



THE VICTORIAN BAR INCORPORATED

**SUBMISSION TO THE
DEPARTMENT OF JUSTICE AND
COMMUNITY SAFETY**

CONSULTATION ON THE CONSTRUCTION OF
MANDATORY REPORTING REQUIREMENT FOR
LAWYERS

INTRODUCTION

1. The Victorian Bar (**the Bar**) welcomes the opportunity to provide a submission in response to the Department of Community Safety (**DJCS**) with respect to its Consultation Paper entitled “Construction of a mandatory reporting requirement for lawyers”, dated July 2021 (**Consultation Paper**).

ACKNOWLEDGEMENT

2. The Bar acknowledges the contributions of the members of its Royal Commission into Management of Police Informants Working Group, in particular Lisa Hannon QC and Alexandra Golding, in the preparation of this submission.

BACKGROUND

3. The invitation for comment arises as a consequence of the Victorian Royal Commission into the Management of Police Informants Final Report dated 30 November 2020 and, in particular, Recommendations 86 and 87. Recommendation 86, in short, proposes that the Victorian Government pursue an amendment to the *Legal Profession Uniform Law*¹ that enshrines a mandatory reporting requirement. Recommendation 87 requires the preparation of “harmonised guidance” and CPD activities to accompany and support the introduction of a mandatory reporting requirement.
4. As part of the consultation process, the Office of the General Counsel, DJCS, has prepared the Consultation Paper, which raises a number of background matters in relation to both the form and content of any mandatory reporting requirement, and the proposed guidance to the profession and CPD activities that might accompany its introduction.
5. In particular, the Consultation Paper invites a response to 15 specific Consultation Questions.
6. The Bar has carefully considered the Consultation Paper and Consultation Questions and is pleased to have the opportunity to provide this response.
7. In giving this response, the Bar has relied, where appropriate, on terms defined in the Consultation Paper.

VICTORIAN BAR RESPONSE - INTRODUCTORY REMARKS

8. The Bar has made plain from the commencement of the consultation process that it does not support an amendment to the Uniform Law which introduces a mandatory reporting requirement for barristers to report the suspected misconduct of other lawyers (whether other barristers, or solicitors).
9. The reasons for the Bar’s position have been set out at length in other submissions and correspondence.
10. However, in summary, the Bar has the following particular concerns about the implementation of any mandatory reporting requirement for barristers:
 - (a) It is unnecessary in the context of the currently regulatory framework.

¹ The *Legal Profession Uniform Law* is contained in Schedule 1 to the *Legal Profession Uniform Law Application Act 2014* (**Uniform Law**). The Uniform Law also has application in New South Wales, and is intended to be introduced into other participating Australian jurisdictions.

The Uniform Law and the *Legal Profession Uniform Conduct (Barristers) Rules 2015 (Uniform Bar Rules)* make plain that a barrister's overriding duty is one which is owed to the Courts and to the administration of justice more generally. Further, there is no clear evidence from jurisdictions in which mandatory reporting obligations exist that there has been an increase in the number of substantiated complaints, or that mandatory reporting has improved the detection of serious misconduct more generally;

- (b) Its implementation may have unintended, but nevertheless serious, professional consequences for a member of the Bar faced with an obligation to act as a reporter in respect of a reportable concern.

The Bar is an independent collective of sole practitioners who both compete with and rely on other members in order to obtain work. One of its great strengths is its professional collegiality. However, its hierarchical nature may create particular consequences for junior counsel faced with a reportable concern in respect of the conduct of a more senior member of counsel. Conversely, it is of critical importance that all members of counsel operating in the sole practice environment (and regardless of relative seniority) continue to feel that they can seek professional guidance from their colleagues (whether informally, or through the Ethics Committee). Finally, issues may arise where a reportable concern has adversely affected a member of counsel, but where that person does not wish for the matter to be reported to the regulator, whether for personal or professional reasons;

- (c) Its implementation has the potential to impose a "one size fits all" disciplinary consequence in respect of reportable conduct that results from mental health issues, drug or alcohol issues, or other serious stressors.

The Bar's current model (through the Bar Council Counsel Committee, the Ethics Committee and the formal Grievance Protocol and reporting processes concerning sexual harassment, bullying and discrimination) facilitates the identification and resolution of professional practice issues of concern and the referral of members to appropriate external services. In appropriate circumstances, the Bar Council will directly refer matters of concern which may constitute unsatisfactory professional conduct or professional misconduct for investigation by the VLSB+C. This model is continually being refined and improved, but functions in harmony with the objectives of both the maintenance of an independent Bar and the professional conduct requirements of the Uniform Law and Uniform Bar Rules.

11. This remains the Bar's primary position, and its responses to the 15 Consultation Questions (which are required to assume the introduction of a mandatory reporting obligation for barristers) are necessarily informed by this position.

RESPONSES TO THE CONSULTATION QUESTIONS

Question 1

Should the new mandatory reporting requirement maintain consistency with the existing professional discipline provisions in the Uniform Law and apply to the conduct of:

- a. Lawyers (as defined), and
- b. Law practices (as defined).

Response:

In the event the mandatory reporting requirement is introduced, it should maintain consistency with terms defined in the Uniform Law.

Certainly, in that circumstance, the obligation to report should apply in respect of the conduct of “law practices” (noting that barristers who are Australian legal practitioners are sole practitioners for the purpose of the definition in s 6(1) of the Uniform Law).

“Lawyers” who no longer hold practising certificates (and are therefore not Australian legal practitioners) may be the subject of a disciplinary complaint under Part 5 of the Uniform Law. There is no reason in principle why the mandatory reporting requirement should be narrower (that is, confined to the conduct of Australian legal practitioners).

Question 2

Who should be required to make a report under the new mandatory reporting requirement:

- a. Lawyers (as defined);
- b. Law Practices (as defined), and
- c. Employers of lawyers.

Response: The Bar responds to this obligation only as it relates to obligations which may be imposed on barristers to become reporters of reportable concerns.

Barristers who are Australian legal practitioners are sole practitioners for the purpose of the definition in s 6(1) of the Uniform Law. They are thus encapsulated by the definition of “law practice” in the Uniform Law.

In the event that a mandatory reporting requirement is introduced for barristers, it is the position of the Bar that only barristers who are Australian legal practitioners (that is, barristers holding current practising certificates) should be *required* to act as reporters. There should be no *mandatory* reporting obligation for barristers who no longer hold a current practising certificate, but who otherwise fall within the definition of

“lawyer” (that is, they are an “Australian lawyer” by reason only of their admission to practice).

However, a path might remain for a non-practising former barrister (who remains an Australian lawyer) to *voluntarily* report a reportable concern if circumstances arose that made it appropriate for that person to do so. Any protections afforded to a mandatory reporter should be extended to a non-practising barrister making a voluntary report.

Question 3

- a. **In defining the type of conduct about which concerns should be reported, should the new mandatory reporting requirement use:**
- i. **The existing Uniform Law definitions of ‘unsatisfactory professional conduct’ and/or ‘professional misconduct’ (as defined), or**
 - ii. **A discrete list of conduct?**

Response: In the event that a mandatory reporting requirement is introduced, then the Bar considers the requirements should be framed in conjunction with, and conform to, the current definitions of unsatisfactory conduct and professional misconduct under ss 296 and 297 of the Uniform Law respectively.

These terms are well understood, supported by case law and capable of capturing the impugned conduct. To introduce other concepts would unnecessarily complicate the introduction of the mandatory reporting requirement.

However, that is a different question to the particular species and degree of conduct that ought to be captured by any mandatory reporting threshold.

In particular, the Bar does not support the concept of a reportable concern extending to all conduct which might constitute unsatisfactory professional conduct or professional misconduct within the meaning of the Uniform Law. To impose such a requirement would result in an unworkable burden not only for members of the Bar, but for both the Regulator and the administration of justice more generally.

The Bar is particularly concerned to avoid the regrettable scenario where the mandatory reporting of arguably “lower level” breaches of professional conduct requirements has the potential to disrupt the continuing participation of counsel in ongoing hearings (with the adverse flow on effect that unnecessary adjournments to enable the retainer of new counsel may create more generally for the orderly functioning of the Victorian justice system).

Rather, it is the Bar’s position that only the most serious instances of professional misconduct should constitute a reportable concern.

The areas of particular concern are identified in response to part b. of Question 3.

b. Which of the following types of conduct do you think should be included in the scope of the new mandatory reporting requirement:

i. Criminal conduct

Yes

ii. Dishonesty

Yes

iii. Sexual harassment

No, as this is a matter that is directly addressed by both other laws, and the Bar's internal policies.

iv. Bullying and discrimination.

No, as this is a matter that is directly addressed by both other laws, and the Bar's internal policies.

v. Breaches of the Solicitors and Barristers Conduct Rules

Whilst reportable conduct will likely also constitute a breach of either the Solicitors or Uniform Barrister Rules, only the most serious instances of breaches constituting professional misconduct should constitute a reportable concern.

vi. Breaches of the Uniform Law or the accompanying rules (other than the Solicitors' and Barristers' Conduct Rules)

Only the most serious instances of breaches constituting professional misconduct (whether or provisions of the Uniform Law, or of related rules such as the *Legal Profession Uniform General Rules 2015*, which address important costs, professional indemnity insurance and trust accounting requirements for both branches of the profession) should constitute a reportable concern.

The Bar submits that it is highly unlikely that breaches of other accompanying rules (such as the *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015* and the *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015*) could ever give rise to professional misconduct of a sufficiently serious nature warranting categorisation as a reportable concern.

vii. Deficient knowledge or skills

No. These are matters that import a degree of subjectivity. They are also matters in respect of which consumers may be protected by the making of a costs or disciplinary complaint under the Uniform Law, or the institution of proceedings at common law for breach of retainer and/or

negligence.

viii. Practice outside accepted professional standards.

No. Once again, these are matters that import a degree of subjectivity. They are also matters in respect of which consumers may be protected by the making of a costs or disciplinary complaint under the Uniform Law, or the institution of proceedings at common law for breach of retainer and/or negligence.

ix. Health impairment or incapacity affecting a person's ability to practice

Yes, provided that the consequential effect on a person's ability to practice is significant, or likely to lead to the delivery of legal services that fall short of the standard expected of a reasonably competent legal practitioner.

x. Practice whilst intoxicated with drugs or alcohol

Yes, but with the qualification attributable to paragraph ix, "health impairment or incapacity" – that the level of intoxication observed has had a significant effect on a person's ability to practise, or is likely to lead to the delivery of legal services that fall short of the standard expected of a reasonably competent legal practitioner.

xi. Matters which may indicate a person is not a fit and proper person

Yes.

xii. As in the UK, facts or matters a person believes should be brought to the regulator's attention

No. The Bar considers that such an obligation is too open ended and subjective, and has also the potential to encourage the making of unnecessary or malicious reports.

c. Should every instance of conduct captured by the new mandatory reporting requirement be reportable or should an additional threshold apply?

Response: It is the Bar's position that only the most serious conduct should constitute a reportable concern. Further, in defining the requisite degree of seriousness, regard should be had to the nature of the risk the conduct poses to clients, members of the public and/or the administration of justice.

Otherwise, as noted above, the burden on both the reporter and the regulator is too onerous. In particular, the Bar is concerned that if the threshold is set too low, the regulator is likely to be overwhelmed by reportable concerns which constitute "low level" conduct, and thus prevented from focussing in a timely fashion on the most serious conduct which has the potential to have a significant adverse impact on clients, other members of the public or on the administration of justice.

It is also relevant to consider the impact on the lawyer or law practice that is the subject of a mandatory report. A report, whether well founded or not, will “stick”. In the case of a barrister, disclosure of both the fact and substance of the mandatory report will likely be required in a number of different settings, including to professional indemnity and top-up insurers, at the time of practising certificate renewal, and at the time of making applications for advancement, including application for appointment as Senior Counsel, or application for judicial or other office.

Even a well-founded report is likely to impact on the mental health of a reported barrister. This concern must be seen in the context of a profession where mental health and wellbeing is under constant challenge, a result of the inherently complex and stressful nature of work performed on a daily basis, and particularly exacerbated by the confronting subject matter arising in some practice areas.

Given the potential serious adverse consequences for the person the subject of any report, it is critical that any mandatory reporting threshold is confined to conduct of only the most serious nature.

Question 4

- a. **Which of the following degrees of knowledge, belief or suspicion do you think should trigger the new mandatory reporting requirement to make a report to the regulator and why:**
- i. **reasonable suspicion;**
 - ii. **belief;**
 - iii. **belief on reasonable grounds, or**
 - iv. **actual knowledge?**

Response: The Bar favours “belief on reasonable grounds” as the minimum state of mind required in order to trigger the mandatory report of a reportable concern.

Whilst a barrister having “actual knowledge” of a reportable concern would nonetheless be captured by this requirement, setting “actual knowledge” as the minimum standard may be too high, and difficult to assess in many circumstances.

By contrast, each of “reasonable suspicion” and ‘belief” are simply too low a standard. Reliance on each would likely result in too many low-level reports being made to the regulator.

The adoption of “belief on reasonable grounds” would strike a balance between these two extremes. It is based on an objective rather than subjective standard. It is broadly consistent with existing reporting

requirements under the Uniform Law² and the *Legal Profession Uniform Law Solicitors Conduct Rules 2015*.³ It is also broadly consistent with the position in other similar common law jurisdictions, such as the United Kingdom and New Zealand.

- b. Should the knowledge, belief or suspicion a reporter is required to form be:**
- i. that a reportable entity *has* engaged in a type of conduct that falls within the scope of the new mandatory reporting requirement, or**
 - ii. that the concerns being reported *are capable* of amounting to conduct that falls within the scope of the new mandatory reporting requirement?**

Response: The Bar supports alternative ii - that is, that the concerns are *capable* of amounting to conduct that falls within the scope of the new mandatory reporting requirement.

It is for the regulator to decide whether the conduct reported constitutes reportable conduct, not the reporter. To require the reporter to form such a view imposes an unnecessary burden on the reporter.

Question 5.

After a reporter acquires or forms the degree of knowledge, belief or suspicion discussed in consultation question 4, which of the following timeframes do you think is most appropriate in which to require them to make a report to the regulator and why?

- a. No timeframe should be specified;**
- b. As soon as practicable; or**
- c. Within 7 days.**

Response: b. The Bar considers that the option b., “as soon as practicable” is the fairest and most workable of the alternatives presented.

It seems trite to note that some form of reporting period would need to be specified, otherwise the report arguably need not be made to the regulator at all. However, a mandatory time period may not be suitable in all circumstances that may be captured within the meaning of a reportable concern.

The Bar only adds that it may be prudent to add a rider that a report should be made “immediately” if a person’s safety is at imminent risk by reason of a reportable concern.

² Section 154(2) concerns the mandatory reporting of trust accounting irregularities.

³ Rule 32.1 concerns the making of allegations of unsatisfactory professional conduct or professional misconduct. There is no equivalent provision in the Uniform Bar Rules.

Question 6

Should reporters be exempt from reporting reportable concerns to the regulator in circumstances where they become aware of those concerns in the course of:

- a. Providing legal services to the reportable entity in relation to actual or potential legal proceedings or providing legal advice in which the reportable concern is an issue;**
- b. Providing services to reportable entities relating to the provision of professional indemnity insurance?**

Response: Yes to both paragraphs a. and b.

A reportable entity (and its professional indemnity insurer) are entitled to obtain legal advice and professional representation in the course of discharging their professional responsibilities.

To require reporters to breach legal professional privilege to make a report cuts across the fundamental right of a person/entity to obtain confidential legal advice. The Bar observes that the institution of such a requirement would result in the mandatory reporting requirements being more onerous and, perhaps, draconian than the position that arises in circumstances where a person is accused of a crime.

However, the Bar accepts that there may be some scope for mandatory reporting where information provided discloses that there are reasonable grounds to believe a person's safety is at risk. Such an obligation is broadly consistent with the existing obligation imposed on barristers in respect of clients, and which constitutes an exception to lawyer-client privilege and a barrister's duty of confidentiality. Rule 86 of the Uniform Bar Rules provides:

A barrister whose client threatens the safety of any person may, notwithstanding rule 114, if the barrister believes on reasonable grounds that there is a risk to any person's safety, advise the police or other appropriate authorities.

Question 7

Noting the existing provisions in the Uniform Law, should the new mandatory reporting requirement require a reporter to report reportable concerns to the regulator notwithstanding that:

- a. Legal professional privilege, or**
- b. A duty of confidentiality**

might apply?

Response: No, for the reasons set out more fully in answer to Consultation Question 6, but with the proposed exception where there are reasonable grounds to believe a person's safety is at risk.

Legal professional privilege or a duty of confidentiality will only arise in certain defined circumstances or

relationships. However, where these duties arise, they must remain paramount. Great care must be taken before there is any further erosion of these core principles of legal practice in their application to barristers.

Question 8

Should a prospective reporter who becomes aware of reportable concerns through their work (paid or unpaid) for an ethical support service be required to report those concerns to the regulator?

Response: No.

Barristers who seek rulings from the Bar's Ethics Committee are required to provide the Committee with full and frank disclosure of the facts upon which they seek a ruling. Members of the Ethics Committee are bound by Rules 114 and 115 of the Uniform Bar Rules. Members of the Committee are approached very frequently on an informal basis (by telephone, email or conference one on one with a concerned barrister), and regularly on a more formal basis, in circumstances where a request for a resolution is received and distributed to the whole of the Committee.

To impose a requirement on the Committee (or its members) to report matters to the regulator would actively discourage the seeking of ethical advice from the Committee. It is the Bar's position that this is a materially adverse outcome for the profession that must be avoided. The seeking of rulings and/or ethical advice should in no way be discouraged. That process serves as an important "early warning system". It serves to *prevent* breaches of the Uniform Law and Uniform Barrister Rules occurring, and is a means by which prospective disciplinary complaints and professional negligence suits might be avoided. It aids in the protection of the public by ensuring that barristers have assistance to ensure that their conduct meets the standards expected of them by the public and the legal profession, and in aid of the broader administration of justice.

If so, do you think the threshold for what qualifies as a reportable concern should be the same as for other reporters? No. If, notwithstanding the matters set out above, the Ethics Committee (or its members) are obliged to report reportable concerns, the Bar suggests that the reporting requirement be limited to circumstances where the prospective reporter has reasonable grounds to believe that there is a risk to any person's safety.

Question 9

Should the following people or bodies be required to report their concerns to the regulator under the new mandatory reporting requirement:

- a. **A prospective reporter who is a victim of the conduct the concerns relate to, and/or**
- b. **A prospective reporter who has been asked by the victim (of the conduct the concerns relate to) not to make a report to the regulator?**

Response: No to both a and b.

Whether to report a matter is a decision that should rest entirely with the victim. Furthermore, a victim should be able to consult with another member of counsel without the fear that an unwanted report must then be made to the regulator by that other counsel.

As noted in the introduction, the Bar has a strong collegiate structure and tradition. Barristers can and do regularly seek confidential advice from their mentors, more experienced counsel and Bar Committees (such as the Ethics Committee), whether informally or by way of a more formal request for resolution.

To require those barristers consulted by a victim to report a matter against the victim's wishes would seriously erode the collegiality of the Bar.

Question 10

Should the new mandatory reporting requirement:

- c. Include a civil penalty provision for non-compliance, and/or**
- d. Specify that non-compliance is capable of constituting unsatisfactory professional conduct or professional misconduct?**

Response: A civil penalty provision should not be included.

It is sufficient to enforce instances of non-compliance by specifying that non-compliance with reporting obligations is conduct that is capable of constituting unsatisfactory professional conduct or professional misconduct within the meaning of the Uniform Law.

The Bar notes that where unsatisfactory professional conduct or professional misconduct is established, the sanctions available are flexible, in aid of both the protection of members of the public and the reputation of the profession more generally. However, the existing range of sanctions includes significant fines (up to \$100,000 for professional misconduct), restrictions on a practitioner's entitlement to practice (including the suspension or cancellation of a practising certificate) and, indeed, referral to the Supreme Court seeking the removal of a practitioner's name from the Roll of Practitioners. In this way, the existing sanctions would serve as a significant general deterrent against a failure to comply with any mandatory reporting obligation.

Question 11

Should the new mandatory reporting requirement include an express prohibition on the victimisation or detrimental treatment of reporters?

Response: Yes.

If a mandatory reporting obligation is introduced, then the position of the Bar is that it is both self-evident and,

indeed, critical, that a reporter must not be victimised nor be the subject of detrimental treatment by reason of the reportage.

The Bar considers that this issue should be addressed by way of express prohibition, rather than assuming that it is a matter about which the regulator could take disciplinary action. Once again, the experiences in other common law jurisdictions (particularly New Zealand and the United Kingdom) provide a helpful guide.

Question 12

Should the new mandatory reporting requirement include:

- a. An express requirement that a report must be made in good faith, and/or**
- b. An express prohibition on malicious reporting?**

Response: Yes.

If a mandatory reporting obligation is introduced, then the position of the Bar is that it is again both self-evident and critical that the legislation require that a report be made in good faith, and with an express prohibition on malicious reporting.

The Bar considers that this issue should be addressed by way of express provisions, rather than assuming that these are matters about which the regulator could take disciplinary action in the event of breach.

This is consistent with the obligation that is already imposed on solicitors in respect of making reports of unsatisfactory professional conduct or professional misconduct under the Uniform Law (noted in footnote 3). It would be incongruous if any mandatory obligations introduced under the Uniform Law were the subject of less onerous requirements.

Question 13

Please tell us about any measures you think would assist to:

- a. Mitigate the risk that the new mandatory reporting requirement may impact collegiality in the legal profession, or**
- b. Support junior lawyers to report senior colleagues.**

Response: As noted in Section 2, Introductory Remarks, the Bar remains extremely concerned that the introduction of mandatory reporting will necessarily impact on the collegiality of the legal profession and, in particular, the Bar (which operates on a much smaller and close-knit scale than the solicitor branch of the legal profession). The potential consequences for junior members of counsel simply cannot be understated.

The Bar's observations in response to Consultation Questions 8, 9, 11 and 12 are key matters raised by it in

seeking to minimise the inevitable adverse impact on collegiality (both generally, and in respect of junior members of counsel).

In addition, comprehensive and practical explanatory or guidance materials and CPD activities will form an important plank in minimising the identified risks. We discuss this further in response to Consultation Question 14.

Question 14

a. What content would you like to see in the guidance that accompanies the new mandatory reporting requirement?

Response: It is difficult to make further comment in the absence of any draft legislative amendment. However, the Bar would be keen to participate in the development of any guidance materials to ensure that their content addresses the specific concerns that may arise for its members.

In particular, it is anticipated that general awareness will be best aided where the guidance materials provide practical examples of the most common issues that might arise.

b. What content would you like to see in the CPD activities that accompany the introduction of the new mandatory reporting requirement?

Response: Once again, it is difficult to make further comment in the absence of any draft legislative amendment. The Bar has a strong tradition of the preparation and delivery of CPD sessions and papers specifically targeted at the practices of barristers, and will again be keen to participate in the development of any CPD materials to be shared specifically with barristers.

However, in general terms, it has been the Bar's experience in respect of ethics-related guidance for barristers (both as part of the Bar Readers' Course and ongoing CPD activities) that the education function is best supported by a number of specific, practical examples (perhaps best described as "Hypotheticals"), whether they are delivered as part of an in-person or online CPD or workshop, a paper or fact sheet, or an interactive online questionnaire.

Question 15

Is there anything else you would like to tell us?

Response: The Bar reiterates the matters raised in paragraphs 8 to 11.