
A PROPOSED EXTENSION OF TENURE OF BAR COUNCIL

MEMORANDUM TO THE VICTORIAN BAR

Introduction

1. The Bar Council seeks your input into a proposed amendment to the Victorian Bar's constitution to extend the tenure of Bar Council members. As we set out in this paper, the purpose of the proposed amendment is to improve the effectiveness and efficiency of work undertaken by the Bar Council and, more generally, to improve the Bar's corporate governance.

Background to the proposed extension of tenure

2. In 2016, a working group of the Bar Council conducted a comprehensive review of the Bar's governance (*Governance Review*).
3. One of the issues raised in the course of that review concerned the utility of the Bar Council only being elected for one year terms which, in terms of the appropriate length of tenure for the Bar's governing body, fell short of what the Governance Review regarded as good governance practice.
4. Among the reasons for this view were that one-year terms created the potential for the pursuit of ad hoc or piecemeal agenda from one year to the next; a focus on 'bite-sized' projects which can be achieved in the short term; the agenda of the Bar Council being heavily influenced by the personal agenda of the sitting President; and the potential for loss of corporate memory, re-invention of the wheel and inconsistency in decision-making. Other factors were that, for more junior Bar Councillors, a one-year term may be limiting in the sense that new members may be just finding their feet when the annual election cycle comes around, with no assurance that they will be re-elected.
5. The Governance Review recommended that in the longer term, consideration be given to extending the tenure of Bar Council members to provide for annual elections for half of the Bar Council but with Bar Councillors being elected for two year terms (a *half Senate-type model*), and that consideration be given to amending the Bar Constitution accordingly (*Review Recommendation*).

The current Bar Council's views

6. On 14 May 2018, at a meeting specially convened for the purpose (*14 May Meeting*), the current Bar Council discussed the Review Recommendation and considered whether constitutional reform to lengthen Bar Councillors' terms ought to be pursued. The Bar Council discussed the current rule (annual elections for all Bar Councillors) and the alternative half Senate-type model favoured by the Governance Review. It also discussed the following alternative options:
 - (a) a **two year model**: comprising bi-annual elections for the whole of Bar Council, with all Bar Councillors elected for two year terms;
 - (b) an **18 month model**: comprising an election every 18 months for the whole of Bar Council, with all Bar Councillors elected for 18 month terms;
 - (c) a **minimal change model**: comprising annual elections for the whole of Bar Council as per the current practice, but with the President able to stand for re-election for a second term;
 - (d) a **NSW type model**: comprising annual elections for the whole of Bar Council, but with the President, by convention, serving an 18 month term, with a change of presidency every 18 months.¹
7. The countervailing arguments to be weighed against the advantages of longer terms for Bar Councillors were also discussed.
8. Among the most important of the countervailing arguments were that longer terms, particularly 2 year terms, would reduce the opportunity for members to stand for election and to serve on the governing body of the Bar. They would increase the term served by the President and likely, therefore, increase the time that other Bar Council members would need to serve as ordinary members before securing an opportunity to serve on the Executive (and then increase the time they would need to serve on the Executive before they could realistically expect to be elected as President). For that reason, longer terms could affect the preparedness of some barristers, who would otherwise make outstanding leaders of the Bar, to put themselves forward as candidates because of the commitment involved and the impact upon their practices. Bar Council noted,

¹ All other Australian Bars currently have annual elections. Most follow the 'minimal change' model. This model was also largely the convention at the Victorian Bar prior to 2000 and there would be no constitutional impediment to it being reintroduced.

however, that until early this century, the predominant practice was for Presidents to serve a term of two years.

9. The views of the majority of Bar Councillors as to the alternative options can be broadly summarised as follows:²
 - (a) the 2-year model would see each council benefit substantially from a continuity of knowledge and experience, and would afford each council the most opportunity to make change. On the other hand, it would reduce opportunities for members of the Bar to participate and the increased time of service required (particularly in executive positions) may discourage excellent candidates from standing or remaining on the Bar Council longer term;
 - (b) the 18-month model would offer more opportunity to participate than the two-year model while minimising the increase in the burden on the executive. However, irregular elections (i.e. every 18 months) may be more disruptive from the perspective of the Bar Office (e.g. preparation of annual budgets may be affected) and stakeholder relationships;
 - (c) the minimalist model would offer a regular turnover of council members and the stability of a longer term for the President should he/she wish to take the option of a second term. This may strike a balance between continuity of experience and refreshment of ideas, however it will not achieve the continuity of knowledge and experience the two-year model provides for; and
 - (d) the half Senate-type model, while having a number of advantages, would potentially lead to distortions in the composition of the Council because there would be fewer vacancies in any given year (5 or 6 in the senior category; 3 in the middle category; 2 in the junior category), with the prospect that it would be more difficult for junior members in each of the three categories to be elected.
10. After a constructive debate considering the pros and cons of each of the above models, a strong majority emerged in favour of the 'two year' model. Given the importance of the matter and the fact that any change to the current practice may involve constitutional reform, the opinion of members on the question in the form of a survey was considered to have merit and be the best

² The Bar Council considered the status quo, the two-year model, the 18-month model, minimalist model and the half Senate-type model in depth. The NSW model did not appeal to the Bar Council, and this paper does not address it in detail.

way or ascertaining whether there is wide-spread support for reform and if so, which model may be favoured.

Our request for your views

11. As foreshadowed above, the Bar Council would like to hear your views on the proposed amendment.
12. We would be grateful if you would consider these arguments and answer the following questions (by completing the survey in the **attached** link):
 - (a) Do you agree that the tenure of Bar Council members should be extended?
 - (b) If yes, do you agree with the Bar Council's recommendation of adopting the two-year model?
 - (c) If no, what do you think would be the most appropriate model to adopt?
13. We look forward to hearing your thoughts, and we appreciate your time.

The Victorian Bar Council

15 August 2018

	In favour of extending tenure	Against extending tenure
	Continuity versus refreshment	
1.	Extending tenure will promote continuity of knowledge, skills and experience.	The election of new Bar Council members allows for an influx of fresh knowledge, skills and ideas. A number of members who are on the Bar Council are often re-elected (including, importantly, the Executive). This achieves a positive mixture of continuity and refreshment.
2.	It would decrease the risk of Bar Council adopting ad hoc, piecemeal agendas from year to year.	The convention that the Junior Vice President becomes Senior Vice President becomes President (the Executive Convention) is well established, and operates to provide continuity in the Executive and, consequently, in the agenda.
3.	It would enable any one Bar Council (and a President) to more comprehensively plan and implement an agenda.	Bar Council members are not elected based on any platform. Rather, they are elected without members of the Bar having any knowledge of their views or intentions. A shorter term allows the members of the Bar to react to any changes made by Bar Council that they do not approve of (by voting in a new Bar Council). It minimises the risk of one President's voice dominating the agenda.
4.	It would help in protecting the corporate memory of Bar Council. It would minimise reinvention of the wheel and reduce the risk of inconsistency in decision-making.	The issue of a lack of corporate memory has not been shown to be a problem. Former Bar Council members usually remain within contact, and appropriate record keeping and consistency in the Executive and Bar Office staff are protective measures.

	In favour of extending tenure	Against extending tenure
5.	It will facilitate Bar Council focusing upon a mixture of short and longer-term objectives. It would minimise the risk that longer-term planning is abandoned by a subsequent composition of Bar Council, and may allow for greater policy improvement over time.	Again, consistency in the Executive is protective here. In addition, longer-term outcomes may yet be abandoned by a subsequent composition of Bar Council, and a shorter term sharpens Bar Council's focus on projects that can be achieved in the short term.
6.	It would reduce the likelihood that multiple concurrent new judicial appointments will impact adversely on the Bar Council's effectiveness.	The disruption that is caused by judicial appointments (particularly in relation to members of the Executive) would be exacerbated in circumstances of longer tenure.
7.	New members of Bar Council will have a shallower understanding of its role, practice and responsibilities.	There will usually be some continuity of membership even outside of the Executive. Even in the unlikely event that there was no continuity, barristers are used to getting across new and complex tasks swiftly.
8.	Newer members may take some time to feel comfortable expressing their view (particularly members of the junior category), and accordingly may contribute less early on (and therefore in total). Shorter-serving councillors may not engage in long-term thinking.	Longer-serving councillors may be more resistant to change and less motivated over time.
9.	Shorter tenure may disrupt the service of motivated and diligent members of Bar Council.	Shorter tenure may assist in relieving Bar Council of underperforming members.
10.	Adoption of the two year or 18 month models would reduce the number of elections.	There would be an administrative burden in obtaining approval for this change from members of the Bar (which may in any event not be forthcoming).

	In favour of extending tenure	Against extending tenure
	Corporate governance best practice	
11.	<p>Extending the term is more in keeping with best practice. The ASX Corporate Governance Council publication <i>‘Corporate Governance Principles and Recommendations’</i> says that the interests of a listed entity and its security holders are likely to be well served by having a mix of directors, some with a longer tenure with a deep understanding of the entity and its business and some with a shorter tenure with fresh ideas and perspective.³</p>	<p>The ASX recommendation was addressing the issue of the independence of directors, and stated that a board should regularly assess that issue in relation to any director who has served in that position for more than 10 years. Although the circumstances of Bar Council are not the same as the board of a listed entity, it is important to note that:</p> <ul style="list-style-type: none"> • assuming their re-nomination (and given the Executive Convention), the current progress of a member of the Executive ordinarily includes a year or two as a Bar Council member and then a further couple of years as a member of the Executive (with a total of 4 or more year); and • if the Extension of Tenure took place, the progress of a member of the Executive would likely include a year at least or two as a Bar Council member and up to 8 years as a member of the Executive. <p>Although the question of closeness to management is not as relevant a consideration in these circumstances, the increase in time as a significant voice on Bar Council would be substantial.</p>
	Participation	

³ <https://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf>; recommendation 2.3

	In favour of extending tenure	Against extending tenure
12.	It would enable members to participate more fully in both the short-term and long-term vision of the Bar.	Changing to a two-year term would halve the number of opportunities for members to be elected to Bar Council.
13.		It would likely affect the composition of Bar Council by category, most particularly persons elected in the junior category. In addition to halving the opportunities for election, a person elected in the junior category with 4 or 5 years' standing will continue in that category, despite having 6 or 7 years' standing at the end of their term. If so, they would not be a representative voice of that category, and Bar Council would not meet the prescribed composition.
Attracting members to Bar Council		
14.		Requiring the President, and other members of the Executive, to act for two years in each Executive position is onerous, and may have the effect of deterring desirable candidates. ⁴ The Executive Convention may not be maintained as effectively if the prospect of a six-year path deters some from completing it, or beginning it at all.
Relationship development		
15.	A one-year term ⁵ makes it difficult to develop relationships, for example with the chief justices and presidents of LIV and ABA.	Those parties are dealing with an office rather than an individual, so the difference may be negligible. The Executive is often involved in high-level meetings, which provides continuity.

⁴ This would probably remain the case even if they were remunerated for the role, as that remuneration would not likely compare to their earnings in private practice.

⁵ Which, in reality, is effectively only eight months.