



VICTORIAN BAR

PROPOSED AMENDMENTS TO THE CONSTITUTION MEMORANDUM TO THE VICTORIAN BAR

1. As part of a comprehensive governance review that has been underway in recent Bar Council terms, the Bar Council has turned its attention to the Constitution of the Victorian Bar. In the Bar Council's view, it is time to update the Constitution to ensure that it reflects the modern practices, procedures and purposes of the Victorian Bar.
2. With that intention in mind, the Bar Council has prepared a series of proposed amendments to the Constitution for your review and approval at a Special General Meeting of the Victorian Bar Inc to be held on **Wednesday, 12 June 2019 at 5pm** in the Neil McPhee room on level 1, Owen Dixon Chambers East.
3. Many of the proposed changes are grammatical, intended to improve clarity of expression or aimed at modernising the language of the document. In addition, however, some substantive amendments are proposed, and the Bar Council would like to bring those specifically to your attention.
4. In broad terms, the substantive amendments are aimed at achieving the following:
 - (a) moving to a biennial election cycle for Bar Council and prescribing a maximum term limit for the Bar President;
 - (b) modernising and refining the clause that enumerates the purposes of the Victorian Bar;
 - (c) limiting the entitlement of barristers to hold shares in or interests in legal practices;
 - (d) empowering the Bar Council to refer for investigation the question of whether a member of the Victorian Bar may have engaged in conduct that would bring the Bar (or the legal profession) into disrepute;
 - (e) increasing the flexibility of the Bar to deal with investigations into the conduct of members, in cases where, eg, the Ethics Committee is unable to deal with a matter because of a conflict or some other reason;
 - (f) enabling casual vacancies on the Bar Council to be filled by a 'count back' process, and prescribing a procedure to resolve ties in Bar Council elections;
 - (g) modernising and refining provisions dealing with the Ethics and Counsel Committees; and
 - (h) inserting a new Part dealing with the Audit, Finance & Risk Committee.
5. Each of the proposed amendments is explained in more detail in the table annexed to this memorandum as Annexure A. The explanatory material that was previously circulated in relation to the proposed move to a biennial election cycle for Bar Council is also annexed as Annexure B.

6. With a view to ensuring that the Constitution can continue to serve the Victorian Bar well in the coming years, the Bar Council asks you to attend the Special General Meeting on 12 June 2019 and vote in favour of the proposed amendments. If you are unable to attend the Special General Meeting, please consider completing a [proxy form](#) and returning it to the Executive Assistant to the President and the Bar Council, Denise Bennett, at denise.bennett@vicbar.com.au, **by no later than 5pm on 11 June 2019**.
7. A Town Hall style meeting to discuss the proposed amendments will be held at 5pm on 30 May 2019 in the Neil McPhee Room. All members of Bar Council are available to discuss the proposed amendments. If particular floors or interest groups would like a personal briefing in relation to the proposed amendments, a member of Bar Council can be made available for that purpose by contacting the Executive Assistant to the President and the Bar Council, Denise Bennett, at denise.bennett@vicbar.com.au.



Dr Matt Collins QC
President
for the Victorian Bar Council
9 May 2019

Annexure A – proposed amendments

Clause	Comment
2	This proposed amendment would update the ‘purposes’ clause of the Constitution. As it presently stands, the purposes clause is not strictly a statement of purposes, but, rather, comprises a mixture of purposes, strategic objectives, and activities that might usefully be pursued by the Victorian Bar. A true purposes clause should articulate the reasons for the existence of the Victorian Bar, the core of which should be the advancement of the interests of its members. In our view, the proposed amended clause is clear, tight and modern, and it achieves that goal.
4.2	Typographical.
6	This proposed amendment would avoid inconsistency of language with clauses 5 and 7.
7.2(c)	Barristers may not be partners in a firm or with other legal practitioners. Incorporated legal practices serve a similar function to partnerships, albeit there is no shareholding in a partnership. The proposed amendment would update the Constitution to preclude barristers from holding interests or shares in legal practices such as incorporated legal practices (including publicly listed law firms), other than shares representing less than 5% of the votes in a listed company that carries on a legal practice, without dispensation from Bar Council.
7.3	As there is presently no definition of ‘member’ of the Victorian Bar, this clause would be inserted for clarity.
8.3	As it stands, the Bar Council only has the power to move members from Part I (Victorian Practising Counsel) to Part IV (Victorian practising counsel who are temporarily absent from practice and do not hold a current practising certificate) of Division A of the Bar Roll. The Bar Council does not have the power to make other changes of its own motion, which has given rise to difficulties affecting the accuracy and integrity of the Bar Roll. For example, where the Bar Council learns of a member’s retirement from a source other than the member, it does not have the power to move that member to the retired list. The proposed amendment would empower the Bar Council to make moves within divisions as appropriate. Procedurally, it also clarifies that a resolution of the Bar Council is necessary.
9.1	See above at 7.2(c).
9.2	This proposed amendment would enable the Bar Council to grant leave where a member has not requested it.

Clause	Comment
11.1	This proposed amendment would remove duplication and consolidate clauses 11.1 and 11.5.
11.5	See above at 11.1.
11.7	This proposed amendment would remove duplication: see 45.2 and 45.3.
11.9	This proposed amendment would clarify that the Honorary Secretary's powers in clauses 11.8 and 11.9 may be exercised independently.
12.3	Typographical / grammar.
12.4	This proposed amendment would better achieve consistency with the Act: see ss 56(3) and (4); clarity of expression.
13.5	Typographical / grammar.
13.6	This proposed amendment would better achieve consistency with the Act: see s 61 of the Act.
13.7	Removal of duplication: see 45.2 and 45.3.
13.8	Consistency of expression.
14 (title)	This clause deals with a broader subject matter than just the removal of members from the Bar Roll, and the proposed amended title would reflect that fact.
14.1	This proposed amendment (and consequential amendments to 14.6 and 14.7) would enable the Bar Council to refer a matter for investigation to a committee other than the Ethics Committee (for example, a special purpose committee) if it were appropriate in the relevant circumstances. For example, it may be appropriate for a matter to be investigated by members who act in a particular practice area, rather than a broad range. A special purpose committee may also be advisable in order to avoid any apprehension of bias in circumstances where the Ethics Committee has given guidance to a member who subsequently becomes the subject of an investigation. The proposed amendment would increase the flexibility of the Bar in those and other situations.
14.1(a)	Update legislative reference to the Uniform Law. The amendment would also remove reference to clause 33.4 because the proposed amendments would see that clause disappear: see further 33.4 below.
14.1(d)	Update legislative reference to the Uniform Law.

Clause	Comment
14.1(e)	<p>This proposed amendment would empower the Bar Council to refer for investigation whether a member may have engaged in conduct that is dishonest or discreditable to a barrister, prejudicial to the administration of justice, likely to diminish public confidence in the legal profession or the administration or justice or likely to otherwise bring the legal profession into disrepute (disreputable conduct).</p> <p>As it stands, the Bar Council has no power to refer a member for an investigation into allegedly disreputable conduct unless there has been a finding of unsatisfactory professional conduct or professional misconduct, which can only be made by the Victorian Legal Service Board or a tribunal or court.</p> <p>The Bar Council believes that the Bar should not be reliant upon the Victorian Legal Services Board taking (and concluding) action against a member of the Victorian Bar before it is able to conduct its own investigation into allegedly disreputable conduct. The Bar Council believes that maintenance of the reputation and integrity of our institution (along with the legal profession in general) requires that the Bar be empowered to take appropriate action if necessary. Any member referred for investigation will be afforded natural justice and the protective rigour of the prescribed procedures. Accordingly, the Bar Council believes that the proposed amendment strikes the right balance between the interests of the Bar and the protection of the rights of members.</p>
14.3(b)	<p>As it stands, the Ethics Committee only has the power to issue a show cause notice requiring a member to show cause why their name should not be removed from the Bar Roll. However, the Bar Council has the power to make various other orders under clause 14.12. In those circumstances, the Ethics Committee (or another investigating committee appointed by Bar Council) should also have the power to seek an explanation from the relevant member as to why orders less serious than removal from the Bar Roll ought not be made.</p>
14.3(c)	Typographical / clarity of expression.
14.4, 14.5	Typographical / clarity of expression.
14.6, 14.7	See above at 14.1.
14.6(b)	Typographical / clarity of expression.
14.7 – 14.9	Clarity of expression.
14.11 – 14.13	Typographical / clarity of expression.
17.4(e)	Clarity of expression.

Clause	Comment
17.11	Clarity of expression.
18.5	Clarity of expression.
18.6	Typographical.
19.1	Clarity of expression.
20.2(c)(ii)	Typographical / clarity of expression.
22.1	Clarification that the requirement is the presence of ten members in person.
22.2	Clarity of expression.
24.2, 25, 26	Clarity of expression.
27.1	Internal consistency and consistency with other provisions: see, for example, clauses 20.1, 21, 22.1, 25, 28.
27.2, 27.3	Clarity of procedure; clarity of expression.
28.1, 28.2, 30	Clarity of expression.
32.1	For completeness.
32.3	Grammar / clarity of expression.
32.4, 33.1	For completeness.
33.2(a)	This proposed amendment would ensure that the Bar Council has the power to make regulations dealing with all relevant conduct of counsel that may not strictly be engaged in during the course of professional conduct (for example, sexual harassment at a bar function).
33.2(h)	Updated legislative reference to the Uniform Law.
33.4	Under the <i>Legal Profession Act 2004</i> (Vic), the Bar Council had the power to make practice rules. However, it no longer has that power, and consequently this clause is redundant.
37.2, 37.3	In light of the proposed change to a biennial election cycle, the Bar Council believes it is appropriate that there be a Constitutional limit on the period for which any one person may serve as President of the Bar Council. Clause 37.2 sets such a limit at two years. Clause 37.3 extends that time if a person step into the shoes of a departing President within one year of the next election, so as to enable them

Clause	Comment
	to fill the lacuna during the departing President's term and then serve the entirety of the following term.
38.1	This proposed amendment would be consequential upon the proposed move to a biennial election cycle for Bar Council: see 45.1 below.
38.3	Typographical.
38.4	Clarity of expression.
39	This proposed amendment would be consequential upon the proposed move to a biennial election cycle for Bar Council: see 45.1 below.
40.1	Clarity of expression; consistency of expression.
41	Typographical / clarity of expression.
42.1	Typographical / clarity of expression; consequential upon the proposed move to a biennial election cycle for Bar Council: see 45.1 below.
42.2(c)	Updated legislative reference to the Uniform Law.
43	<p>As it stands, a by-election must be held any time a member of the Bar Council ceases to be a member. This is unduly onerous, costly and impractical.</p> <p>Many fewer members vote in a by-election than in an ordinary election, with the consequence that a person elected in a by-election has invariably attracted many fewer votes than the candidates who just missed out at an ordinary election.</p> <p>In addition, the current rule means that a by-election must be held even if a member is, say, appointed to a court two weeks after an ordinary election.</p> <p>The Bar Council believes a more appropriate course is the replacement of a departing member with the person who received the next highest number of votes in the last election. Proposed clause 43.3 would provide for a by-election only in the event that the vacancy is unable to be filled by 'counting back' and where there is more than three months until the next ordinary election.</p>
45.1	<p>This proposed amendment would introduce a biennial election cycle in place of the current annual cycle, with the result that all members of Bar Council would be elected to serve for a two-year term, rather than the current one-year term. It is proposed following detailed consideration given to the issue by previous Bar Councils and the current Bar Council, and a survey of members in August 2018.</p> <p>62% of the 287 members who participated in the survey voted in favour of extending the tenure of the Bar Council and, of those, 87% were in favour of a</p>

Clause	Comment
	<p>two-year model (as opposed to the various other models that were put forward for consideration).</p> <p>As set out in the explanatory paper that accompanied the survey (a link to which can be found in the introduction to this memorandum), a biennial election cycle would have a number of significant advantages over the current model. Continuity: with each Bar Council serving for a longer term, there will be increased continuity of knowledge, skills and experience for each Bar Council. Effectiveness: one-year terms can reduce the effectiveness of each Bar Council in several ways. One-year terms can encourage shorter-term thinking and “reactive” decision-making, whereas two-year terms will encourage each Bar Council to plan and act in the longer term. Two-year terms mean that once any given Bar Council has “found its feet”, there is a meaningful stretch of time for that Bar Council to work together for the balance of the term. A two-year term will also reduce the risk of inconsistent decision-making. Improved Relationships: longer terms will assist each Bar Council, including the Executive, to develop and maintain key relationships (both internal to the Bar, and external to the Bar).</p> <p>There are countervailing arguments. Longer 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 ordinarily 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 would ordinarily expect to be elected as President. Longer terms could, for that reason, affect the preparedness of some barristers who would make outstanding leaders of the Bar to put themselves forward because of the commitment involved and the impact upon their practices.</p>
45.2	This proposed amendment picks up deleted content from 13.7.
48.1, 48.2	This proposed amendment would remove duplication (see 45.2, 45.3 and 48.2) and consolidate clauses 48.1 and 48.2.
48.3	Clarity of expression.
48.4(c)	Typographical.
51.1	This proposed amendment addresses the situation where two people receive the same numbers of votes for the final position in any category. It would resolve a tie by reference to seniority (with any disputes in relation to seniority to be finally determined by the outgoing Bar Council).
53.1	Clarification that the requirement is the presence of ten members in person.

Clause	Comment
53.2	This proposed amendment would allow flexibility of scheduling.
54.3	Typographical.
56.1	Typographical.
57.3	Clarity of procedure.
59.1	This proposed amendment would be consequential upon the proposed move to a biennial election cycle for Bar Council.
60.2	Updated for reference to the Uniform Law.
60.3	Clarity of procedure.
61.1	These proposed amendments are consequential upon a change in the delegation of the complaints function from the Victorian Legal Services Commissioner. Until 2015, the VLSC delegated that function directly to the Ethics Committee. Thereafter, the delegation was made to the Bar Council instead. This proposed amendment would reflect the new status quo.
61.2	For completeness.
62	Updated legislative reference to the Uniform Law; minimising complexity and ensuring that the Bar Council is empowered to remove a member of the Ethics Committee as appropriate.
63.1	This proposed amendment would be consequential upon the proposed move to a biennial election cycle for Bar Council.
63.1A	For completeness.
64.3	Clarity of procedure.
65	For clarity and consistency with the Ethics Committee.
65A	The proposed amendment would give the Audit, Finance & Risk Committee constitutional status, in recognition of the central importance of management of the Bar's finances and risks. It also contemplates inclusion on the Committee of a person who is not a member of the Victorian Bar as, given the Committee's purview, the presence of an accountant or otherwise suitably qualified professional may be considered appropriate. In addition, the existing Ethics Committee clauses dealing with the removal of members are replicated here.

Clause	Comment
70.1	Clarity / vesting responsibility for (and control of) the Bar's finances in the CEO.
74.4	Clarity of expression.
74.5	Given the modern prevalence of electronic communications, this requirement is unduly onerous (and is not required by the Act).
76, 78.3, 81.2, 81.3	Typographical / clarity of expression.
82.1, 82.4	These proposed amendments would ensure that all Committees performing functions on behalf of the Victorian Bar, and the Bar employees supporting them, are (or may be) indemnified by it.
83	These proposed amendments would facilitate the provision of notice to members.
84.6	To remove reference to previous legislation and enable transition to new legislation without further amendment of the Constitution.

Annexure B – Proposed biennial election cycle for Bar Council

[Constitutional Working Group Discussion Paper on Tenure](#)