



VICTORIAN BAR

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Dear ██████████,

Review of Lawyers' Practising Certificate Fees in the Regulatory Impact Statement

The Victorian Bar (the **Bar**) welcomes the opportunity to provide feedback to the Legal Services Board and Commission (the **LSBC**) in respect of the Regulatory Impact Statement (the **RIS**) released on 24 October 2017 for the proposed *Legal Profession Uniform Law Application (Practising Certificate Fees) Regulations 2017* (the **proposed Regulations**).

As invited to do so, this letter responds to the stipulated stakeholder discussion topics posed by the LSBC in the RIS.

Introduction

The Bar notes that the RIS considers four options for the setting of new practising certificate fees.

The Bar welcomes the establishment by the RIS of a separate tier of practising certificate fees for barristers in recognition of their lower levels of risk and regulatory cost. It also welcomes a reduction in practising certificate fees for barristers, which is proposed in respect of Options 3 and 4.

The Bar notes however that the percentage of the recovery of regulatory costs that barristers would pay under proposed Options 3 and 4 is set at 100 per cent, while Principal solicitors and employee solicitors who, like barristers, do not hold trust authorisation, will continue to have their practising certificate fees substantially subsidised by the interest stream generated by the Public Purpose Fund.

As discussed in the Bar's preliminary submission dated 10 April 2017, in comparison with Principal and employee solicitors, complaints against barristers are comparatively significantly lower and the consequent regulatory cost is greatly reduced. Further, the Bar's Ethics and Counsel Committees, through the functions delegated to them, make a substantial contribution to the regulation of barristers.



The voluntary contribution of the Bar's Ethics and Counsel Committees delivers a substantial reduction to the cost of regulation, conservatively estimated to be in excess of \$1,000,000 per annum applying the Supreme Court scale fee. This estimate does not include any estimate of the value of the additional voluntary contribution made by the Bar's Counsel Committee. The Bar is generally supportive of the LSBC's preferred option, Option 3, amongst the options presented. It is however contended that the practising certificate fees paid by barristers should also be afforded some level of subsidy from the interest stream as is provided to solicitors in private practice, and in particular, to Principals without trust, many of whom are sole practitioners.

Options 3 and 4 each categorise barristers as a separate category of practising certificate. The Bar welcomes the 2% reduction to the current practising certificate fee applied to barristers in each of those options. However, in each of Options 3 and 4 barristers will fund 100% of the cost of regulation. Options 3 and 4 provide for a significant subsidy to be applied to the cost of regulation for Principals (without trust authorisation) which is not proposed to be afforded to barristers. There is an apparent inequity for Principals (without trust authorisation) to be afforded a significant (~52%) subsidy from the Public Purpose Fund interest stream while barristers will contribute 100% of the cost of regulation through the payment of their practising certificate fees.

Stakeholder discussion topics

(1) Differentiating between fees based on practitioner (or other category)

The establishment of a separate tier of fees for barristers, as each fee option allows, is supported by the Bar in principle for the following reasons:

- The low rate of complaints against barristers as compared with the broader profession and the consequent lower cost of regulation of barristers.
- Barristers do not receive trust money and have a significantly lower risk profile than solicitors in respect of complaints and regulation and the consequent associated cost.
- The significant voluntary contribution and consequent regulatory cost-saving benefit delivered by the Bar's Ethics and Counsel Committees in the performance of their respective delegated functions.
- The significant and ongoing financial investment (over \$1,000,000 per annum) made by the Bar to continuing professional development and education for its members which also contributes to the high compliance culture of the Bar and consequent comparatively low regulatory cost of barristers as compared to Principals without trust and employee solicitors.

1. Low rates of complaint against barristers

The complaints data provided in the LSBC's Annual Report 2016-17 (the **Report**) shows that a significantly higher proportion of complaints were received in the relevant period in respect of solicitors than barristers. Barristers represent 10% of the profession and 39% of all 'sole practitioners'. However, complaints against barristers amount to only 5.77% of the total complaints made against practitioners.



Further, complaints made are not proportionate to the number of practising solicitors and barristers, with 7.2% of the total number of solicitors being the subject of a complaint as compared to only 4.1% of barristers being the subject of a complaint.¹

Plainly, on the face of these statistics alone, the cost of regulation of barristers ought to be significantly less proportionally than the cost of regulation of solicitors. Equally, barristers do not contribute to the increasing cost of regulation of the legal profession to the same extent as solicitors. The fact that the LSBC's RIS recognises this by creating a separate tier of fees for barristers is welcomed. However, in the Bar's submission, complete recognition would be achieved by affording barristers with a comparable level of subsidy from the interest stream that has been afforded to Principals (without trust authorisation).

2. *Barristers do not receive trust money and have a lower risk profile than solicitors in respect of complaints and regulation*

The existing tiered structure (Option 1) allows for a distinction to be made between practitioners with or without trust authorisation.

Options 2 and 3, both stratified fee structures, also recognise the higher cost of regulation involved for practitioners with trust accounts. Option 4 does not.

The Bar continues to support the recognition of barristers as a separate practising group which entails significantly less regulatory oversight and consequently much less regulatory cost. The fact that barristers do not hold trust authorisation in and of itself reduces their risk profile in respect of complaints being made and the consequent regulatory cost.

3. *The Ethics & Counsel Committee Delegated Functions*

A significant cost-saving benefit is achieved to the overall cost of regulation by delegating certain regulatory and compliance functions to the Bar through the work of the Bar's Ethics Committee and Counsel Committee. This substantially reduces the cost of regulating barristers and, by necessity, reduces the associated costs that would otherwise arise if the regulator needed to employ staff or brief third parties if these matters needed to be investigated and reported on internally. Just as this supports the case for the creation of a separate tier of fees for barristers, it also provides support for a percentage of subsidisation to be applied to practising fees paid by barristers.

Ethics Committee

The members of the Bar's Ethics Committee are invited to serve on the Committee by the Bar Council and do so on a voluntary (pro bono) basis.

¹ Figures obtained from the Legal Services Board and Commissioner's Annual Report 2016-17 at pages 48 and 58: 1403 of 19414 solicitors (7.2%) received complaints against them, compared with 86 of 2074 barristers (4.1%).



Pursuant to the *Legal Profession Uniform Law Act 2014*, the Victorian Legal Services Commissioner may delegate certain functions to the Bar.² The current instrument of delegation dated 28 August 2015 specifies the duties and powers that have been delegated to the Bar.

The Ethics Committee is comprised of 16 barrister members, currently 9 of which are senior counsel (QC/SC) and 7 junior counsel. The most junior member of the Committee has been at the Bar for 9 years. The Committee meets between 12 – 14 times per year.

The Table below contains details of the number of matters referred by the Commissioner to the Bar's Ethics Committee for investigation over the last 3 years in addition to the number of rulings (now resolutions) provided by the Ethics Committee to members of the Victorian Bar.

Year	Complaints referred/delegated	Rulings/Resolutions
2014-15	10	55
2015-16	14	52
2016-17	15	41

The number of matters considered and investigated are not indicative of the time, commitment and work of the Committee and the staff, and the numbers alone do not reflect the variable complexity or significance of each matter. During the last financial year, some 15 matters have been referred to the Committee and 10 matters returned and reported on.

Considerable volunteer resources are applied to complaints investigations referred to the Committee. While funding is provided to support the Compliance team at the Victorian Bar, no funding is sought in respect of the investigation and reporting on complaints by the Committee or its members.

The Bar estimates that on average approximately 3 to 4 days of the investigating member's time is applied to a complaint investigation. From time to time more complex matters are referred to the Ethics Committee for consideration. Senior and junior counsel may be appointed to work together on more complex matters, which may require several weeks (10 or more days) of counsels' time to complete the investigation and report.

In the last year, the Bar Council also approved the implementation of a Grievance Protocol pursuant to which 'Barrister to Barrister' complaints are referred to the Ethics Committee. In the short time in which the policy has been in operation, the Committee has dealt with 4 grievance matters; 1 matter was partially resolved by mediation, 1 matter was resolved by mediation and 2 matters were resolved through a written apology being given and accepted. Again, Ethics Committee members contributed considerable time to facilitating, resolving and reporting on each of these matters on a pro bono basis.

² *Legal Profession Uniform Law Application Act 2014* (Vic) s 56(1).



The Bar's Ethics Committee also makes resolutions to provide assistance to members in respect of ethical issues as and when they arise while conducting a matter before the court or when giving advice. Under the new uniform Rules, the Ethics Committee gives resolutions in accordance with which a member may act. While a resolution does not bind a member to act as directed or advised, members are encouraged to seek guidance from the Ethics Committee as and when any such matter arises.

In urgent situations, resolutions are provided directly by individual members of the Committee. However, in all but exceptionally urgent cases, written requests are circulated for the consideration of all members of the Committee. Resolutions are also considered at the regular meetings of the Committee.

The significance and importance of the provision of resolutions by the Committee has been articulated in the past to the LSBC. The Committee receives over 50 formal written requests a year and approximately triple that number of informal requests for guidance. This role performs a very important compliance and educative function that contributes to the quality of the performance of barristers in their role, the high compliance culture at the Bar and the resulting overall low complaint rates in respect of barristers.

As with complaints investigations, the numbers of resolutions are not necessarily indicative of the time commitment of the Committee members, as the numbers do not reflect the complexity arising in respect of each resolution.

The Bar has not endeavoured to record or estimate the time spent and value of the contribution of the work of the Ethics Committee in detail or through any formal mechanism. The value of the services provided, applying the Supreme Court scale fee is, however, conservatively estimated to be well in excess of \$1,000,000 per annum.

Counsel Committee

The Bar's Counsel Committee is comprised of 7 members of Bar Council, 4 of which are senior counsel (silks). The Counsel Committee meets as required throughout the year to consider and determine suitability matters pursuant to delegations from the Board. Like the work of the Ethics Committee, the number of matters and meetings held is not indicative of the significant amount of resources that are applied to the consideration and determination of matters before this Committee. Again, all members of the Counsel Committee serve on a voluntary pro bono basis.

In addition, the Bar submits that its continuing commitment to its established and high-quality education programs (the Readers' Course and Continuing Professional Development ('CPD')) is also significant to ensuring a strong compliance culture at the Bar. As with the Ethics and Counsel Committees, each of the Readers' Course and the CPD program are reliant on and benefit significantly from the volunteer contribution of the members of these Committees and members of the Bar more broadly.

The Readers' Course Committee and CPD Committee oversee and make recommendations to Bar Council as to compliance with Reading and CPD requirements respectively. The work of these members is also contributed on a volunteer unpaid basis.



The Bar's education team manages the operational aspects of each of the Readers' Course and CPD program and also conducts the CPD audit each year, the results of which are reported to the LSBC. The Bar does not currently receive regular annual funding from the LSBC to support the day-to-day operation of either its Readers' Course or its continuing professional development courses. The operating expenses to conduct the Bar's education programs is in excess of \$1,000,000 per annum. This excludes the value of the significant contribution of our members and the judiciary to the program.

Finally, and separate from the above, the Bar supports any mechanism that seeks to subsidise the fees paid by community sector practitioners and volunteers. Such mechanisms promote a key objective of the RIS, that is, community sector legal services, and ensures that disadvantaged and vulnerable persons are afforded access to justice. The Bar has a proud history of its members contributing significantly to pro bono work through our pro bono scheme with Justice Connect, our Duty Barrister Scheme and the unofficial work of many individual members on a day-to-day basis.

(2) The extent to which practitioners pass costs of practising certificate fees on to their clients

Barristers and solicitors perform complementary roles. They are dependent on each other and each benefit from the other's contribution. However, in practise, solicitors work more closely with their clients on a day-to-day basis. They are in most cases the first point of contact for legal advice. In this sense, whilst it is feasible that a barrister may 'pass on' the cost of practising certificate fees to their instructor, which would then be passed on to the client, the nature of the relationship between barrister and solicitor, and solicitor and client, means a direct link is more tenuous.

Notwithstanding this, barristers as individual sole practitioners incur various costs of business and overheads which will necessarily inform, to a certain extent, their hourly and daily rates that are ultimately charged to clients.

To the extent that a practitioner may pass the costs of practising certificate fees on to clients, the Bar notes that, in doing so, it is for the practitioner to ensure that the legal costs charged to the client remain fair and reasonable in all the circumstances, are proportionally and reasonably incurred, and proportionate and reasonable in amount.³

(3) The likely effect changes in these costs may have on practitioner and client behaviour

The RIS details the impact of each proposed fee option in terms of hourly cost by practitioner type.⁴ The cost ranges from \$0.12 to \$2.38. Further, the RIS details the impact of each proposed fee option in terms of percentage of income or revenue affected by practitioner type. This ranges from 0.21% to 3.13%.

While the proposed fees, particularly in respect of Options 3 and 4, do not represent a significant portion of overall business costs for barristers, the issue of rising costs of business more generally is of great concern.

³ Legal Profession Uniform Law, s 172 (1).

⁴ RIS, p 64.



For many barristers, particularly those practising in criminal law, even the smallest of variances can be significant.

The business of a barrister is a small business. As is the business of a sole practitioner without trust authorisation. In this respect, barristers have similar cost and market pressures as do Principals (without trust authorisation) operating as sole practitioners. As stated above, it is of concern to the Bar that Principals (without trust authorisation), of whom a significant proportion are sole practitioners, will benefit under Options 3 and 4 from a 52% subsidy from the interest generated from the Public Purpose Fund while barristers, also sole operators and small business operators, will not. To this end, it is notable that the Bar represents 39% of all sole practitioners and 28.76% of small businesses as recognised in the RIS.⁵

The Bar welcomes the modest reduction in the practising certificate fees for barristers proposed in Options 3 and 4. As stated in the Bar's preliminary submission, the Bar was and is opposed to any increase on the basis that any such move would cause further hardship for a significant amount of our members, particularly the criminal bar which represents over 600 of our 2000 members. The Bar asks that consideration be given to a further reduction in the proposed fee via a fair apportionment of the interest stream subsidy proposed to be granted to solicitors in sole practice without trust authorisation.

(4) Whether there are other reasons why a different balance between the fee and interest streams is preferable?

The Bar does not oppose the 40:60 revenue to interest stream model in principle, as proposed in Option 3. The structure proposed does provide barristers with a modest 2%, or \$7 per year reduction which is welcomed.

However, it is reiterated, whilst the preferred Option 3 results in barristers receiving a modest reduction, they will pay 100% of the cost of regulation. The Bar contends that there is a basis for barristers to pay less than 100% of the costs of regulation in circumstances where a 52% subsidy on the cost of regulation is afforded to sole practitioners and Principals (without trust authorisation).

The Bar acknowledges that solicitor sole practitioners may be at greater risk of complaint than barristers due to the client facing nature of solicitors' work. However, barristers have regular client contact and contact with witnesses when briefed to advise and appear in Court and are equally susceptible to complaints in respect of that contact, particularly in respect of family law and criminal law matters.

(5) Whether the level of information services currently provided for practitioner certificate applications is desirable?

The Bar is not aware of any issues being experienced by its members in respect of the information being provided in respect of practitioner certificate applications.

⁵ RIS, p 70.



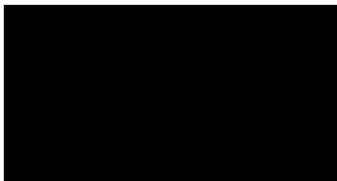
Conclusion

The Bar supports the adoption by the RIS of a distinct barrister category for the setting of practising certificate fees.

Of the four proposed options, the Bar's preferred option is Option 3, recognising that Option 4 also provides for a comparable 2% reduction in the cost of practising certificate fees for barristers. The Bar's support for Option 3 is however subject to the qualification that the Bar believes consideration should be given to further reducing the cost of barristers' practising certificate fees via the provision of an appropriate level of subsidy from the Public Purpose Fund interest stream to ensure an equitable assignment and apportionment of the cost of regulation is applied. Barristers, should in the Bar's submission, benefit from the interest stream subsidy to at least the same extent that sole practitioners without trust authorisation will benefit, which under Option 3 will amount to a 52% subsidy.

Please do not hesitate to contact me if you would like to discuss any aspect of our comments or require further information in relation to the matters raised above.

Yours sincerely



Sarah Fregon
Chief Executive Officer
Victorian Bar Inc