



THE VICTORIAN BAR INCORPORATED

**SUBMISSION TO THE  
VICTORIAN LEGAL SERVICES  
BOARD + COMMISSIONER**

REVIEW INTO CONTINUING PROFESSIONAL  
DEVELOPMENT REQUIREMENTS FOR  
LAWYERS IN VICTORIA

## INTRODUCTION

1. The Victorian Bar (**the Bar**) welcomes the opportunity to provide a submission to the Victorian Legal Services Board + Commissioner (**VLSB+C**) with respect to its review of the Continuing Professional Development requirements for lawyers in Victoria (**CPD Review**).
2. The Bar's submission sets out its views in response to several of the consultation questions posed in the Issues Paper dated 1 June 2020.

## ACKNOWLEDGMENT

3. The Bar acknowledges the contributions of its Health & Wellbeing Committee, Equality and Diversity Committee and CPD Committee in the preparation of this submission.

## RESPONSES TO CONSULTATION QUESTIONS

4. The Bar's submission responds to consultation questions 17, 19, 22, 23, 35, 36, 38-41, and 44, respectively.
5. It is otherwise submitted that most of the remaining consultation questions are more suitable for response by individual practitioners.

## PART 2.2: CPD SUBJECT AREAS

**Question 17: Are there any specific topics (e.g. technology, sexual harassment) that you think should be included as mandatory topics for all lawyers? If yes, please specify the topics you think should be included.**

1. The Bar submits that the addition of two CPD categories, one related specifically to health and wellbeing, and another related to appropriate conduct, equality and diversity training, and a mandatory requirement for barristers to complete 1 CPD point in each of those categories per CPD cycle, is appropriate.

### Health and wellbeing

2. The CPD Review Issues Paper states at page 14:

*"Some jurisdictions suggest or require their lawyers undertake CPD activities in health and wellbeing. Numerous studies have identified mental health and wellbeing as an endemic challenge in legal practice. Workplaces are required to have effective health and safety policies to guard against the detrimental consequences of persistent high stress, and lawyers need to be aware of how to respond to such issues at an individual and organisational level.*

*All of these topics are suitable for CPD activity. Whether or not they should be mandated or how they should otherwise be supported is discussed further in the sections on regulation and are matters on which the review seeks contributions."*

3. There is evidence to suggest that stress, anxiety, depression and substance abuse are an ongoing and serious concern for the legal profession in Australia.<sup>1</sup>
4. In June 2018, the Bar conducted a survey of its members to establish the quality of Victorian barristers' working life (***the Survey***).
5. The Survey incorporated three questionnaires:
  - a) the work-related quality of life scale;
  - b) the barrister wellbeing scale; and
  - c) the workplace wellbeing outcome scale.
6. It also gave respondents the opportunity to suggest ways in which barristers could improve their quality of working life. 40% of Victorian Bar members provided valid responses to the Survey.
7. The results of the Survey were published in October 2018. Two benchmarks were used: the 2017 Barrister Wellbeing Survey of 1088 Australian (non-Victorian) barristers; and the Work-Related Quality of Life Scale survey of 6000 people from 10 UK universities. Against those benchmarks, Victorian barristers reported a higher level of satisfaction with their overall quality of working life, but a higher level of stress at work, and a lower level of satisfaction with home-work interface.
8. The Survey revealed that in the last year:
  - a) 16% of male barristers and 36% of female barristers reported that they felt they had been discriminated against;
  - b) 2% of male barristers and 16% of female barristers reported that they had been sexually harassed; and
  - c) 20% of male barristers and 37% of female barristers reported that they had been bullied.
9. 55% of male barristers and 66% of female barristers reported that they had experienced judicial bullying.
10. It is a purpose of the Bar to promote the physical and mental wellbeing of barristers.<sup>2</sup> It is also in the interests of the administration of justice and the rule of law to ensure that barristers are mentally fit to practise. This is inherent in the rules relating to legal practise. For example, under Rule 13(1)(m) of the *Legal Profession Uniform General Rules 2015 (General Rules)*, in determining whether an applicant for the grant or renewal of an Australian practising certificate is a fit and proper person, it is relevant to consider whether that person is currently able to carry out satisfactorily the inherent

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<sup>1</sup> Australian research into this topic is summarised in C Parker, 'The 'Moral Panic' Over Psychological Wellbeing in the Legal Profession: A Personal or Political Ethical Response' (2014) 37(3) *University of New South Wales Law Journal*, 1103; and J Chan, S Poynton and J Bruce, 'Lawyering Stress and Work Culture: An Australian Study' (2014) 37(3) *University of New South Wales Law Journal*, 1062.

<sup>2</sup> See clause 2(c) of the Victorian Bar Constitution.

requirements of practice as an Australian legal practitioner. There are powers to require an applicant to be medically examined,<sup>3</sup> and conditions can be imposed on practising certificates requiring a holder to undergo counselling or medical treatment.<sup>4</sup>

#### CPD Rules

11. One way in which the mental wellbeing of barristers can be promoted is through the Bar's CPD program.
12. Sections 429 and 420 of Schedule 1 to the *Legal Profession Uniform Law Application Act 2014 (Uniform Law)* empower the Legal Services Council (**Council**) to make Uniform Rules, including in relation to Continuing Professional Development (**CPD**). Section 424 provides that the Continuing Professional Development Rules may require Australian legal practitioners to comply with provisions for continuing professional development and may provide for any aspect of continuing professional development.
13. The *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015 (CPD Rules)* came into effect on 18 November 2016. Rule 9(1) provides that a barrister must, unless otherwise exempted, in each CPD year engage in CPD activities in each of the categories set out below:
  - a) Ethics and Professional Responsibility;
  - b) Practice Management and Business Skills;
  - c) Substantive Law, Practice and Procedure, and Evidence; and
  - d) Barristers' Skills.
14. Rule 9(2) provides that these categories are subject to any requirement of the designated local regulatory authority or legislation.
15. Rule 6(1) of the CPD Rules provides that CPD activities must be "of significant intellectual or practical content and must deal primarily *with matters related to the practice of law*" and "relevant to a practitioner's immediate or long term needs in relation to the practitioner's professional development as a barrister and practice of the law".
16. The CPD Committee of the Bar, in conjunction with the VLSB+C, have prepared the *Victorian Bar Continuing Professional Development Policy 2016 (CPD Policy)* under Rule 6(3) of the CPD Rules. The CPD Policy relates to the format of CPD activity and the cap on CPD points that may be gained from each activity but does not give guidance as to what subject matter might qualify for a CPD point.

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<sup>3</sup> Section 95 of Schedule 1 to the *Legal Profession Uniform Law Application Act 2014 (Vic)*.

<sup>4</sup> See Rule 16(e) of the General Rules.

17. The question of whether a seminar or activity designed to address the health and wellbeing of barristers will fall within the current CPD categories as set out in the CPD Rules is unclear. The category 'Practice Management and Business Skills' may be sufficiently broad to encompass seminars or activities directed to managing client relationships or working well with peers, and this is most regularly the category ascribed to health and wellbeing sessions currently accredited as a CPD unit under the Uniform Law.
18. However, even if the category 'Practice Management and Business Skills' is interpreted with such breadth, there are seminar topics or activities of clear importance to the health and wellbeing of barristers that risk falling outside this category. Examples include:
- Coping with bullying, sexual harassment or discrimination;
  - Vicarious trauma identification and treatment;
  - Substance abuse;
  - Mindfulness training;
  - Emotional wellbeing;
  - Positive communication;
  - Creating a healthy workplace; and
  - Sleep, nutrition and exercise.
19. There is also no capacity to complete CPD points for accessing professional support from a qualified psychologist or from a peer support group established and moderated for that purpose. Given the situations of conflict and trauma to which barristers are frequently exposed, recognising and formalising the need for professional supervision and peer support as a regular part of practice management would encourage barristers to seek out such supervision and support.

[Suggestion for change](#)

20. Clarity is required as to whether seminar topics or activities related to health and wellbeing (such as those listed above) fit within the existing CPD categories, such as 'Practice Management and Business Skills'. However, this would not give sufficient weight to the importance of health and wellbeing as a critical component of effective practice, and it would do little to promote participation in health and wellbeing seminars and activities.
21. The separate identification of a CPD category related to 'Health and Wellbeing' would prompt lawyers to consider their health and wellbeing as part of their professional development, and it would compel them to attend or participate in at least one seminar or activity designed to promote their health and wellbeing.
22. A subsidiary benefit would be in lessening any taboo associated with attending or participating in seminars or activities related to mental health or substance abuse.

23. The Bar seeks a recommendation by the CPD Review that the CPD Rules expressly accommodate health and wellbeing as a separate CPD category, and that barristers must complete at least 1 CPD point in that category in each CPD cycle.

### **Appropriate conduct, equality and diversity training**

24. The Bar is committed to gender equality, cultural and ethnic diversity, LGBTIQ inclusion, assistance to barristers with a disability, and applying best practice to ensuring participation of barristers with family and caring responsibilities. This commitment was reaffirmed and strengthened by the updating and endorsement of the Bar's [equality and diversity policy](#) in 2020. Under its policy, the Bar commits to implementing practical measures and initiatives designed to achieve equality and inclusion at the Bar, including "incorporating within its CPD program high quality seminars or workshops that focus on equality and diversity in the legal profession".

25. As is set out below, the Bar would welcome the addition of a separate category of CPD for all lawyers, including barristers, related to issues that focus on appropriate conduct in the workplace, equality and diversity. To the extent that the introduction of such a category should require lawyers to engage in sexual harassment training, it is submitted that all lawyers should be required to undertake one hour of sexual harassment training (or the equivalent of one CPD point) within this category every three years. A move to triennial CPD reporting (as discussed below in response to question 44) would help facilitate this.

### Sexual harassment

26. The introduction of mandatory sexual harassment training is sought, in many respects, because of the way that the Bar, and the practise of barristers, is structured. That is, there is no 'employer' with legal responsibility to prevent sexual harassment under anti-discrimination laws. Nor is there any entity at the Bar with power to make lawful and reasonable directions for barristers to attend sexual harassment training.

27. Concomitantly, the structure of the Bar also leaves barristers who are victims of sexual harassment, and particularly junior barristers, more vulnerable. As sole practitioners, they are dependant upon other counsel to develop their practices, both reputationally and as a source of future work. There is no formal oversight of these relationships, as might occur in traditional employment situations.

28. The requirement for lawyers to undertake sexual harassment training on a regular basis would assist in educating lawyers about what constitutes sexual harassment, the types of behaviour that constitute unwelcome or inappropriate behaviours, and provide lawyers with practical strategies on how to respond when a lawyer experiences, suspects or witnesses sexual harassment.

29. Sexual harassment reflects and reinforces gender inequality. Whilst sexual harassment can impact everyone, statistically, female barristers are disproportionately subjected to it. Women make up only 30% of the Bar. At the most senior level of the Bar, women make up only 13% of silks. It is critical that basic steps, such as sexual harassment training, be taken to foster a work environment that

promotes the careers of female barristers. Sexual harassment training would also benefit health and wellbeing aims, by promoting safe legal workplaces.

30. In addition to addressing sexual harassment directly, CPD which relates to broader issues of discrimination, bullying and unconscious bias, are also important and will be of assistance in creating systemic cultural change which makes the incidence of sexual harassment less likely. Sessions that cover these topics should be included as options for education if the additional mandatory CPD category that is sought is introduced.

#### Cultural competency

31. CPD reform may also provide an opportunity for lawyers to develop cultural competency. In particular, racial, ethnic and cultural diversity training would promote greater equality within the profession but also assist in promoting access to justice in the wider community.
32. The Bar notes that some of its members, especially those practising in criminal jurisdictions, often choose to undertake independent cultural competency training in respect of indigenous legal issues. A wider reaching program of cultural competency training through CPD would be beneficial for all lawyers.
33. For all of the above reasons, the Bar seeks a further recommendation by the CPD Review that the CPD Rules expressly accommodate appropriate conduct, equality and diversity training as a separate CPD category, and that barristers must complete at least 1 CPD point in that category in each CPD cycle.

#### Technology and disability

34. The issues paper specifically asks whether technology training should be mandatory. In the interests of maintaining as much flexibility as possible within individual CPD plans, the Bar does not believe that technology training should be mandatory. However, the Bar is supportive of efforts to increase the technological skills of members of the Bar. On this point, it recently endorsed the introduction of [minimum technology standards](#) at the Bar that it expects will lead to increased engagement with technology amongst its members.
35. The Bar also observes that it would be worthwhile if the Review explored whether the technology increasingly used by Courts and the profession is helpful to those with a disability, including if they are, or could be made more, compatible with technology already used to assist lawyers in their practices.
36. Finally, the Bar submits that it is important to ensure that members of the Bar, and the wider profession, who have a disability are sufficiently supported to enable their access to all CPD events, seminars, and sessions.

**Question 19: Are there any of the four subject areas that you think do not need to be mandatory for all lawyers? If yes, please elaborate.**

37. The Bar submits that all four current subject areas should remain mandatory for barristers, with the addition of the two compulsory subject areas, as set out above.
38. The four subject areas are fundamental to maintaining the core competencies and knowledge associated with the work of a barrister, generally.
39. One of the key objectives of the Bar under its Strategic Plan is to foster excellence and enhance the performance of Victorian barristers. A primary focus of the Bar in achieving this objective is to deliver a CPD program that supports and encourages barristers to maintain and improve high standards of legal services for the public interest, and to enable barristers to adapt to the changing needs of consumers of legal services.
40. The Bar runs a year-long comprehensive CPD program, which includes CPDs covering all four prescribed areas each year. The majority of the CPDs are organised under the auspices of an Association of the Bar or a Standing Committee of the Bar. Committees and Associations are encouraged to develop and host sessions that are of relevance and benefit to members of the Bar within their practice area/s. The delivery of the CPD program is supported by the Bar's education team.
41. Whilst, as is expanded upon below, it is important that within each subject area barristers are able to receive tailored CPD that meets their perceived needs, the learning capable of being delivered within the four areas remains important to ensuring competent practise.

## **PART 2.3: DIFFERENT LEVELS OF EXPERIENCE**

**Question 22: Should the CPD requirements for more experienced lawyers (>15 years post-admission experience) be changed? If yes, how should they be changed?**

**Question 23: Should the CPD requirements for less experienced lawyers (<3 years post-admission experience) be changed? If yes, how should they be changed?**

42. The development and improvement of professional knowledge and skills, and the maintenance of clients' and the public's confidence in the profession, is in the interests of all barristers regardless of their years of call.
43. Legal practice is continuously evolving. Within such a landscape, the need for barristers to educate themselves and be aware of changes to the law and its operation, remains critical at all levels of seniority. CPD also helps to ensure that the skills and capabilities of counsel keep pace with the current standards of other lawyers of similar seniority and standing.
44. In saying that, and despite the substantial amount of training new barristers receive in the Bar's Readers' Course, it remains more likely that skills and knowledge gaps will be more evident at junior barrister level. Whilst such gaps can be filled via mentors that barristers develop working relationships

with, and also through the open door policy of the Bar and chambers, further structured CPD over and above what is currently required for those with less than three years' call, is worthy of consideration. For example, in the UK, a New Practitioner Programme at the UK Bar has been developed that requires barristers to undertake 45 hours of CPD within their first three years of call, beginning from 1 January in the calendar after they first commence practising as a barrister. This must consist of at least nine hours on advocacy and three hours on ethics. In the UK, such a programme is viewed by the regulator as being of significant benefit to the development of skills, knowledge, and competencies of new barristers.

## **PART 2.7: REGULATOR'S ROLE**

### **Question 35: Should the mandatory 10 CPD point requirement be retained, abolished or changed?**

**Please elaborate on your response.**

45. A minimum number of CPD hours should be required. This is because, in the Bar's view, a mandatory minimum number of hours mitigates against the risk of public confidence in the skills and knowledge of barristers being eroded due to a (perceived) lack of training and development.
46. In the Bar's view, the number of CPD points presently required is appropriately set at 10. However, it is also important to recognise that CPD should not be a 'tick-the-box' exercise. It should be meaningful, flexible and tailored to the individual practise needs of barristers to allow barristers to adequately address any skill or knowledge gaps they may have. Barristers should have individual responsibility for deciding what training they require within each of the mandatory subject areas. To facilitate such an approach, the range of activities that are permitted must be as flexible as possible, and be supported by a CPD plan, to ensure the quality and relevance of CPD's undertaken.
47. There should also not be a pre-occupation with only permitting CPD activities that are verifiable. To the extent that practitioners must 'produce' a document, or receipt of attendance at an event as evidence of the attainment of CPD, the Bar submits, with respect, that such requirements are not necessary. Rather, permitted CPD activities should focus on how individual practitioners best attain knowledge and skills. For example, if private study (i.e. reading journals or legal commentary) or workplace learning is an effective means by which practitioners learn, it should not be excluded simply on the basis that it is more difficult to verify as having been completed.

### **Question 36: Should all lawyers be required to prepare CPD plans on an annual basis that identify learning and development needs and activities? Please elaborate on your response.**

48. In the Bar's view, all lawyers, including barristers, should be required to identify learning and development needs and activities in annual CPD plans. Doing so would facilitate tailored and effective learning, which is targeted to individual practice areas and needs.
49. It would also ensure a planned and structured approach is taken by lawyers to their professional development, and guards against the risk that CPD becomes a purely compliance exercise with similar or repetitive CPD activities undertaken for the purpose of simply accruing points.

**Question 38: Do you think that a competency framework that described the necessary skills for legal practice would help to create a more useful CPD program?**

50. To ensure that the Bar's delivery of its education program is relevant and contemporary, the Bar is conducting a comprehensive review and update of its education program. This exercise is aimed at ensuring its education program equips barristers with the requisite skills to deal effectively with issues that arise at each stage in the life of their practice, and to ensure that the Bar's educational offerings are consistent with best practice and support professional growth.
51. As part of this process, a competency framework for barristers has been identified by the Bar and will shortly be finalized that describes the skills and knowledge that barristers require in order to provide high quality legal services to consumers of legal services. As a key provider of CPD for barristers in Victoria, and armed with the knowledge of the unique skills, pressures and demands that barristers confront in their professional lives, the Bar submits it remains best placed to identify and deliver appropriate CPD content to barristers consistent with the required competencies identified in the framework. The Bar would be pleased to share its competency framework with the Commissioner once complete.
52. In the Bar's view, without a clear understanding of what the desirable competencies of a legal practitioner should be, it is difficult to plan a complete CPD program, and significantly increases the risk that key learning outcomes will not be attained.

**Question 39: Do you think that a voluntary accreditation scheme for CPD providers would provide you with useful information about CPD providers and activities?**

53. The introduction of some form of accreditation scheme for CPD providers is supported by the Bar.
54. Doing so would offer greater certainty and assurance to legal practitioners that providers of CPD are deemed by the regulator to be delivering educational programs, and employing persons to deliver such programs, of sufficient quality and standing within the profession.

## **PART 2.8: COMPLIANCE AND ENFORCEMENT**

**Question 40: How onerous do you find the CPD record keeping requirements? If you think they are too onerous, please provide details of how they could be improved.**

55. Present CPD record keeping requirements are not onerous for barristers.
56. Whilst barristers have the option to maintain their CPD record in any manner they choose, the Bar provides its members with a straightforward and easy-to-use electronic platform via its website as an optional record keeping tool. Feedback from its members indicates that the platform is beneficial to those who use it.

**Question 41: Would an online solution make it easier for you to maintain your records and receive information and reminders about CPD?**

57. In the Bar's view, the development of online solutions by organisations should be encouraged.

58. The Bar implemented an online learning management system for barristers in 2017. It has an inbuilt tool to record CPD attendances. Although it is not mandatory, it has been useful for records management both at the individual level and from a regulatory perspective.
59. The learning management system is simple for barristers to record in person attendances and automatically records electronic attendances.
60. Presently, the Bar provides members with an option to receive information and reminders about all upcoming CPD events and sessions via email.

## **PART 2.9: TECHNICAL ISSUES**

### **Question 44: Do you think that the CPD scheme should move to a triennial reporting basis, subject to a minimum annual activity requirement?**

61. The Bar supports a move to triennial reporting. As noted in the Issues Paper, although such a move would require amendment to the Uniform Law, it would reduce the regulatory burden on lawyers and costs to the regulator.
62. Importantly, it would also provide practitioners with the flexibility of organising their CPD activities over the course of the three-year cycle, which, for example, would allow for anticipated busy periods to be planned around.
63. The Bar supports a system where CPD compliance declarations do not need to be made at the time of practising certificate renewal but rather at any time during the CPD year. This would also alleviate the administrative burden placed on regulators during busy practising certificate renewal periods.