulates that the PPF can pay out an amount determined by the LSB and approved by the Attorney-General to meet the expenses of the LSB in performing functions under the Act. Section 6.7.7(1) prescribes that the LSB must pay out of the PPF an amount determined by the LSB to meet the expenses of the LSC in performing functions under the Act. The LSB considers that recovering these costs through the practising certificate fees will impose a financial burden on practitioners. These costs may be more appropriately recovered through the PPF.

- External interventions**
Section 5.6.7(3) prescribes that the law practice that is the subject of an external intervention must pay the costs associated with the external intervention process. Where the expenses are not met by the law practice, the Act specifies that the expenses can be met by the PPF. Section 5.6.7(5) gives the Board power to recover any unpaid fees from the law practice.
- VCAT Legal Practice List**
Following an application made by the LSC, where VCAT is satisfied that the practitioner is guilty of a disciplinary breach, the Tribunal may make orders for the practitioner to pay a fine (section 4.4.19(b)). The fine must be deposited into the PPF (section 6.7.3(2)(iii)). While the Act does not specify that this money should be used to cover the costs associated with the Legal Practice List, the LSB believes this money should be allocated to covering this function. Another function performed by VCAT involves reviewing decisions made by the LSB in relation to issuing, renewing, suspending or cancelling practising certificates. As this function relates to the administrative processes of the LSB, the LSB considers that the costs associated with this function should not be borne by the profession.
- Board of Examiners/Council of Legal Education**
The Act prescribes that the PPF must pay the expenses of the Council of Legal Education and Board of Examiners not met from admission fees (section 6.7.3(2)(viii)). As legal practitioners already make a contribution to the cost of this function through admission fees, the LSB does not consider it appropriate to recover the additional expenses through the practising certificate fees.
- Payments to professional associations for education programs**
Funding is distributed to the professional associations for the purposes of delivering education programs for their members, for example the Bar Readers' Course. As these programs are predominately for the membership of the professional associations, the LSB does not believe these expenses should be met by the broader profession.
- Payments to professional associations for programs (6.7.14)**
Funding is provided to the professional associations for a wide range of purposes including policy and research, delivering legal ethics training and the LIV legal referral service. The beneficiaries of these activities include members of the public, members of the professional associations and the broader legal profession. The LSB does not believe these costs should be borne by the profession.

The functions that will be recovered through the practising certificate fees are described below. The costs associated with these functions are shown in Figure 4.2.

Figure 4.2: Total regulatory costs to be recovered through the practising certificate fees

Function	2006-07 (\$'000)	2007-08 (\$'000)	2008-09 (\$'000)	2009-10 (\$'000)	2010-11 (\$'000)
Issuing practising certificates – LIV	641	732	864	786	807
Issuing practising certificates – Bar	164	186	102	51	112
Trust account investigations	2,202	2,458	2,025	2,155	2,214
LSC complaint handling	2,128	2,172	2,994	4,067	4,160
Issuing practising certificates – LSB	210	335	329	370	420
Other regulatory functions – LSB	229	313	356	401	454
Total	5,574	6,246	6,670	7,830	8,167

- Issuing practising certificates – LIV and Bar**
The LSB has delegated the responsibility of issuing practising certificates to the professional associations, namely the LIV and Bar. The LIV is responsible for processing applications for solicitors, while the Bar processes applications for barristers. This function involves receiving and processing applications for the issue of new practising certificates and renewal of practising certificates, assessing disclosures of suitability matters, verifying that the applicant has obtained the relevant professional indemnity insurance and processing requests for the amendment of practising certificate conditions.

- *Trust account investigations*
The LSB has delegated the function of trust account investigations to the LIV and Bar. Trust account investigations aim to identify unusual activity in connection with money held in trust accounts. To ensure compliance with the trust account obligations, the LIV carries out approximately 400 investigations per annum. This function is relevant to practitioners or law practices with a trust account.
- *LSC complaint handling*
These are the costs incurred by the LSC in handling complaints about lawyers. These costs relate only to staff costs; indirect costs such as administrative and occupancy expenses will not be recovered through the practising certificate fees for the reasons listed above.
- *Issuing practising certificates - LSB*
Although the function of issuing practising certificates has been delegated to the LIV and Bar, some work is required by the LSB to support the delegates in carrying out this function. This includes reviewing applications, maintaining practitioner records and maintaining the register of legal practitioners and law practices.
- *Other regulatory functions - LSB*
LSB staff perform a range of other regulatory tasks, including processing statements of trust money from external examiners and dealing with enquiries relating to trust accounts and statutory deposit accounts.

4.2 Level of cost recovery under each option

Figure 4.3 shows the level of cost recovery under each of the options.

Figure 4.3: Total regulatory costs to be recovered through the practising certificate fees

Function	Option 1: Base case	Option 2: Full cost recovery	Option 3: Issuing practising certificates and handling complaints	Option 4: Issuing practising certificates	Option 5a: Single practising certificate fee under option 2	Option 5b: Single practising certificate fee under option 3
	(\$'000)	(\$'000)	(\$'000)	(\$'000)	(\$'000)	(\$'000)
Issuing practising certificates – LIV	Nil	807	807	807	807	807
Issuing practising certificates – Bar	Nil	112	112	112	112	112
Trust account investigations	Nil	2,214	Nil	Nil	2,214	Nil
LSC complaints handling*	Nil	3,740	3,740	Nil	3,740	3,740
LSC – trust account complaints	Nil	499	499	Nil	499	499
Issuing practising certificates - LSB	Nil	420	420	420	420	420
Other regulatory functions - LSB	Nil	454	Nil	Nil	454	Nil
Total regulatory costs	Nil	8,167	5,498	1,339	8,167	5,498
Less costs associated with volunteers [#]	Nil	16	16	16	16	16
Total regulatory costs to be recovered	Nil	8,151	5,482	1,322	8,151	5,482

* As shown in figure 4.2, the total cost associated with the complaints handling function is \$4.1 million. Further analysis was carried out to identify the costs associated with handling complaints relating specifically to trust money and trust accounts. The LSC estimates that approximately 12% of their time is directed towards dealing with trust account related complaints. The pro-rata method has been used to identify the amount that is to be allocated only to practitioners with trust authorisation. This amount is \$499,200, which is shown in the above table under the heading *LSC – trust account complaints*. The pro-rata analysis is shown in the Appendices.

[#]The costs which are relevant to volunteer practising certificates have been deducted from the total regulatory costs. The costs associated with volunteer practising certificates are relatively low; for example, the cost of processing volunteer practising certificates is approximately \$16,000 per year. The cost of handling complaints relating to volunteer lawyers is unknown because the LSC does not capture the practising certificate type held by the legal practitioner who is the subject of a complaint. Regulatory costs pertaining to volunteer practising certificates will be recovered through the PPF. This amount is \$16,000.

4.3 Practising certificate fee calculation

Figure 4.4 shows the practising certificate fee calculation for each of the options. The costs have been allocated on the basis that practitioners should bear the costs associated with the functions which are relevant to their practising certificate category.

For example, in options 2 and 3, the costs associated with trust account investigations have been allocated to practitioners with a trust authorisation practising certificate. Therefore, the costs associated with trust account investigations and handling complaints relating to trust issues will be allocated only to these practitioners. Accordingly, approximately \$2.7 million will be borne by practitioners with a trust authorisation practising certificate. The cost of issuing practising certificates has been allocated to all practitioners because there is no difference in the costs for processing the different types of practising certificates.

Example of the fee calculation under option 2:

- The total amount to be recovered through the practising certificate fees under option 2 is \$8.1 million.
- The costs associated with performing functions relevant only to practitioners maintaining a practising certificate with trust authorisation are deducted from this amount. This amount is \$2.7 million (trust account investigations and LSC - trust account complaints).
- The total cost to be recovered from all practitioners is \$5.4 million. This amount is divided by the total number of practitioners, which is 16,522 (volunteer practitioners have been excluded from this figure). This produces the figure of \$329, which is the practising certificate fee for a practising certificate without trust authorisation.
- The costs relevant to practitioners maintaining a practising certificate with trust authorisation is then allocated to these practitioners. Therefore, the amount of \$2.7 million is divided by the 3,463 practitioners with trust authorisation. This produces the figure of \$784, which is the amount that is to be recovered from each practitioner with a practising certificate with trust authorisation. This amount is added to the \$329 recoverable through the issuing of practising certificates and complaints handling. This produces the figure of \$1,113, which is the fee for a practising certificate with trust authorisation under the full cost recovery option.

Figure 4.4 Practising certificate fees under each of the options

Function	Option 1 – Base case	Option 2 – Full cost recovery	Option 3 – Issuing practising certificates and complaints handling	Option 4 – Issuing practising certificates	Option 5 a – Single practising certificate fee (Full cost recovery)	Option 5b – Single practising certificate fee (Issuing practising certificates and complaints handling)
Total amount to recover from all practitioners (excludes costs associated with trust accounts)	Nil	5,437,578	4,982,968	1,322,168	8,151,000	5,482,000
Number of practitioners*	16,522*	16,522*	16,522*	16,522*	16,522*	16,522*
Total fee for practising certificate without trust authorisation	Nil	329	302	80	Fee for all practitioners - 493	Fee for all practitioners - 332
Fee for practising certificate with trust authorisation	Nil	329	302	80	N/A	N/A
Add costs associated with trust account investigations	Nil	2,214,000	N/A	N/A	N/A	N/A
Add costs associated with LSC – Trust account complaints	Nil	499,200	499,200	N/A	N/A	N/A
Number of practitioners maintaining a practising certificate with trust authorisation	3,463	3,463	3,463	3,463	N/A	N/A
Additional cost per practitioner with trust authorisation	Nil	784	144	N/A	N/A	N/A
Total fee for practising certificate with trust authorisation	Nil	1,113	446	80	N/A	N/A

* Excludes the 205 practitioners maintaining a volunteer practising certificate.

4.4 Costs and benefits of each of the options

Option 1: The base case – no practising certificate fees

Practising certificate type	Current fee	Proposed fee
With trust authorisation	\$412	\$0
Without trust authorisation	\$256	\$0
Revenue	\$4.8 million	Nil

Costs

- This option would result in the loss of the entire practising certificate fee revenue stream, which amounted to approximately \$4.8 million in 2010-11. This loss of funding could be adequately covered by other sources of income in the PPF. However, this will result in less funding being available for other purposes also funded through the PPF; for example, legal aid and grants made for law reform, legal research and legal education.
- If legal practitioners were not required to contribute to the cost of legal regulation, then they would face no financial incentives to economise on the use of the regulatory functions performed by bodies like the LSB, because they wouldn't be paying for them, the same as with any free good or service.
- The *Cost Recovery Guidelines* state that regulatory fees and user charges should be set on a full cost-recovery basis because it ensures that both efficiency and equity objectives are met. This option is significantly inconsistent with this policy.

Benefits

- Not having fees would relieve the LSB of the administrative burden of having to collect and process practising certificate fees. In addition, no administrative fees would be incurred through monitoring and administering practising certificate fee income and making practising certificate fee regulations.
- Legal practitioners would also benefit by not being required to pay a fee. Legal consumers would also benefit by not having this expense passed onto them through service fees.
- In comparison to the other jurisdictions, this option is the most favourable in terms of practising certificate fees for lawyers, which may encourage interstate practitioners to take up employment in Victoria, or entice them to register as an interstate practitioner with the LSB.

Groups likely to be affected

- This option may affect the organisations that receive funding from the PPF if the funding distributed to these bodies decreases in order to cover the loss of the regulator's income from practising certificate fees.

Option 2: Full cost-recovery

Practising certificate type	Current fee	Proposed fee
With trust authorisation	\$412	\$1,113
Without trust authorisation	\$256	\$329
Revenue	\$4.8 million	\$8.1 million

Costs

- Under this option, the entire cost of legal regulation would be recovered through the practising certificate fees. To achieve this, practising certificate fees with trust authorisation would increase from \$412 to \$1,113, while practising certificates without trust authorisation would increase from \$256 to \$329.
- The revenue for the practising certificate fee income would increase by approximately \$3.3 million.
- Practitioners with trust authorisation would face a fee increase of approximately 170%. This may result in fewer practitioners taking out practising certificates with trust authorisation, particularly in large law practices or partnerships. The level of regulatory risk may increase if only one practitioner in a law practice elects to hold a practising certificate with trust authorisation in order to minimise operational costs. This may increase regulatory risk as there will be fewer practitioners in law practices with the authority and experience to supervise and manage trust accounts.
- Some practitioners may refuse to pay the fee, resulting in an increase in the number of unqualified practice matters that would inevitably be investigated and dealt with through the regulatory system, therefore adding to the cost of regulation. Some practitioners may also act outside of their practising certificate conditions. For example, practitioners may carry out legal work relating to trust money without holding a practising certificate with trust authorisation. This would also be dealt with through the regulatory system.
- A number of law firms currently pay for the cost of their employees' practising certificate fees. If this option were adopted, then these law firms may cease to provide this as an incentive or benefit for their employees. The fee would therefore need to be paid directly by legal practitioners.
- To obtain a practising certificate with trust authorisation, practitioners must hold a principal practising certificate. It is assumed that because these practitioners maintain a principal practising certificate then they may occupy a senior position within their law practice. The Hudson Legal Salary Survey 2011¹⁴ indicates that a salaried partner at a top tier law firm earns over \$300,000+ per annum, mid-tier partners earn \$200,000+ while a partner at a boutique firm earns between \$140,000 and \$300,000. An analysis of the impact of full cost recovery indicates that the fee is likely to pose a financial burden on practitioners with trust authorisation; however, relative to their salaries, the fee is not unduly significant. The fee increase of \$701 or 170% however is significant compared to the current practising certificate fees.
- According to the Hudson Survey, the salary of a first year practitioner is estimated to be between \$65,000 and \$75,000. At a mid-tier firm, the salary is between \$60,000 and \$70,000 while first year practitioners at boutique firms earn between \$50,000 and \$70,000. The proposed fee increase for a practising certificate without trust authorisation is unlikely to pose a financial burden on practitioners.
- The much higher fees may create a barrier to entry to those practitioners who are less well remunerated, for example part-time legal practitioners, casual practitioners, new barristers, sole practitioners and rural practitioners, whose salaries may not be at the same level as top-tier or mid-tier practitioners.
- It should also be noted that when applying for or renewing their practising certificates, legal practitioners are required to pay a Fidelity Fund contribution fee, which ranges from between \$95 for

¹⁴ Hudson Legal Salary Guide 2011, Hudson Legal 2011, <http://au.hudson.com/documents/EmpAu_Salary_Guide_Legal.pdf>.

employees without trust authorisation to \$380 for practising certificates with trust authorisation. Law practices are also required to obtain professional indemnity insurance with the LPLC. The premium for a law practice whose fee income is less than \$5 million is \$6,217 for principals and \$1,555 for employees. Discounted rates apply for law practices whose income exceeds \$5 million. The premiums range from \$132 to \$4,354 depending on the income of the practitioner. While these fees are not related to the cost of performing regulatory functions, they are compulsory fees which legal practitioners are also required to pay when renewing or applying for a practising certificate. These fees must be paid in accordance with the Act. Therefore, it may be unreasonable to analyse the practising certificate fees in isolation. In light of the fees payable for PII and the Fidelity Fund, setting practising certificate fees at full cost recovery may create an unreasonable barrier to entry to legal practitioners and impose a financial burden on some practitioners.

- Government may face inevitable political pressure from the legal profession should they face a sharp increase in their fees. Practitioners may argue for a diminution of the LSB's regulatory functions. While practitioners could still face the full cost of regulation, the scale of that cost, and hence the fees they pay, would be reduced. This could result in an inadequately regulated legal profession, to the detriment of consumers of legal services but also ultimately to legal practitioners themselves, with the public losing confidence in the profession. A possible counter argument is that legal practitioners with high standards will always recognise the benefit of regulation because it minimises the impact of 'bad' legal practice. There are still limits to how much practitioners are prepared to pay for beneficial regulation. Past that point, the benefit-cost analysis will lead them to argue for less regulation.
- A further consequence of political pressure over sharp fee increases could be that if the LSB recovers all its regulatory costs from practising certificate fees, a justification would emerge to support the case that the LSB should not retain the investment income from interest earned on trust accounts. If that were to happen, it would have no ability to fund legal aid, legal research and other non-regulatory functions. This may impact significantly on those organisations and activities which are funded through the PPF due to the potential loss of income. These organisations may be forced to seek financial support from other sources administered by the Victorian Government.
- This fee would be one the highest of all the states and territories (with the exception of barristers fees in ACT, NSW and Queensland), which could discourage some practitioners from engaging in legal practice in Victoria.

Benefits

- This option is consistent with the Victorian Government's policy on full cost-recovery.
- One benefit of this option is that more funding would be available for other activities funded by the PPF, for example legal aid and legal education.
- There are efficiency reasons, based on the standard theory of cost-recovery, for direct costs to be recovered from those whose activities give rise to the costs, or who benefit directly from the expenditure of the costs. Additionally, an arguable benefit is one of fairness: it is fair that legal practitioners, who are the beneficiaries of the regulatory system, should pay for the cost of legal regulation.

Groups likely to be affected

- As noted above, legal practitioners maintaining a practising certificate with trust authorisation are likely to be affected by the significant fee increase under this option. Sole practitioners, casual practitioners, part-time practitioners and rural practitioners who may not earn the same level of income as practitioners in top-tier or mid-tier firms may be unable to pay the fee.
- Legal practitioners will invariably pass on the fee increase to consumers through their legal fees. The increase may be insignificant for consumers who engage the services of a practitioner holding a practising certificate without trust authorisation; however, the impact may be more significant where the practitioner holds a practising certificate with trust authorisation. The impact on consumers will depend on the size of the practitioner's client base.

- Legal consumers would be affected if practitioners refuse to pay the practising certificate fee and engage in legal practice without a valid practising certificate. Conversely, some practitioners may refuse to pay the higher fee associated with a practising certificate with trust authorisation and may carry out legal work involving the receipt of trust money. These practitioners would be acting outside of their authorised practising certificate conditions, which pose a risk to consumers.
- Legal consumers may be impacted if legal practitioners with a practising certificate authorising the receipt of trust money relinquish their practising certificates due to the high fee. This means consumers would have limited access to legal practitioners who could perform legal work involving the receipt of trust money.
- Some legal practitioners may forego their membership with the professional associations in order to pay their practising certificate fee. This will affect the income that is collected through membership fees by these bodies.

Option 3: Recover the cost of practising certificate fees and all complaints handling

Practising certificate type	Current fee	Proposed fee
With trust authorisation	\$412	\$446
Without trust authorisation	\$256	\$302
Revenue	\$4.8 million	\$5.4 million

Costs

- Under this option, practising certificate fees for trust authorisation would increase from \$412 to \$446 and from \$256 to \$302 for practising certificates without trust authorisation. The practising certificate fee income would increase from \$4.8 million to \$5.4 million, resulting in a revenue increase of \$600,000.
- The fees under this option are lower than option 2 and therefore are more likely to be accepted as a fair increase by the profession over option 2. Based on the above discussions regarding income, there is likely to be some financial impact on practitioners, however the impact is likely to be slight compared with option 2.

Benefits

- While this option is not consistent with the Government's policy on full cost-recovery, it would result in legal practitioners contributing to 67% of the costs identified as relevant regulatory costs. The fee is also lower than option 2 yet higher than options 4 and 5.
- More funding would be available for other activities and purposes funded through the PPF.
- This option would be easy to administer and monitor because the costs are attributed to specific activities.
- The recovery of costs is linked to specific activities; therefore the objective of the practising certificate fee can be easily understood. Another advantage of this is that if the costs of carrying out these functions decrease in the future, then the fees can be adjusted in line with the new costs.
- The fees are higher than solicitors' fees in NSW, yet very significantly lower than the fees for barristers. The fee is lower than the fee structures in the other states and territories.

Groups likely to be affected

- Legal practitioners are likely to be affected due to the proposed fee increase; however, the fee increase is insignificant in comparison to the proposed fee increase under option 2.
- Legal practitioners are likely to pass on the fee increase to consumers through their legal fees. As the fee increase is minimal, the impact on consumers is likely to be minor.

Option 4: Recovery of the cost of issuing practising certificates

Practising certificate type	Current fee	Proposed fee
With trust authorisation	\$412	\$80
Without trust authorisation	\$256	\$80
Revenue	\$4.8 million	\$1.3 million

Costs

- This option would recover the costs incurred through the issuing of practising certificates, which is approximately \$1.3 million.
- This would result in a revenue loss of \$3.5 million for the practising certificate income stream. The shortfall in the cost of regulation would need to be met by the PPF, which will affect the level of funding available for other activities funded through the PPF, for example legal aid and legal education.
- The financial impact is likely to be minimal. This fee is unlikely to create a barrier to entry to the profession.
- This option is inconsistent with the government's policy on cost recovery and recovery of efficient costs.

Benefits

- Practitioners would benefit from this option by paying a lower fee. This option therefore is likely to be favoured by the profession due to the significant reduction in the fee.
- Implementing a single fee for practising certificates with trust authorisation may encourage more practitioners to monitor and supervise trust accounts in their firms which would lower regulatory risk.
- This option also proposes to reduce the practising certificate fee types from three to two, which might result in higher compliance rates as the fees will be easy to understand.
- The fee would be easy to monitor because it is linked to a specific activity.
- The fee would also be easy to administer due to the reduction in the number of fee types.
- This fee would be the lowest of all the states which may encourage practitioners to take up employment opportunities in Victoria or register as an interstate practitioner with the LSB.

Groups likely to be affected

- This option may affect the organisations that currently receive funding through the PPF as their funding may decrease slightly in order to cover the loss of income from the practising certificate fees. The impact is likely to be insignificant as the loss of \$1.3 million is relatively low.

Option 5: Single practising certificate fee

Option	Single fee
5a: Single practising certificate fee under option 2 - Full cost recovery	\$493
5b: Single practising certificate fee under option 3 – Recovery of the cost of complaints handling and issuing practising certificates	\$332

Costs

- The cost impact would be different under each option. Under the full cost recovery option, the fee for a practising certificate with trust authorisation would increase by \$81; and under the complaints and issuing practising certificates option the fee would decrease from \$412 to \$332. Practitioners maintaining a practising certificate without trust authorisation would face a fee increase of \$237 under full cost recovery, and an increase of \$76 under the cost of complaints handling and issuing practising certificates option.
- The proposed single fee under the full cost recovery option would impose a financial impact on practitioners holding a practising certificate without trust authorisation. The fee increase would be considered significant compared with the current fee. This has the potential to create a barrier to entry for some practitioners, such as new practitioners and part-time practitioners, who may earn a slightly lower income than practitioners working at a larger legal entity. Those with trust authorisation will benefit from the decrease in the fees.
- The principal cost is that there would be less of an alignment of fees with risks and costs to the LSB i.e. there would be a cross-subsidy from those legal practitioners who do not operate trust accounts to those who do. Whether this would be a significant problem would depend on how trust accounts are operated within legal organisations. If the risks of operating trust accounts are shared by all members of the organisation, then it would be economically efficient for all legal practitioners within an organisation to pay the same practising certificate fees. A more refined version of this argument would be for all partners of a legal partnership to pay the same fees. This counter-argument would not work however, in the case of sole practitioners who operate a trust account. In that case a single practising certificate fee would be a clear, and inefficient, cross subsidy in their favour.

Benefits

- The principal benefit of a single fee is that it would be administratively transparent and marginally easier (hence, less costly) to administer. This option would also be simple to understand therefore the compliance rate amongst the legal profession is likely to be high.
- Legal practitioners who currently hold a practising certificate with trust authorisation would benefit from a reduction in costs.
- This may encourage more practitioners to monitor and supervise trust accounts in their firms which would lower regulatory risk.
- These fees are relatively low in comparison to the other states. This may encourage other practitioners to seek employment in Victoria over another state. The fees are higher than the solicitors' fees in NSW.

Groups likely to be affected

- Legal practitioners who currently hold a practising certificate without trust authorisation are likely to be impacted by this option due to the proposed fee increase, particularly with regard to the proposed fee increase under option 5a. As noted above, the fee increase of \$237 may pose a financial burden on some practitioners and create a barrier of entry to the profession, particularly for new practitioners and part-time practitioners.

4.4 Multi-criteria analysis

A multi-criteria analysis (MCA) has been used as an aid to decision making to determine whether the benefits of a regulatory option outweigh its costs, and to 'rank' different options. The MCA involves:

- specifying a number of assessment criteria
- assigning a 'weighting' to each criterion
- assigning scores for each option in relation to each criterion, and
- calculating a weighted score for each option.

Each criterion attempts to reflect either stated economic outcomes, i.e. efficiency or stated policy objectives. The MCA allows a decision to be made based on the weighted scores. The option assigned the highest weighted score is the 'preferred option'.

In this analysis, the criteria are:

- the extent to which practising certificate fees under each option pose a barrier to entry to the profession
- the extent to which the options recover the allocated costs under each option of regulating the legal profession
- the extent to which practising certificate fees pose a regulatory risk through the profession opting to minimise the amount of solicitors managing trust accounts, and
- the extent to which practising certificate fees will represent an amount that is uncompetitive in relation to other interstate jurisdictions.

These criteria have been chosen on the basis that they reflect the main benefits and costs associated with the options and the objective that the fees should promote economic efficiency and equity.

The first criterion focuses on the difficulty of entering the industry if the fees were excessive (i.e. in the case of new practitioners entering the profession).

The second criterion reflects the extent to which the options promote economic efficiency through the efficient allocation of resources in the economy. This is achieved through the appropriate recovery of costs, and equity through ensuring the costs are appropriately borne by those who accrue the benefits.

The third criterion assesses the extent to which the options present any regulatory risk to the legal profession. The risk is if the fees are considered too excessive by the profession then it may result in law practices reducing the amount of practitioners managing trust accounts or through the increase of unlicensed practitioners.

The fourth criterion reflects whether the fees set under each option are at a competitive level in comparison to interstate jurisdictions. Setting a fee level that is excessive in comparison to interstate jurisdictions presents a risk that practitioners may elect to register outside of Victoria, with subsequent consumer protection risks (because, as noted above, the LSB has limited authority with respect to practitioners practising in Victoria on an interstate practising certificate).

Weightings are assigned to each of the criteria, reflecting their relative importance in the policy decision-making process. The assigned weightings for each of the criteria are:

- | | |
|-----------------------------------------------------------|--------------|
| • poses a barrier to entry | 20 per cent |
| • fees reflect full cost recovery | 40 per cent |
| • fees encourage holding of trust authorisation | 20 per cent |
| • competitiveness of fees relative to other jurisdictions | 20 per cent. |

In allocating a weighting, it was assumed that the primary objective of cost recovery should be weighed somewhat higher than each of the other criteria. Hence this criterion is weighted at 40 per cent and the other three criteria at 20 per cent each. For each option, a qualitative score is assigned to each of the criteria, depending on the impact of the option on the criteria. An overall score is then derived for each of the criteria

by applying its weighting and summing the result. The option with the highest score represents the most attractive alternative. The assessment is presented in Figure 4.5.

Figure 4.5 Multi-criteria analysis

Criteria	Revenue	Fees-Trust	Fees-No Trust	Poses barrier to entry (a)	Fees reflect full cost recovery (b)	Fees encourage holding of trust authorisation (c)	Competitiveness of fees relative to other jurisdictions (d)	Overall Score					
Weighting				20%		40%		20%		20%		100%	
				Assigned score	Weighted score	Assigned score	Weighted score	Assigned score	Weighted score	Assigned score	Weighted score	Assigned score	Weighted score
Option 1: Base case	0	0	0	0	0	0	0	0	0	0	0	0	0
Option 2: Full cost recovery	8 150 778	1 113	329	-5.0	-1.0	10	4	-7.5	-1.5	-3.0	-0.6	-5.5	0.9
Option 3: Issuing practising certificates and complaints handling	5 482 168	446	302	-4.0	-0.8	6	2.4	-0.5	-0.1	-2.0	-0.4	-0.5	1.1
Option 4: Issuing practising certificates	1 322 168	80	80	-1.0	-0.2	1.5	0.6	0.0	0.0	-0.5	-0.1	0	0.3
Option 5a: Single fee-Full cost recovery	8 150 778	493	493	-6.0	-1.2	7	2.8	0.0	0.0	-3.0	-0.6	-2	1
Option 5b: Single fee - Issuing practising certificates and complaints handling	5 482 168	332	332	-4.0	-0.8	4.5	1.8	0.0	0.0	-2.0	-0.4	-1.5	0.6

Revenue and fees are based on 2010-11 actual costs.

Weightings for each criteria are allocated on the basis of the relative contribution of each criteria to the intended outcomes of the Regulations, particularly that of economic efficiency and equity.

Scores for each criterion are allocated on the following basis:

- the extent to which fees under each alternative might pose a barrier to entry based on the magnitude of the fees relative to the base case of no fees (on a scale between -10 and +10 where a large barrier = -10 and no barrier = +10).
- the fee is a reflection of the recovery of full regulatory costs relative to the base case of no fees (on a scale between -10 and + 10 where 0 is no cost recovery (the base case) and full cost recovery = +10)
- the extent to which the fees encourage practitioners to hold a practising certificate with trust authorisation relative to the base case of no fees (on a scale between -10 and +10 where risk is significant relative to the base = -10 and minimal risk = +10)
- the fee is a reflection of the competitiveness of the fees relative to other jurisdictions relative to the base case of no fees (on a scale between -10 and +10 where significantly less competitive relative to the base case = -10 and significantly more competitive = +10).

Scoring explanation

Option 2: Full cost recovery

Option 2 produced an overall score of 0.9. A score of -5.0 was assigned to the 'poses barrier to entry' criterion because the LSB believes the fees, most notably for a practising certificate with trust authorisation, under this option may create a barrier to entry to the profession, particularly for practitioners with a low remuneration level, for example, part-time practitioners, casual practitioners, sole practitioners and rural practitioners. A score of 10 was assigned to the 'fees reflect full cost recovery' criterion because the fees under this option will recover the full costs identified as relevant regulatory costs and the costs will be recovered from those parties that give rise to the costs. This option was assigned a score of -7.5 under the criterion of 'fees encourage holding a practising certificate with trust authorisation' because the LSB believes the fee level for a practising certificate with trust authorisation may deter some practitioners from maintaining this practising certificate. The fee for a practising certificate with trust authorisation will be among the highest of the other states and territories, at least for certain categories of practitioners. However, it will be much lower than for other types of practitioners in some jurisdictions (for example, barristers in New South Wales and the ACT). On balance, it has been determined that this option should be assigned a score of -3.0 under the 'competitiveness of fees relative to other jurisdictions' criterion.

Option 3: Issuing practising certificates and handling complaints

This option produced an overall score of 1.1. The LSB does not believe the fees under this option will create as large a barrier to entry to the profession as Option 2, however the fees may discourage entry of some part-time practitioners or casual practitioners; a score of -4.0 therefore was assigned to the 'poses barrier to entry' criterion. As this option will recover approximately 67% of the costs identified as relevant regulatory costs, but will not recover costs from all parties in proportion to the risk or regulatory activities that they give rise to, a score of 6 was assigned to the 'fees reflect full cost recovery' criterion. The fees are unlikely to discourage practitioners from taking out a practising certificate with trust authorisation, but in recognition of the higher fee for this practising class under this option, it received a score of -0.5 for the 'fees encourage holding a practising certificate with trust authorisation' criterion. A score of -2.0 was assigned to the 'competitiveness of fees relative to other jurisdictions' criterion because the fees under this option will be among the lowest of the states and territories, behind the fees for solicitors in NSW, but they will still be higher than under the base case.

Option 4: Issuing practising certificates

Option 4 produced an overall score of 0.3. As the fees under this option are significantly lower than any other option, the LSB does not consider that the fees under this option would be likely to pose a barrier to entry to the profession, but may still impose a small barrier to some practitioners compared with the base case. This option therefore scored -1.0 under the 'poses barrier to entry' criterion. This option will result in a loss of revenue from practising certificate fees of \$6.8 million per annum compared to full cost recovery. The fees are also not structured to recover costs according to the risks/regulatory requirements of different practitioners. Accordingly, a score of only 1.5 was assigned to the 'fees reflect full cost recovery' criterion. Given the fees under this option will be the same for both with and without trust authorisation, the LSB believes that the fee for a practising certificate with trust authorisation is unlikely to discourage practitioners from applying for this practising certificate type. This option therefore scored 0 in relation to the 'fees encourage holding a practising certificate with trust authorisation' criterion. A small negative score of only -0.5 was assigned to the 'competitiveness of fees relative to other jurisdictions' criterion because the fees under this option, though higher than the base case, would be the lowest of all the states and territories.

Option 5a: Single fee - Full cost recovery

Option 5a produced an overall score of 1. The LSB believes the fee level proposed is likely to pose a barrier to entry to the profession, particularly in relation to new practitioners and part-time practitioners; therefore a score of -6.0 was assigned to the 'poses barrier to entry' criterion. A score of 7 was assigned to the 'fees reflect full cost recovery' criterion because the fees will recover the full costs identified as relevant regulatory costs, but are not structured to recover the costs from those parties that give rise to them. Given the fees under this option will be the same for both with and without trust authorisation, the LSB believes that the fee level for a practising certificate with trust authorisation is unlikely to discourage practitioners from applying for this practising certificate type. This option therefore scored 0 in relation to the 'fees encourage holding a practising certificate with trust authorisation' criterion. A score of -3.0 was assigned to the 'competitiveness of

fees relative to other jurisdictions' criterion because the fee is relatively low in comparison to the fees in the other states and territories, despite it being higher than the base case.

Option 5b: Single fee - Issuing practising certificates and complaints handling

Option 5b produced an overall score of 0.6. The LSB does not believe the fees under this option will create as large a barrier to entry to the profession as Option 2 or Option 5a, however the fees may discourage entry of some part-time practitioners or casual practitioners; a score of -4.0 therefore was assigned to the 'poses barrier to entry' criterion. A score of 4.5 was assigned to the 'fees reflect full cost recovery' criterion because this option will recover 67% of the costs identified as relevant regulatory costs, but, as with option 5a, the fees are not structured to recover costs proportionate to the level of regulatory activity for each certificate type. Conversely, given the fees under this option will be the same for both with and without trust authorisation, the LSB believes that the fee level for a practising certificate with trust authorisation is unlikely to discourage practitioners from applying for this practising certificate type. This option therefore scored 0 in relation to the 'fees encourage holding a practising certificate with trust authorisation' criterion. The fee is relatively low in comparison to the other jurisdictions; this option therefore received a score of -2.0 under the 'competitiveness of fees relative to other jurisdictions' criterion, reflecting that it is still higher than the base case.

4.4.1 Cost explanation

Having assessed the various alternatives against the MCA, and ranking each option against their costs and benefits, the recovery of the cost of issuing practising certificates and complaints handling produced the best score. This is option 3. It should be noted that options 2 and 5a rank closely with option 3. The rankings of the options may alter if different judgments were applied to the scores.

5 The preferred option

5.1 Preferred option

The preferred option for the proposed practising certificate fee Regulations is option three. Practising certificate fees under this option will recover the costs associated with issuing practising certificates and complaints handling, which is approximately \$5.4 million. The fees will be structured into two categories: practising certificates with trust authorisation and practising certificates without trust authorisation. The fees for each of these categories are listed in the table below.

Figure 5.1: Practising certificate fees under the preferred option

Practising certificate fee type	Fee amount
Practising certificate with trust authorisation	36.50 fee units (\$446)
Practising certificate without trust authorisation	24.71 fee units (\$302)

Option three was identified as the preferred option for the following reasons:

- although this option is not entirely consistent with the Government's policy on absolute full cost recovery, the fees will cover 67% of costs identified as relevant regulatory costs
- the fees under this option will generate an additional \$600,000 in income for the PPF, which can be directed towards purposes such as legal aid and legal education
- the proposed fee increase is relatively insignificant in comparison to the fees under option 2
- the fees will be the second lowest of the other states and territories, behind the fees for solicitors in NSW
- the fee structure is identical to the one that is currently in place, which means the level of compliance amongst the profession is likely to be high, and
- this option produced the most balanced approach through the multi-criteria analysis (MCA), with a score of 1.1.

If adopted, the proposed Regulations will take effect on 1 July 2012 and will be in force for a period of five years, which will enable sufficient time for the national system to settle and therefore provide a clearer indication of the cost of regulation under the new scheme. The fees will be assessed at the end of the five year period to determine the appropriate level for practising certificate fees under the national framework.

As noted above, it is Government policy that regulatory fees should generally be set on a full cost recovery basis. Where full cost recovery is not adopted, reasons must be given for the departure from this policy. Practising certificate fees have never been set to recover the full cost of legal regulation. The shortfall in the cost of regulation is met by other sources of income in PPF, including the interest on trust money and the income generated through the LSB's investment activities. The Act permits the cost of regulation to be covered by the PPF. Accordingly, the PPF will meet the regulatory costs which are not recovered through the proposed practising certificate fees.

5.2 Reasons for rejecting the other options

5.2.1 Option 1: The base case

The base case was not adopted as the preferred option for the following reasons:

- this option would result in a loss of \$4.8 million in revenue for the PPF. This loss of income would be covered by other sources of income in the PPF, which would affect the level of funding available for other purposes funded by the PPF, such as legal aid and legal education, and
- this option is significantly inconsistent with the government's policy on the recovery of costs for regulatory fees and user charges.

5.2.2 Option 2: Full cost recovery

Full cost recovery was not adopted as the preferred option for the following reasons:

- the fees for practising certificates with trust authorisation would increase by 170%, which might discourage some practitioners from maintaining this type of practising certificate. If this occurred, then regulatory risk may increase as there would be fewer practitioners who could supervise and manage trust money and trust accounts. Conversely, some practitioners may choose not to apply for

this practising certificate type due to the high fee level, which means the number of practitioners who could carry out legal work involving the receipt of trust money would diminish. Consumers would be impacted as they would have more limited access than at present to practitioners who could undertake legal work involving trust money.

- the fees may create a barrier to entry to the profession for part-time or casual practitioners and rural practitioners or sole practitioners whose incomes may not be at the same level as practitioners employed by the mid-tier and top-tier law firms, and
- the proposed fee for practising certificates with trust authorisation would be the highest of all the jurisdictions, with the exception of barristers fees in ACT, NSW and Qld. The fee may deter some practitioners, solicitors in particular, from seeking employment in Victoria.

5.2.3 Option 4: Cost of issuing practising certificates

This option was not adopted as the preferred option for the following reasons:

- this option would result in a loss of income for the practising certificate fee income stream, in the amount of \$1.3 million, which may affect the level of funding allocated to other activities through the PPF, and
- this option is significantly inconsistent with the government's policy on the recovery of efficient costs.

5.2.4 Options 5a and 5b: Single practising certificate fee under full cost recovery and issuing of practising certificates and complaints handling options

Neither of these options was adopted as the preferred option for the following reasons:

- the practising certificate fee under the full cost recovery option may pose a financial burden to those practitioners who currently hold a practising certificate without trust authorisation. The fee increase would be considered significant compared with the current fee for this practising certificate type, and
- the proposed fee increase of \$237 may restrict entry to the profession for sole practitioners, part-time and new practitioners who may be less well remunerated than practitioners at mid-tier and top-tier firms.

5.3 The cost base under the preferred option

Figure 5.2: Cost base for the preferred option

Function	(\$'000)
Issuing practising certificates – LIV	807
Issuing practising certificates – Bar	112
Complaint handling – LSC	4,160
Issuing practising certificates – LSB	420
Total regulatory costs	5,498
Less costs associated with volunteers	16
Total regulatory costs to be recovered	5,482

The cost base for the preferred option is approximately \$5.4 million. Approximately \$1.3 million is associated with the cost of issuing practising certificates. This figure is comprised of the cost of the LIV and the Bar in issuing practising certificates on behalf of the LSB. Some costs are also incurred by the LSB for processing practising certificates, which amounts to approximately \$420,000. The cost base also includes the costs incurred by the LSC in handling complaints, which is approximately \$4.1 million. The costs associated with processing volunteer practising certificates has been excluded from the cost base in accordance with the cost recovery guidelines, which stipulates that cross-subsidisation should be avoided when structuring fees and charges. The costs associated with volunteer practitioners will be recovered through the PPF. This fractional amount is approximately \$16,000.

Net present value of the proposed Regulations

Based on the cost base of \$5.4 million, and assuming a five year period for the proposed Regulations with an opportunity cost of capital of 3.5%, the total base cost of \$27.42 million has a net present value of \$24.752 million.

5.4 Methodology behind the calculation for the proposed fee

If adopted, the proposed fees will be charged based on two practising certificate types: with trust authorisation and without trust authorisation. The fees have been determined on the basis that practitioners should bear the costs associated with the functions which are directly relevant to their practising certificate category.

Accordingly, the costs associated with processing practising certificates have been allocated equally amongst the two practising certificate categories. However, the cost of complaints handling has been allocated so that only practitioners with trust authorisation will bear the cost of complaints handling relating to trust accounts. The LSC estimates that approximately 12% of its time is directed towards dealing with complaints which raise trust account issues. The pro-rata method has been used to determine the amount of costs that should be allocated to practitioners with trust authorisation. The formula is shown below:

$$\text{Cost of complaints handling} \times \% \text{ of time spent dealing with trust account complaints} = \text{Amount to be allocated to practising certificates with trust authorisation}$$

$$\$4,160,000 \quad \times \quad 12 \% = \$499,200$$

Accordingly, the amount of \$499,200 should be recovered only from practitioners with a practising certificate with trust authorisation. This amount should be deducted from the total amount of regulatory costs (\$5.4 million) which produces the figure of \$4.9 million. The \$4.9 million has been divided by the total number of practitioners (excluding volunteer practitioners), which is 16,522. This produces the fee that should be charged to practitioners without trust authorisation, which is \$302. The amount of \$499,200 was then divided by the number of practitioners with a practising certificate with trust authorisation, which is 3,463. This produces the figure of \$144. This amount was added to the \$302 to produce the fee that should be charged to practitioners with a trust authorisation practising certificate. This figure is \$446.

Figure 5.3: Calculation for the proposed fees

Function	Option 3 – Issuing practising certificates and complaints handling
Total amount to recover (excludes costs associated with LSC – trust account complaints)	4,982,968
Number of practitioners*	16,522
Total fee for practising certificate without trust authorisation	302
Fee for practising certificate with trust authorisation	302
Add costs associated with LSC – Trust account complaints	499,200
Number practitioners maintaining a practising certificate with trust authorisation	3,463
Additional cost per practitioner with trust authorisation	144
Total fee for practising certificate with trust authorisation	446

* Excludes the 205 practitioners with a volunteer practising certificate

5.5 Efficient costs

Level of efficiency of the cost base

In accordance with the *Cost Recovery Guidelines*, the RIS must demonstrate that cost recovery is based on efficient costs. The *Guidelines* stipulate that poorly designed arrangements can create incentives for inefficiency.

Determining whether costs are efficient can be identified through a number of techniques. One method involves comparing fees against another department or agency performing similar activities. While it would seem practical to compare the LSB's costs with the fees of a regulator in another jurisdiction, the different funding arrangements in each jurisdiction makes it difficult to draw any conclusions about whether the fees are intended to cover the same range of costs as in Victoria.

For example, the practising certificate fee in WA is set to recover the entire cost of legal regulation because unlike Victoria, WA does not have access to a PPF. NSW and Queensland have similar funding

arrangements to Victoria; however, it is unknown what functions their practising certificate fees are set to recover. Accordingly, the LSB is unable to compare the level of efficiency of the cost base with the practising certificate fees in another jurisdiction.

Efficiency of processing practising certificates

It is difficult to determine the level of efficiency associated with processing practising certificates because the cost base of \$1.3 million is not limited to processing practising certificates. The cost base comprised of a number of different functions relating to practising certificates, for example, updating and entering practitioner data on the register of legal practitioners, verifying that the applicant has the relevant professional indemnity insurance and in some cases, assessing any suitability issues disclosed by the applicant. These steps will vary depending on the subject of the practising certificate application (e.g. whether the application is for the renewal of a practising certificate or for the variation of a practising certificate). To enable stakeholders to comment on the level of efficient costs relating to the issuing of practising certificates process, Figure 5.4 has been prepared which provides a breakdown of the number of staff employed by the LSB to carry out practising certificate functions. This table does not include staff employed by the delegates (i.e. the LIV and Bar), because they are employees of private entities and are not classified as Victorian government employees. Please note that the LSB staff listed in the table below also perform a range of other tasks in addition to the function of processing practising certificates. During the renewals period, LSB staff allocate approximately 80% of their time towards the processing of practising certificates. However, outside of the renewals cycle, LSB staff spend approximately 12% of their time working on practising certificate related functions.

Figure 5.4: No. of staff employed by the LSB for processing practising certificates

Classification	No. of staff
VPS 6	1
VPS 5	1
VPS 3	3
VPS 2	2

Further analysis has been carried out to identify the level of efficiency of the processing of practising certificates based on the average cost per practising certificates. The analysis revealed that the cost of processing practising certificates has varied over a five year period. For example, in 2010-11, the average cost per practising certificate was \$80. The processing costs reduced slightly in 2009-10 to \$75 yet increased by \$5 per practising certificate in 2010-11. The cost of processing practising certificates reached approximately \$88 per practising certificate in 2007-08. The LSB believes that the cost of processing practising certificates may decrease in the future following the introduction of the LSB's new online renewal system. It is anticipated that this online system will reduce the requirement for manual processing of practising certificates, which may lead to a reduction in the costs incurred through the processing of practising certificate application forms. In addition, the information provided by practitioners on their application and renewal forms is stored in a central database maintained by the LSB. This database is used by the LSB and its delegates to record information relating to legal practitioners and law practices. Enhancements are continually being made to this database to ensure efficiencies are achieved in the processing of application and renewal forms.

Figure 5.5: Cost of processing practising certificates

Year	Cost (\$'000)	No. of practising certificates	Cost per practising certificate
2010-11	1,339	16,727	\$80
2009-10	1,207	16,028	\$75
2008-09	1,295	15,371	\$84
2007-08	1,253	14,232	\$88
2006-07	1,075	13,724	\$78

Efficiency of complaints handling

It is difficult to make any conclusions about the level of efficiency of handling complaints because every complaint is different. While a majority of complaints are relatively straightforward, some complaints contain complex issues that result in the complaint taking several months to finalise. To enable stakeholders to comment on the level of efficient costs relating to complaints handling, Figure 5.6 has been prepared which provides a breakdown of the number of staff employed by the LSC to carry out complaint handling functions.

The LSC estimates that a majority of staff allocate 100% of their time towards complaints handling functions. The Executive Officers however, allocate between 50% and 80% of their time on the complaints handling function.

Figure 5.6: No. of staff employed by the LSC to carry out complaint handling functions

Classification	No. of staff
EO - 2 (Commissioner)	1
EO - 3	1
VPS 6	6
VPS 5	13
VPS 4	7
VPS 3	5
VPS 2	1

It is difficult to make a direct comparison of the level of efficiency of complaints handling in Victoria with other jurisdictions due to slight variations in the way complaints are handled in each jurisdiction. The cost of complaints handling in Victoria was approximately \$1,594 per complaint in 2010-11. This is compared with \$2,264 per complaint in 2009-10. As shown in Figure 5.7, the costs associated with complaint handling by the LSC increased by approximately 38% compared with 2008-09, however this was relative to the number of complaints finalised, which was 38% more than the number finalised in 2008-09. Of the 2,609 complaints finalised in 2010-11, approximately 20% were resolved within 30 days of the LSC receiving the complaint. Close to 32% were resolved between 30 and 90 days of receipt of the complaint. Approximately half (1,311) were finalised within a period of 120 days or more. Although this figure appears to be high, the LSC believes this number represents the number of outstanding complaints finalised, which was a focus for the office in the reporting period. It should be noted that the LSC recently introduced a new process for handling complaints, which involves resolving complaints through informal dispute resolution, rather than launching a formal investigation where the complaint does not raise issues involving serious misconduct. The LSC believes this new process will result in complaints being handled faster, which may result in efficiencies being achieved in the cost of complaints handling in the future.

Figure 5.7: Cost of complaints handling

Year	Cost (\$'000)	No. of complaints finalised	Cost per complaint
2010-11	4,160	2,609	\$1,594
2009-10	4,067	1,796	\$2,264
2008-09	2,994	1,893	\$1,581
2007-08	2,172	1,893	\$1,147
2006-07	2,128	2,101	\$1,012

5.6 Method of collecting the charge is efficient and appropriate

As previously noted, the LSB has delegated the function of issuing practising certificates to the LIV and the Bar. The LIV processes applications for solicitors while the Bar processes applications for barristers. Legal practitioners are required to pay the practising certificate fee when submitting their application form. The fee can be paid by cheque, money order or credit card. The application form cannot be processed until payment has been received. The online system also allows practitioners to pay for their practising certificates online, thereby eliminating the need for the manual processing of payments. The cost incurred through collecting the fee is recovered through the practising certificate fees. This amounts to \$1.3 million; however it is difficult to determine what proportion of this figure accounts for the cost of processing of practising certificate fees. As noted above, the LSB anticipates that the introduction of the online application and renewal system will lead to a decrease in the total costs associated with issuing practising certificates.

5.7 Groups affected by the proposed Regulations

Legal practitioners

Legal practitioners will be affected by the proposed Regulations as they will be required to pay the fee prescribed in the Regulations. The impact under the preferred option is likely to be insignificant due to the

level of increase of the proposed fees, which amounts to an increase of \$34 for practising certificates with trust authorisation and \$46 for practising certificates without trust authorisation. The impact will be greater if the government adopts the higher fee under option 2.

Consumers of legal services

Consumers of legal services may be affected by the Regulations as legal practitioners are likely to pass on the cost of the fee increase to consumers through their legal fees. The impact will be insignificant due to the modest low level increase under the preferred option. If the Government decides to adopt a higher fee increase such as option two, then the impact on consumers will be greater.

Professional associations

The implications of the proposed regulations on the professional associations, such as the LIV and Bar, is likely to be minimal. However, if the government decides to adopt option two, being full cost recovery, then some practitioners may elect not to pay their membership fees in order to pay their practising certificate fee. This will affect the income received by these organisations through membership fees. The fees under the preferred option are unlikely to affect the income received by the bodies through membership fees.

5.9 Legislation authorising the making of the Regulations

Section 7.2.17(2)(b) of the Act prescribes that the Governor-in-Council may make regulations with respect to practising certificate fees for the Victorian legal profession. Section 7.2.17(3) prescribes that the regulations are to be made on the recommendation of the Board. Section 7.2.17(a) and (b) stipulates that in making a recommendation, the Board must take into account: (a) the cost of regulating different classes of legal practitioners and (b) any representations made to the Board by a professional association regarding appropriate levels for fees for classes of local legal practitioners who are members of that association. The views of the professional associations were sought during the consultation process and are summarised in this document.

5.10 Changes to the Regulations

The proposed Regulations will adopt a similar format to the sunseting Regulations, with the major amendments relating to the date of enforcement of the Regulations and the proposed practising certificate fees. Unlike the sunseting Regulations, the fees in the proposed Regulations will be expressed in fee units to enable the fees to be automatically indexed on an annual basis. The proposed Regulations also explain in clearer terms how the pro rated fee is applied, by specifying the percentage discount that is applied to the fees according to the quarter in which the practising certificate comes into force. The relevant amendments are set out in the following table:

Sunseting Regulations Legal Profession (Practising Certificate Fees) Regulations 2010	Proposed Regulations Legal Profession (Practising Certificate Fees) Regulations 2012
<p>1 Objective The Regulations were in force for the 2011-2012 financial year.</p>	<p>1 Objective The proposed regulations will be in force for the 2012–2017 financial years.</p>
<p>5 Fees The prescribed fee for a local practising certificate to be in force in the financial years 1 July 2011 to 30 June 2012 is— (a) for a practising certificate authorising the receipt of trust money, \$412; (b) for a practising certificate not authorising the receipt of trust money, \$256. (c) for a practising certificate in force for part of that financial year only, an amount (rounded to the nearest dollar) calculated on a pro rata basis that bears the same proportion to the relevant fee in paragraph (a) or (b) as the period the certificate is in force, rounded up to the next quarter, bears to the whole</p>	<p>5 Fees (1) The prescribed fee for a local practising certificate for each of the financial years beginning 1 July 2012 and 1 July 2016 is— (a) for a practising certificate authorising the receipt of trust money, 36.50 fee units; (b) for a practising certificate not authorising the receipt of trust money, 24.71 fee units. (2) Despite subregulation (1), if a local practising certificate is only to be in force for part of a financial year specified in that subregulation, the fee for that practising certificate is— (a) in the case of a practising certificate that is to take effect between 2 July and 30 September—the</p>

financial year.	<p>relevant prescribed fee;</p> <p>(b) in the case of a practising certificate that is to take effect between 1 October and 31 December—75% of the relevant prescribed fee;</p> <p>(c) in the case of a practising certificate that is to take effect between 1 January and 31 March—50% of the relevant prescribed fee;</p> <p>(d) in the case of a practising certificate that is to take effect between 1 April and 30 June—25% of the relevant prescribed fee.</p>
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6 Impact on small business

There are approximately 4,689 sole practitioners registered in Victoria who may be classified as small businesses. The proposed fee increase is unlikely to affect sole practitioners or small law practices because the proposed fee is fairly minimal. However, the impact on sole practitioners may be significant if the Government adopted option 2, which proposes a higher fee.

7 Competition assessment

It is unlikely that the proposed Regulations will restrict entry to the legal profession as the proposed fee increase is minimal. Competition issues may arise if the Government were to adopt option 2, particularly where part-time, casual practitioners or sole practitioners are concerned, who may not earn the same level of income as full-time practitioners or practitioners at a larger law firm.

8 Implementation and enforcement

If approved, the proposed Regulations will take effect from 1 July 2012 and will sunset on 30 June 2017. There are no perceived issues around the implementation of the proposed Regulations as the Act stipulates that legal practitioners must pay the relevant practising certificate fee when applying for or renewing their practising certificates. As the preferred option proposes a minimal fee increase, the anticipated compliance rate amongst practitioners is likely to be high. In addition, the preferred option also proposes a similar fee structure to the current fee arrangements, which means practitioners' familiarity with the fees would result in higher compliance rates amongst the profession. If the Government adopted option 2, which proposes a higher fee increase than option 3, it may be appropriate to implement option 2 as a gradual fee increase over the five year time frame of the Regulations. Practitioners will be notified of the new fee through the information sent to all practitioners during the practising certificate renewals period. The new fees will also be listed on the notes accompanying the practising certificate application and renewal forms, and updated on the online renewal form. Practitioners will also be advised of the proposed fee in relevant industry publications.

9 Consultation

In accordance with the *Legal Profession Act 2004*, the LSB is required to consult with the professional associations in recommending new practising certificate fees for the Victorian legal profession. The LSB distributed copies of the draft RIS to the LIV, Bar, Australian Corporate Lawyers Association and the Federation of Community Legal Centres and sought their feedback on the document and an indication of their preferred option. Their feedback was presented to the LSB in making its decision about the preferred option. The feedback received from these organisations is summarised below. A 28 day consultation period will occur once the RIS has been finalised, which is in accordance with the consultation requirements prescribed in the *Subordinate Legislation Act 1994*.

Feedback from the Law Institute of Victoria

The LIV expressed the view that there should be no increase to the practising certificate fees, excepting for possible CPI, prior to the commencement of the national system. The LIV suggested that this be included as an option in the RIS process. The LSB has not assessed this as an option in the RIS because it is inconsistent with the Government's policy on the remaking of sunseting regulations. When replacing sunseting regulations, there is a requirement to demonstrate that the nature and extent of the problem still exists and to assess the effectiveness of the existing regulations. The LIV's alternative preferred option was option 3, which is consistent with the preferred option. The LIV also expressed support for making the regulations for a period of five years to allow the national law time to settle.

Feedback from the Victorian Bar

The Bar expressed support for structuring the fees based on the distinction between those who are authorised to receive trust money and those who aren't. The Bar highlighted the difficulties being experienced by a number of barristers and felt that the increase proposed in options 2 and even option 5 may cause hardship for some barristers.

The Bar felt that because of the linkage of the functions to the costs in option 3, there was greater logic in choosing this option. The Bar acknowledged that future costs savings in performing the functions associated with this option could be achieved, particularly with regard to the introduction of the online renewal system and the new complaints handling process. The Bar also noted that the profession can influence the cost of these functions by embracing these initiatives. The Bar also noted the need for annual indexation as preferable from large increases in fees at irregular intervals. The Bar also recommended that the LSB establishes a regular review mechanism to maintain greater accountability of the fees.

Feedback from the Australian Corporate Lawyers Association (ACLA)

ACLA is the professional body that represents the interests of in-house lawyers, including government lawyers. ACLA's preferred option was option 3. ACLA highlighted that anecdotally in-house lawyers generate fewer complaints to the LSC, and that many in-house lawyers have their own processes for dealing with complaints. This issue will be considered further during the consultation period.

Feedback from the Federation of Community Legal Centres

The Federation believes the practising certificate fee for community legal centre and Victoria Legal Aid lawyers should be waived. Further to this, the Federation highlighted that CLCs do not charge clients for their services and do not deal with trust money. Hence, the risk of complaints and therefore the regulatory costs for community legal centre lawyers are likely to be lower than other lawyers. As previously noted, if the fees for community legal centres and Victoria Legal Aid lawyers were waived, then the regulatory costs relating to these lawyers would be met through other sources of income in the PPF, which would affect the level of funding that would otherwise be provided to these organisations through legal aid and legal grants. The Federation suggested that the funds could be met by imposing a higher fee on non-community legal centre lawyers. The *Cost Recovery Guidelines* stipulate that cross-subsidisation should be avoided when setting fees unless there is an explicit decision of the Government to cross-subsidise¹⁵. Accordingly, the regulatory costs relevant to community legal centre lawyers should not be passed on to other practitioners.

10 Evaluation strategy for the proposed Regulations

While an evaluation strategy is not a mandatory step in the RIS process, it is recommended as a matter of good practice. As the proposed Regulations will sunset in 2017, an evaluation strategy will assist the regulators in determining the appropriate fee levels in 2017. This step is also important because efficiencies will need to be assessed with regard to the introduction of the new online renewal service and the new complaints handling process.

The following data will be collected by the LSB to inform the effectiveness of the proposed Regulations:

- income generated through the practising certificate fees
- number of applications processed by the LIV and Bar
- number of applications submitted via LSB Online
- cost of processing practising certificate applications by the LIV and Bar
- cost of processing applications via LSB Online
- number of complaints handled by the LSC, LIV and Bar
- costs associated with complaints handling by the LSC, LIV and Bar.

This information will be collected on an ongoing basis and reviewed quarterly. This data will be reported through annual reports, reports to the Attorney-General on the operations of the organisations and operational reports to the Board. The LSB meets regularly with the stakeholders consulted through this process. This issue will be discussed at these meetings with stakeholder groups.

¹⁵ *DTF Cost Recovery Guidelines, May 2010, pg 33.*

11 Conclusion

In consultation with the professional associations, the LSB has recommended that the practising certificate fees be set at \$446 for a practising certificate with trust authorisation and \$302 for a practising certificate without trust authorisation.

The fees will recover the costs associated with issuing practising certificates and handling complaints, which amounts to approximately \$5.4 million. While this option is not an absolute match for the government's policy on full cost recovery, the fees will recover 67% of costs identified as relevant regulatory costs. The Act permits the cost of regulation to be covered by the PPF and not met through government appropriations. Accordingly, due to the unique funding arrangements of the PPF, the shortfall in the cost of legal regulation will be met through other sources of income in the PPF.

In light of the impending national profession reforms, the LSB has recommended that the Regulations be made for a period of five years, which will enable time for the regulatory system to settle under the national scheme. The fees will be subject to an annual automatic indexation, which will be calculated based on the fee units applicable at the time the applicant is applying for the practising certificate.

12 Appendices

12.1 Pro-rata analysis

The DTF *Cost Recovery Guidelines* state that regulatory fees and user charges should be set on a full cost-recovery basis because it ensures that both efficiency and equity objectives are met. Further analysis has been conducted to define what of the total regulatory costs relate to the direct cost of regulation. In order to do this, costs deemed to be indirect were eliminated. In addition, where costs provide for different outputs, a pro-rata analysis was conducted to determine those costs that related to the regulatory function. Costs were allocated to PC issuing, general regulation, complaints, investigations and general administration.

Figure 12.1 Costs and drivers of cost recovery

		2006 -07	2007 -08	2008 -09	2009 -100	2010 -101	PC Issuing	Regulatory	Complaints	Trust reviews and management	Investigations	Other
Cost	Cost driver	\$	\$	\$	\$	\$	%	%	%	%	%	%
LSC staff costs	Staff time	2,128	2,172	2,994	4,067	4,160	0%	0%	44%	12%	44%	0%
LSB staff costs	Staff time	1,754	2,793	2,738	3,085	3,497	12%	13%	0%	0%	0%	75%

12.2 Practising certificate fees in interstate jurisdictions

State/Territory	Fee
New South Wales	<p>Solicitors</p> <p>Solicitors admitted for a period of more than two years:</p> <ul style="list-style-type: none"> - private practice or ILP: \$300 - corporate lawyer: \$300 - government lawyer: \$300 <p>Solicitors admitted for a period of less than two years:</p> <ul style="list-style-type: none"> - private practice or ILP: \$230 - corporate lawyer: \$230 - government lawyer: \$230 <p>Barristers</p> <p><i>Silk</i></p> <p>CBD: \$5,940 Regional: \$4,155 Statutory office holder: \$1,403</p> <p><i>Junior 5+years</i></p> <p>CBD: \$2,216 Regional: \$1,549 Statutory office holder: \$852</p> <p><i>Junior 2-5 years</i></p> <p>CBD: \$828 Regional: \$577 Statutory office holder: \$828</p> <p><i>Junior 1-2 years</i></p> <p>CBD: \$257 Regional: \$193 Statutory office holder: \$257</p> <p><i>Readers</i></p> <p>CBD: \$176 Regional: \$156</p> <p><i>Academic</i></p> <p>CBD: \$570 Regional: \$570</p>
Queensland	<p>Solicitors</p> <p>Principal - \$760 Non-principal - \$380</p> <p>Barristers</p> <p><i>City</i></p> <p>City - \$405 12 years + \$296</p> <p>Regional - \$262 12yrs +: \$228 10yrs + \$ 250</p> <p>Interstate</p> <p>Class C Silk \$392 Class C Junior \$192</p>

State/Territory	Fee
South Australia	\$524
Western Australia	\$1,000
Northern Territory	Unrestricted barrister or solicitor - \$1,400 Restricted barrister or solicitor - \$1,260
ACT	<p>Solicitors Private unrestricted: \$1,120.50 Private restricted: \$721,50 Government unrestricted: \$705.50 Government restricted: \$503.50</p> <p>Barristers Silk: \$2,774 Junior 3 + yrs: \$2,295 Junior 6 – 12 yrs: \$1,918 Junior 3 – 5 yrs: \$1,438 Junior 1 – 2 yrs: \$1,153 Readers: \$459 Government: \$510</p>
Tasmania	Principal: \$1,055 Employee: \$788 Corporate: \$404 Barristers: \$404

12.3 Exposure draft of the proposed Regulations

**Legal Profession (Practising Certificate Fees)
Regulations**

Exposure Draft

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Victoria

**Legal Profession (Practising Certificate Fees)
Regulations**

Exposure Draft

1 Objective

The objective of these Regulations is to prescribe fees to be paid for local practising certificates under the **Legal Profession Act 2004** for the 2012–2013 to 2016–2017 financial years.

2 Authorising provision

These Regulations are made under section 7.2.17(2)(b) of the **Legal Profession Act 2004**.

**3 Practising certificate fees from 1 July 2012 to
30 June 2017**

(1) The prescribed fee for a local practising certificate for each of the financial years beginning 1 July 2012, 1 July 2013, 1 July 2014, 1 July 2015 and 1 July 2016 is—

- (a) for a practising certificate authorising the receipt of trust money, 36.50 fee units;

Legal Profession (Practising Certificate Fees) Regulations

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- (b) for a practising certificate not authorising the receipt of trust money, 24·71 fee units.
 - (2) Despite subregulation (1), if a local practising certificate is only to be in force for part of a financial year specified in that subregulation, the fee for that practising certificate is—
 - (a) in the case of a practising certificate that is to take effect between 2 July and 30 September—the relevant prescribed fee;
 - (b) in the case of a practising certificate that is to take effect between 1 October and 31 December—75% of the relevant prescribed fee;
 - (c) in the case of a practising certificate that is to take effect between 1 January and 31 March—50% of the relevant prescribed fee;
 - (d) in the case of a practising certificate that is to take effect between 1 April and 30 June—25% of the relevant prescribed fee.
 - (3) A fee under subregulation (2) must be rounded to the nearest whole dollar.
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Legal Profession (Practising Certificate Fees) Regulations

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ENDNOTES

Fee Units

These Regulations provide for fees by reference to fee units within the meaning of the **Monetary Units Act 2004**.

The amount of the fee is to be calculated, in accordance with section 7 of that Act, by multiplying the number of fee units applicable by the value of a fee unit.

The value of a fee unit for the financial year commencing 1 July 2011 is \$12.22. The amount of the calculated fee may be rounded to the nearest 10 cents.

The value of a fee unit for future financial years is to be fixed by the Treasurer under section 5 of the **Monetary Units Act 2004**. The value of a fee unit for a financial year must be published in the Government Gazette and a Victorian newspaper before 1 June in the preceding financial year.