

MEMORANDUM

To: Members of the Victorian Bar

From: Dr Matt Collins QC

Special General Meeting of the Victorian Bar Inc to be held on 12 June 2019 **Proposed special resolution 4: discreditable and disreputable conduct by members**

This memorandum sets out, in summary form, the reasons why I support proposed special resolution 4, which is to be put to the members of the Victorian Bar Inc at a special general meeting to be held on 12 June 2019 at 5pm in the Neil McPhee Room.

The proposed amendment

Proposed special resolution 4 (**PSR 4**) seeks to amend [clause 14.1 of the Constitution](#) by inserting a new paragraph (e). If inserted, clause 14.1(e) would read as follows:

The Bar Council may refer to the Ethics Committee or a committee or at least three persons who may, but need not be, members or former members of the Bar Council or of the Bar (in this clause, the committee to which the Bar Council refers a matter is called “the Investigating Committee”) for investigation and consideration for the purposes of this clause a matter of whether a member of the association may have:

...

- (e) engaged in conduct that was or is:
 - (i) dishonest or otherwise discreditable to the profession of a barrister;
 - (ii) prejudicial to the administration of justice;
 - (iii) likely to diminish public confidence in the legal profession or the administration of justice; or
 - (iv) likely to otherwise bring the legal profession into disrepute.

If a matter were referred to an Investigating Committee under clause 14.1(e), the Investigating Committee could require the provision of information in relation to the matter to be investigated (clause 14.2), and either dismiss the matter or direct that the Honorary Secretary of the Bar serve a show cause notice on the member (clause 14.3).

By clauses 14.5–14.7, if a show-cause notice were issued, the notice would be heard by the Counsel Committee (in the same way as other hearings are currently conducted by that Committee). If the Counsel Committee were unable to deal with the matter for some reason (for example, because the member concerned was a member of the Counsel Committee) there is provision for an alternative show-cause panel to be constituted.

On a show-cause hearing, natural justice would be afforded and the member would have a right to be represented by counsel (clause 14.10). A hearing could result in the matter being dismissed, or the member being reprimanded, cautioned, required to undergo counselling or further education or training, or in the most extreme case, have their name struck off the Bar Roll (clause 14.12).

Rights of review would be available both under the Constitution (clause 17) and under the *Associations Incorporation Reform Act 2012* (Vic).

Rationale for the proposed amendment

Members are already required not to engage in conduct of the kind set out in proposed rule 14.1(e), under rule 8 of the [Legal Profession Uniform Conduct \(Barristers\) Rules 2015](#) (Vic). Proposed clause 14.1(e) precisely mirrors the content of rule 8.

However, since the introduction of the Legal Profession Uniform Law in 2014, enforcement of rule 8 has not been within the control of the Bar. Rather, complaints that barristers have engaged in conduct in breach of rule 8 are made to the Legal Services Board and Commissioner (**LSB+C**) which may or may not choose to investigate the complaint. Where a complaint is investigated by the LSB+C (often by the Bar pursuant to a delegation the Bar Council holds from the LSB+C) the complaint is, naturally, looked at from the standpoint of the right of legal practitioners to practise, having regard in particular to the need to protect consumers.

The Bar has a quite different—but in my view equally important—interest in holding members to the highest standards. If members of the Bar engage in conduct that breaches rule 8 or proposed rule 14.1(e), that conduct can reflect on each and every one of us. It can undermine the very high standing in which the Victorian Bar is held publicly. The conduct that gave rise to the Royal Commission into the Management of Informants is a good example. There are other recent examples. The loss of reputation is no small thing—once tarnished, it is very difficult to restore.

The Victorian Bar invests very significant time, energy and money in projects designed to protect and enhance its reputation. I believe that, in order to safeguard the reputation of the Victorian Bar and its 2,100 practising members (and, for that matter, former and future members), the Bar Council should have the power, subject to appropriate safeguards, to sanction members who engage in conduct of the kind proscribed by rule 8 and proposed rule 14.1(e).

I do not believe it is satisfactory, in effect, to outsource to an external regulator the power to safeguard the reputation of the Bar and its members. As a professional member association, the Victorian Bar should have control, subject to appropriate safeguards, over who its members actually are. Critically, the Bar's governing body should be appropriately empowered to deal with misconduct by its members.

Rules of the kind embodied in proposed rule 14.1(e) are common among professional member associations, usually without safeguards of the kind proposed here, including:

- the [NSW Bar](#): see clause 7.2;
- the [Law Institute of Victoria](#): see clause 17;
- the [Royal Australasian College of Surgeons](#): see clause 3.2.1(d); and

- the [Australian Institute of Company Directors](#) (see the definition of “Expulsion Event” in Schedule 1).

I have read in some emails circulated during the week a concern that the proposed amendment in some way seeks to circumvent the role of the regulator. That concern is, with respect to those who have expressed it, quite misplaced.

Complaints to the LSB+C can result in disciplinary action being taken against the rights of legal practitioners to practise, including in extreme cases the loss of practising certificates.

The proposed amendment is directly at an entirely different matter. No action taken under proposed special resolution 14.1(e) could result in the loss of a practising certificate: that is and by legislation must remain the exclusive province of the LSB+C. Proposed special resolution 14.1(e) is solely about membership of the Victorian Bar, your professional association. It is directed at protecting your reputation and that of the institution.

I seek your support

If you have lodged a proxy against PSR 4 based on a misconception of its intent and operation, or are otherwise persuaded by what is set out above, you are of course free to withdraw your proxy and lodge a proxy in support of PSR 4. To do so, please contact denise.bennett@vicbar.com.au. I urge you to do so, in the interests of building a stronger and better governed Victorian Bar.

Of course, you are free to disagree with me in relation to this. PSR 4 will either succeed or fail at the special general meeting to be held on 12 June. It would be most unfortunate, however, if the debate were to be lost on the basis of misinformation or misconceptions.

Thank you for taking the time to read this.

Matt

Dr Matt Collins QC
President
The Victorian Bar Inc