



VICTORIAN BAR

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Dear Mr McGarvie,

Review of Lawyers' Practising Certificate Fees

The Victorian Bar welcomes the opportunity to provide feedback to the Legal Services Board and Commission (the **LSBC**) about its Review of Lawyers' Practising Certificate Fees. The Victorian Bar (the **Bar**) respectfully opposes any increase in barristers' practising certificate fees and advocates for the establishment of a separate tier of fees for barristers. The Bar's position in this respect is based primarily upon the following:

1. The low rate of complaints as against barristers as compared with the broader profession and the consequent lower cost of regulation of barristers.
2. Barristers do not receive trust money and have a lower risk profile than solicitors in respect of complaints and regulation.
3. 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.
4. The Legal Profession Uniform Law makes provision for a barrister specific practising certificate enabling a distinction to be made.

Current Fees and Proposed Options

Table 1 below details the options being considered by the LSBC to apply for fees for a practising certificate without trust authorisation.

Table 1: Comparison of current fees and options

Practising certificate type	Current fee	Option 1 (100% from fees – tiered approach)	Option 2 (100% from – single fees)	Option 3 (50/50 equal mix – tiered approach)	Option 4 (50/50 equal mix – single fee)
Without trust authorisation	\$344	\$913	\$1,033	\$456	\$517

Noting that the option to retain current practising certificate fee levels is not proposed as an option in Table 1, the Bar respectfully submits that the Board should consider retaining current practising fee levels for barristers on the basis that barristers practising certificate fees be set as a separate and distinct group.

1. Low rates of complaint against barristers

The complaints data provided in the LSBC’s Annual Report 2015-16 (the **Report**) supports the case for establishing a separate tier of fees for barristers.

The Report shows that a significantly higher proportion of complaints were received in the relevant period in respect of solicitors than barristers. Barristers represent approximately 10% of the profession and 37% of all ‘sole practitioners’. However, complaints against barristers amount to only 3.4% of the total complaints made against practitioners.

Further, complaints made are not proportionate to the number of practising solicitors and barristers, with 6.8% of the total number of solicitors being the subject of a complaint as compared to only 3.4% of barristers being the subject of a complaint.¹

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. An increase in practising certificate fees by reason of the increasing cost of regulation of the whole profession unfairly burdens barristers who arguably do not contribute to this increasing cost.

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

Apportionment of regulatory cost recovery from each type of practitioner as a separate and distinct group has been the practice of the Board in the past with tiers being set on the basis of a distinction being made between practitioners with or without trust authorisation.

¹ Figures obtained from the Legal Services Board and Commissioner’s Annual Report 2015-16 at pages 44 and 54: 1270 of 18548 solicitors (6.8%) received complaints against them, compared with 70 of 2045 barristers (3.5%).

The fee structure options (table 1) in the Board’s Discussion Paper for those with trust and without trust authorisation demonstrate a significant increase in the cost of regulation for practitioners with trust accounts.

The Bar continues to support the recognition of the additional cost of regulation in respect of solicitors holding trust accounts which entails significantly more regulatory oversight and consequently increased regulatory costs. The fact the 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 Committees Delegated Functions

The 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.

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. These delegated functions are executed by the Victorian Bar Council, the Victorian Bar’s Ethics Committee and the Counsel Committee.

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.

Table 2 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.

Table 2: Ethics Committee Complaints Referred and Resolutions

Year	Complaints referred/delegated	Rulings/Resolutions
2014-15	10	55
2015-16	14	52
YTD 16-17	15	31

The number of matters considered and investigated are not indicative of the time commitment and work of the Committee and the staff, as these numbers do not reflect the complexity or significance of each matter. This year (year to date) some 15 matters have been referred to the Committee and 10 matters returned and reported on.

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



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 their time to facilitating, resolving and reporting on each of these matters on a pro bono basis.

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 exceptional 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.

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

The Bar has not endeavoured to record or estimate the actual time spent and value of the contribution of the work of the Ethics Committee. It is however conservatively estimated to be well in excess of \$700,000 per annum and likely to be much greater if individual market rates were applied.

The 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. Similarly to 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 work of this committee. All members of the Counsel Committee participate on a voluntary pro bono basis.

The Bar contends that the cost-saving benefit received by the LSBC in delegating compliance functions to the Bar through the work of the Ethics Committee and Counsel Committee significantly reduces the cost of regulation in respect of barristers and supports the proposition of the creation of a separate tier of practising certificate fees for barristers.

4. The Legal Profession Uniform Law ('LPUL') has introduced a separate practising certificate type for barristers

Under the LPUL a barrister specific practising certificate has been introduced. There is now a statutory condition imposed upon the issuing of a barristers practising certificate to require that the holder has undertaken a reading period to the satisfaction of the Victorian Bar. In most cases this precondition will be met by an applicant having completed the Bar Readers' Course.

The introduction of a separate practising certificate type for barristers may provide a mechanism upon which practising certificate fee levels can be specifically applied. The Bar encourages the Board to consider this for the reasons outlined in points 1 to 3 above.

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 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 members for which no funding is sought or received.

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.

Conclusion

In addition to the matters raised above, the Bar is opposed to any increase of the cost for barristers' practising fees as contemplated by the LSBC on the basis that any such move would cause further hardship for a significant number of our members. There are many members with ongoing concerns about the decreasing volume of work available and the increasing costs of running a practice. The Bar shares those concerns. More specifically, it is in view of these concerns that the Bar itself has not increased subscription rates at all for 7 years.



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The Criminal Bar Association, representing over 600 members of the Bar many of whom perform Legal Aid and Crown Prosecution work at fixed rates that have not been substantially increased for many years, is particularly concerned about increases to the costs of practice of any kind for the reason that it will have a disproportionate impact on their members.

In addition to ensuring the assignment of costs is appropriately and transparently applied to the respective categories of practice amongst the profession, the Bar contends that apportionment and identification of the separate costs of regulation of each type of practitioner should also encourage high performance and accountability across the profession.

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

Yours sincerely

Sarah Fregon
Chief Executive Officer
Victorian Bar Inc