



## **RESPONSE TO THE PRODUCTIVITY COMMISSION REPORT 11 DECEMBER 2013**

---

### **Introduction**

The ABA appreciates the opportunity to respond to the Productivity Commission's Issues Paper on Access to Justice Arrangements.

The ABA has considered the submission provided by the NSW Bar Association and has endorsed it as an appropriate response, generally reflecting the position of the Australian Bar Associations. There are a number of areas where there are state variations to the NSW Bar's position. The following is a separate consolidated summary of those 'local variations' and should be read in conjunction with the NSW Bar's submission.

To assist the Commission the numbering in this document is consistent with the numbering of the NSW Bar's Submission.

### **Section 4: 'The costs of accessing civil justice' Para 19: Timeliness and delays**

#### **AUSTRALIAN CAPITAL TERRITORY BAR ASSOCIATION**

##### ***Section 4: 'The costs of accessing civil justice'***

The Bar Association of the ACT does not collect data, which would enable a quantitative response to this issue. However, the Association contends that the cost of accessing civil justice cannot be assessed without also considering qualitative issues, which go to the nature of what is delivered. A poor justice outcome renders the system useless as it thereby fails to meet the key reason for its existence. Poor justice outcomes make access to justice an empty concept, in turn rendering expenditure within the system wasteful.

It is thereby contended that in considering the cost of access, the extent to which the costs expended contribute directly to achieving a just outcome ought be borne in mind. In the context of the role of the Bar in civil litigation, the extent to which the role of the barrister enables a trying of the true issues at stake in the assessment of justice ought be recognized.

It is generally accepted that there is a sharp contrast between civil cases argued by a self-represented litigant and those conducted by counsel, particularly as to the facility representation gives the court in terms of pursuit of relevant issues. To this end, case law recognises that a court is required to adopt a less efficient procedure where parties are not represented by professional counsel in order to attempt to maintain a justice outcome. Not only does the task that confronts the court become more difficult, but the process by which that task is pursued becomes less efficient.

It is submitted that counsel in civil proceedings contribute to access to justice in terms of making a just outcome more achievable for the court, and by rendering the process more efficient.

**Para 19: Timeliness and delays**

The Association contends that systemic delay due to an absence of court based resources undermines the ability of a court to come to an effective determination of issues by reason, among other things, of the impact of the passage of time on the ability to bring cogent reliable evidence to an issue. This undermines a key aspect of the proper resolution of disputes on merit. The delay also leads to duplication of the work required in preparation of matters for court which clearly creates inefficiency in the delivery of legal services.

**BAR ASSOCIATION OF QUEENSLAND**

**Section 4: 'The costs of accessing civil justice'**

**Para 19: Timeliness and delays**

In Queensland, the *Uniform Civil Procedure Rules 1999* (Qld) ("UCPR (Qld)") applies to civil proceedings in the Supreme Court, District Court and Magistrates Court.<sup>1</sup> The purpose of the UCPR (Qld) is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.<sup>2</sup> Accordingly, the UCPR (Qld) are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of the UCPR (Qld).<sup>3</sup> In a proceeding before a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way.<sup>4</sup> The court is empowered to impose appropriate sanctions if a party does not comply with the UCPR (Qld) or an order of the court.<sup>5</sup>

The Queensland Civil and Administrative Tribunal ("QCAT") was established in 2009. It has a wide jurisdiction to deal with an extensive range of various legal disputes. The objects of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ("QCAT Act") include the establishment of an independent tribunal to deal with matters in a way that is accessible, fair, just, economical, informal and quick.<sup>6</sup>

Section 240 *QCAT Act* requires a review of the operation of the Act within the first three years after commencement, and then every five years thereafter. In December 2012, the Queensland Attorney-General released a consultation paper calling for submissions about QCAT. This review is still underway.

---

<sup>1</sup> Rule 3 of the *Uniform Civil Procedure Rules 1999*.

<sup>2</sup> Rule 5(1) of the *Uniform Civil Procedure Rules 1999*

<sup>3</sup> Rule 5(2) of the *Uniform Civil Procedure Rules 1999*

<sup>4</sup> Rule 5(3) of the *Uniform Civil Procedure Rules 1999*

<sup>5</sup> Rule 5(4) of the *Uniform Civil Procedure Rules 1999*

<sup>6</sup> Section 3 of the *Queensland Civil and Administrative Tribunal Act 2009*

## **SOUTH AUSTRALIAN BAR ASSOCIATION**

### ***Section 4: 'The costs of accessing civil justice'***

#### ***Para 19: Timeliness and delays***

South Australia has a general pre-action protocol in Rule 33, that requires the parties to exchange reasoned offers and responses before issuing proceedings. There is a Court ordered Settlement Conference soon after proceedings are instituted and mostly before any interlocutory steps. The case management is generally conducted by Masters with a full range of powers of directions, including sending cases for mediation. Most recently South Australia has adopted the requirement for the parties to file a Litigation Plan to assist in the identification of issues in dispute and their timely management.

## **TASMANIAN INDEPENDENT BAR**

### ***Section 4: 'The costs of accessing civil justice'***

#### ***Para 19: Timeliness and delays***

Mandatory case management (except in the case of personal injury claims in respect of which either party can opt in) occurs pursuant to the *Supreme Court Rules 2000*. Case management occurs by the holding of directions hearings. The purpose of a directions hearing is to eliminate any lapse of time, from the commencement of a proceeding to its final determination that is not reasonably required for the fair and just determination of the outstanding issues between the parties and the preparation of the case for trial.<sup>7</sup> In addition a judge may make any order, as part of the directions hearing, to ensure that the proceeding is conducted and resolved justly and efficiently.<sup>8</sup>

The overarching purpose of case management is to ensure the proceedings are conducted and resolved justly and efficiently.<sup>9</sup>

## **WESTERN AUSTRALIAN BAR ASSOCIATION**

### ***Paragraph 19:***

Comparable provisions appear in the *Rules of the Supreme Court* in Western Australia. The *Rules* provide that the elimination of any lapse of beyond that essential to the fair and just determination of the issues in bona fide contention is the goal of the practice, procedure and interlocutory processes of the Court. That goal is reflected in the application of case flow management, including a Commercial and Managed Cases List. Attention to these goals is an essential feature of counsel's advice.

---

<sup>7</sup> R.451(2).

<sup>8</sup> R.451(3).

<sup>9</sup> R.414A.

**Section 5: 'Is unmet need concentrated among particular groups –  
Self represented litigants'**

**Paras 29 and 30: New South Wales Bar Association Guidelines**

**AUSTRALIAN CAPITAL TERRITORY BAR ASSOCIATION**

***Section 5: 'Is unmet need concentrated among particular groups-Self  
represented litigants'***

The ACT Bar does not have separate guidelines for dealing with self-represented litigants. Under the Legal Profession Act 2006 (ACT), practise as a barrister is subject to the Legal Profession (Barristers) Rules (ACT). Barristers must ensure to take care and consider the provisions of the Rules when dealing with self-represented litigants. After considering the NSW's excellent publication 'Guidelines for Barristers on Dealing with Self-Represented Litigants' the ACT Bar is mindful to consider such adoption for the ACT.

**BAR ASSOCIATION OF QUEENSLAND**

***Section 5: 'Is unmet need concentrated among particular groups - Self  
represented litigants'***

***Paras 29 and 30: New South Wales Association Guidelines***

The Bar Association of Queensland has not published a guide for dealing with self-represented litigants, similar to that published by the New South Wales Bar Association.

The Queensland Public Interest Law Clearing House ("QPILCH") is a community-based legal organisation that coordinates the provision of pro bono legal services for individuals and community groups. QPILCH jointly publishes with the Queensland Law Society a guide to assist solicitors when dealing with self-represented litigants. It is an excellent publication that seeks to provide assistance to practitioners in navigating the challenges of dealing with self-represented litigants, particularly in civil matters. It expressly refers Queensland Barristers to the New South Wales *Guide to Barristers on Dealing with Self-Represented Litigants*. The QPILCH Guide is available on the organisation's website (<http://www.qpilch.org.au/cms/details.asp?ID=681>).

QPILCH is also in the process of finalising the Self-Represented Litigants: Guidelines for Barristers. A draft has already been prepared and considered by the Council of the Bar Association of Queensland.

The Queensland judiciary is guided by the Equal Treatment Benchbook when dealing with people who are self-represented. The Benchbook is publicly available on the Courts' website ([http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0004/94054/s-etbb.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0004/94054/s-etbb.pdf)).

**SOUTH AUSTRALIAN BAR ASSOCIATION**

***Section 5: 'Is unmet need concentrated among particular groups - Self  
represented litigants'***

***Paras 29 and 30: New South Wales Association Guidelines***

The South Australian Bar Association does not have an equivalent.

## TASMANIAN INDEPENDENT BAR

### ***Section 5: 'Is unmet need concentrated among particular groups-Self represented litigant'***

#### ***Paras 29 and 30: New South Wales Association Guidelines***

The Tasmanian Bar has no equivalent.

## WESTERN AUSTRALIAN BAR ASSOCIATION

### ***Paragraphs 33-36:***

The Western Australia Bar works closely with the Law Society of Western Australia, through its Law Access scheme to provide pro bono and reduced fee assistance to the community. The Western Australia Bar also provides direct assistance to requests from members of the public and solicitors by circulating such requests to its membership and facilitating those members making contact with those requesting assistance.

### **Section 6: 'Avenues for improving access to civil justice'**

## AUSTRALIAN CAPITAL TERRITORY BAR ASSOCIATION

### ***Section 6: 'Avenues for improving access to civil justice'***

The ACT Bar together with the ACT Law Society has established a Pro Bono Clearing House to improve access to civil justice. The Clearing House comprises a list of barristers who have agreed to take on at least two pro bono cases each year.

The Federal Court Rules set out procedures governing court appointed referrals for legal assistance pursuant to Order 80. The ACT Bar has pursuant to such an Order, arranged for the appropriate representation.

## BAR ASSOCIATION OF QUEENSLAND

### ***Section 6: 'Avenues for improving access to civil justice'***

#### ***Paras 33-36: Existing legal assistance provided by the New South Wales Bar***

The Bar Association of Queensland has a number of established schemes which seek to improve access to civil justice by facilitating the provision of pro bono or reduced fees and legal assistance by its members to persons in need.

As discussed above, QPILCH coordinates the provision of pro bono legal services. The Bar Association of Queensland has always been very supportive of QPILCH.

Member barristers assist the Self-Representation Service with advice, in particularly complex matters. The Self Representation Service operates in the Supreme and District Courts in Brisbane, and the volunteer lawyers provide initial assessment and guidance. The service was modelled on the Royal Courts of Justice Advice Bureau in London.

A similar “Self-Representation” pilot was conducted in the Federal Courts Building in Brisbane, but that pilot has now expired, and funding has not been returned, despite its success.

A Self-Representation Service is also conducted in QCAT.

The Bar Pro Bono Referral service is coordinated by QPILCH on behalf of the Bar Association of Queensland. The Bar Pro Bono Referral Service was established to coordinate and target pro bono referrals in civil matters for people experiencing hardship. It is managed by QPILCH on behalf of the Bar Association of Queensland. The Service, which operates with the QLS Pro Bono Referral Service, is funded by the Queensland Attorney-General from the Legal Practitioner Interest on Trust Accounts Fund and the Bar Association of Queensland and Queensland Law Society.

The Magistrates Court Service is another recent initiative. QPILCH and the Bar Association of Queensland have recently started a project in which barristers assist litigants in civil matters in the Brisbane registry of the Magistrates Court. Barristers will help assess applications, and where they determine a matter has merit, QPILCH will attempt to find a member law firm to instruct the barrister.

In addition, assistance is, from time to time, sought directly from the Bar Association of Queensland. Such assistance is sought either directly from members of the public, or more typically by referral from a court in relation to a specific matter.

## **SOUTH AUSTRALIAN BAR ASSOCIATION**

### ***Section 6: ‘Avenues for improving access to civil justice’***

#### ***Paras 33-36” Existing legal assistance provided by the New South Wales Bar***

Members of the SA Bar provide considerable pro bono or reduced fee legal assistance on an informal basis to members of the community. They also serve on numerous community Committees and Boards.

## **TASMANIAN INDEPENDENT BAR**

### ***Section 6: ‘Avenues for improving access to civil justice’***

#### ***Paras 33-36: Existing legal assistance provided by the New South Wales Bar***

The provision of *pro bono* or reduced fee legal assistance by members of the Tasmanian Bar is currently informally provided by members of the bar.

## **Section 9: ‘Using informal mechanisms to best effect’**

### **Para 50: Alternative Dispute Resolutions (ADR)**

## **BAR ASSOCIATION OF QUEENSLAND**

### ***Section 9: ‘Using informal mechanisms to best effect’***

#### ***Para 50: Alternative Dispute Resolution (ADR)***

Queensland’s primary “overarching obligations” are specified in r 5 of the UPCR and s 3 QCAT Act (as noted above).

Court referral to a “directions conference” is common in the Magistrates Court, where almost all matters are set for a “directions conference” before a trial listing is allocated. A directions conference is conducted before a court registrar, who attempts to bring the parties to a resolution, and failing resolution, makes orders and directions concerning the future conduct of the proceedings.

QCAT has a similar process, referred to as a “compulsory conference” under part 6 division 2 *QCAT Act*.

In addition, a party can apply to the court pursuant to the UCPR (Qld) for an order that a matter be referred to ADR, or the court can make the order of its own initiative.

It would be rare that a matter proceeds to trial in Queensland without having been to either a settlement conference or mediation between the parties, or a compulsory conference before a registrar or court official.

## **SOUTH AUSTRALIAN BAR ASSOCIATION**

### ***Section 9: ‘Using informal mechanisms to best effect’***

#### ***Para 50: Alternative Dispute Resolution (ADR)***

Judges and Masters have the power to order mediation on the application of parties, or of their own motion and may do so without the consent of all parties. SA has mandatory Settlement Conferences some of which are referred to Judges or Masters, and in personal injuries cases are conducted by Registrars, although they do not take any active involvement.

## **TASMANIAN INDEPENDENT BAR**

### ***Section 9: ‘Using informal mechanisms to best effect’***

#### ***Para 50: Alternative Dispute Resolutions (ADR)***

The Supreme Court of Tasmania has discretion to refer a matter arising in proceedings before it for mediation or neutral evaluation whether or not the parties to the proceedings consent. In practice mediation occurs in most proceedings before the Court.

## **WESTERN AUSTRALIAN BAR ASSOCIATION**

### ***Paragraph 50:***

Compulsory court based mediation is an integral feature of the Supreme and District Courts in Western Australia.

## **Section 10: 'Improving the accessibility of tribunals'**

### **Paras 59-63**

#### **AUSTRALIAN CAPITAL TERRITORY BAR ASSOCIATION**

##### ***Section 10: 'Improving the accessibility of tribunals'*** ***Paras 59-63***

The ACT now has the facility of a common Tribunal which incorporates the work of what was previously a multiplicity of Tribunals and disciplinary bodies within the Territory. The Association commends the grouping together of such bodies into a common tribunal as a positive contribution to efficiency in the resolution of legal disputes.

#### **BAR ASSOCIATION OF QUEENSLAND**

##### ***Section 10: 'Improving the accessibility of tribunals'*** ***Paras 59-63***

QCAT, as discussed above, was established by the *QCAT Act*, with all provisions having commenced by 1 December 2009.

Any such Tribunal must be adequately funded to ensure that it can properly discharge its duties, which can affect workload and resources available to Tribunal members. For instance, it is understood that Tribunal members are not entitled to receive transcripts of proceedings before them, even where the matter is part heard. In some instances, the proceedings can involve large amounts of money (for instance building claims), or important issues.

In Queensland, some practitioners have commented that the delays in obtaining hearing dates can be far longer than those faced in the Supreme, District or Magistrates Courts. Such delays impede access to justice.

#### **SOUTH AUSTRALIAN BAR ASSOCIATION**

##### ***Section 10: 'Improving the accessibility of tribunals'*** ***Paras: 59-63***

South Australia has recently established the South Australian Civil and Administrative Tribunal (SACAT). Decision-making and review functions previously undertaken by other bodies have been transferred to the SACAT creating a 'one-stop shop'. SACAT has an original jurisdiction, in which it will make administrative decisions, as well as a review jurisdiction, in which it will review decisions which have already been made (either by other statutory agencies or by the SACAT in its original jurisdiction). SACAT has been established to improve access to justice. Having a single tribunal instead of a multiplicity of bodies is intended to simplify and streamline matters for both the public and the government.

#### **TASMANIAN INDEPENDENT BAR**

##### ***Section 10: 'Improving the accessibility of tribunals'*** ***Paras 59-63***

Tasmanian has no equivalent body to NCAT.



## WESTERN AUSTRALIAN BAR ASSOCIATION

### **Paragraph 59-63:**

Western Australia has, since the passage of the *State Administrative Tribunal Act 2004*, had single amalgamated administrative tribunal (SAT). SAT has flexible processes, geared toward the efficient determination of disputes, including by mediation and compulsory conferences. The participation of the legal profession, including members of the Western Australia Bar, enhances the capacity of the SAT to achieve its goals.

### **Section 11: 'Improving the accessibility of courts' Paras 88 and 89: Court fees**

## AUSTRALIAN CAPITAL TERRITORY BAR ASSOCIATION

### **Section 11: 'Improving the accessibility of courts' Paras 88 and 89: Court fees**

Mechanisms are in place in the ACT for the waiver of fees for many low income litigants. It is appropriate that such a scheme remains in place.

## BAR ASSOCIATION OF QUEENSLAND

### **Section 11: 'Improving the accessibility of courts' Paras 88 and 89: Court fees**

The Law Council of Australia has previously prepared a submission to the Commonwealth Senate Legal and Constitutional Affairs References Committee for the inquiry into court fee increases in Federal courts. The Council's persuasive submission can be found at the organisation's website ([www.lawcouncil.asn.au](http://www.lawcouncil.asn.au)).

In Queensland, the *Uniform Civil Procedure (Fees) Regulation 2003* (Qld) sets out the fees payable on the setting down of a matter in the Supreme, District and Magistrates Courts. Whilst a distinction is drawn between individuals and corporations, there is no distinction between small and large corporations. The Registrar is given the power to apply a "reduced fee".

## SOUTH AUSTRALIAN BAR ASSOCIATION

### **Section 11: 'Improving the accessibility of courts' Paras 88 and 89: Court fees**

Section 130(2) of the *Supreme Court Act 1985* and Section 53(2) of the *District Court Act 1991* provide for the remission of court fees in certain circumstances. The court may remit or reduce fees where a person's income, day-to-day living expenses and liabilities and assets are assessed at being at a level that remission or reduction of the fees is warranted. Guidelines have been published and are available to assist applicants.

## TASMANIAN INDEPENDENT BAR

### **Section 11: 'Improving the accessibility of courts'**

#### **Paras 88 and 89: Court fees**

The Principal Registrar of the Supreme Court has discretion in the exceptional circumstances of the particular case to reduce, remit or allow time to pay court fees if the payment of the fees would involve undue hardship.<sup>10</sup>

### **Section 12: 'Effective and responsive legal services - A responsive legal profession'**

## AUSTRALIAN CAPITAL TERRITORY BAR ASSOCIATION

### **Section 12: 'Effective and responsive legal services-A responsive legal profession'**

The ACT Bar Association is responsible for the imposition and maintenance of professional standards for ACT barristers. In order to practise at the ACT Bar, qualified lawyers are required to complete additional entry requirements. The ACT Bar Association has subscribed to the NSW Bar Exams and the NSW Bar Practice Course for ACT candidates. Candidates must achieve a 75 per cent pass mark in the three bar examinations, and successfully complete a formal Bar Practice Course. The course is run twice a year and currently runs for four weeks, full-time.

The aim of the Bar Practice Course is to teach advanced advocacy, mediation, and other barrister skills, as well as provide practical insights into life and practice at the Private Bar.

New barristers are required to complete the Bar Practice Course as part of a reading programme. The Bar Council's authority to impose a reading program (by way of a condition on a practising certificate) is conferred by section 47(2)(b) of the *Legal Profession Act 2006* (ACT).

On taking out a practising certificate with conditions following the successful passing of the three exams, the legal practitioner is termed a 'reader'. The reader embarks on the reading programme, by successfully completing the NSW Bar Practice Course, 10 days of criminal reading and 10 days civil reading.

The period of reading commences on the issuance of the practising certificate with conditions attached, and continues for at least 12 months.

During the 12 month period, the reader remains under the supervision of at least one experienced barrister, holding a current practising certificate in the ACT, 'the tutor'. Depending on the reader's progress, the conditions on the practicing certificate are lifted at the completion of the 12 month reading period.

Following the successful completion of the reading course, all practicing barristers are required to comply with annual Continuing Professional Development (CPD) requirements to ensure that their knowledge of the law and barristers' practice is kept up to date.

---

<sup>10</sup> Clause 3 of Schedule 2 of the *Supreme Court Rules 2000*.

The annual CPD requirements must be fulfilled under the following strands:

- (a) Ethics and Regulation of the Profession;
- (b) Management;
- (c) Substantive Law, Practice and Procedure, and Evidence;
- (d) Advocacy, Mediation, and other Barristers' Skills.

The entry and CPD requirements for members of the bar are onerous and ongoing. They ensure that barristers in the ACT must satisfy professional standards.

## **BAR ASSOCIATION OF QUEENSLAND**

### ***Section 12: 'Effective and responsive legal services-A responsive legal profession'***

#### ***Paras 92-102: Legal education and skills-safeguarding confidence in the Bar***

The Bar Association of Queensland requires that barristers sit the “bar exams” before completing the bar practice course. Students must achieve a 65 per cent pass mark in each of the three bar examinations, which cover ethics, practice and procedure, and evidence. The course is run twice per year, and runs for six weeks full time.

New barristers are then subject to “pupillage” for one year as a condition of the practicing certificate. Pupillage is governed by the Bar Association of Queensland’s *Administration Rules*. Pupillage requires the barrister to have a Senior Master (a Queens Counsel [QC] or Senior Counsel [SC]), and a Junior Master (a barrister of not less than five years standing in actual practice). A pupil is free to undertake any private work, with an exception relating to “direct access” briefs. In the first six months of pupillage, before accepting a brief directly from a client with no instructing solicitor, a barrister must obtain the written approval of his or her Senior and Junior masters and submit that written approval to the Chief Executive.

A pupil must meet with each of his or her pupil masters within two weeks of the pupil commencing practice so as to plan and commit to the pupillage year, and thereafter at least once a month to discuss the pupil’s progress at the bar. The *Administration Rules* covers what must be reviewed at each monthly meeting.

In the first six months of pupillage, the pupil must undertake a minimum of forty hours of court orientated work with either master or another barrister with greater than five years’ experience at the bar. In the second six months of pupillage, the pupil must undertake a minimum of twenty hours of court orientated work. “Court orientated work” means conferences or other preparation for a hearing and actual court or Tribunal attendances. Masters are to report any non-compliance by the pupil. Attendance for court orientated work by a pupil is without remuneration.

In addition, pupils must perform such practical exercises, attend lectures or seminars and participate in such exercises or activities as the Bar Association shall from time to time direct. Often, these take the form of compulsory continuing professional development (CPD) seminars, specifically directed towards pupils.

All Queensland barristers are required to comply with the *Continuing Professional Development Rules* made pursuant to the *Administration Rules*. Each year, ten CPD points must be completed, with at least one CPD point in the mandatory strand of ethics, and at least one point in either Advocacy or Practice Management. A very large proportion of barristers complete far in excess of the minimum 10 CPD points.

## **SOUTH AUSTRALIAN BAR ASSOCIATION**

### ***Section 12: 'Effective and responsive legal services-A responsive legal profession'***

#### ***Paras 92-102: Legal education and skills-safeguarding confidence in the Bar***

There is no barrier to entry to the Independent Bar in SA . However those wishing to join the SA Bar Association undergo a training course known as the Bar Readers' Course which trains the participants in advocacy and related skills. It provides compulsory training and development of practitioners who wish to become full time advocates, sign the Bar Roll and become members of the Independent Bar. This course focuses on development of a barrister's advocacy skills , their understanding and compliance with different Courts' practices, and the reinforcement and maintenance of a high ethical code of conduct within those practising at the Independent Bar. It is directed at ensuring that counsel at the Independent Bar achieve and exercise the highest standard of practice

During the Bar Readers' course, the Readers are required to have a mentor, typically a Queen's Counsel, a Senior Counsel (since 2009) or a barrister who has been a member of the South Australian Bar Association for at least 5 years.

The SA Bar Association also facilitates the conduct of ongoing and advanced advocacy courses, seeking to pass on the knowledge of the most experienced practitioners of the Independent Bar and further develop the skills of those who are members of the Bar Association. These courses are run annually and are freely available to those member of the Association.

The Association also works hard to, and provides a focus for, ongoing education and training of its members. It provides regular continuing practice development lecture delivered by specialist barristers across different areas of law. These education sessions are very well attended, and make a significant contribution to compliance of its member with their continuing education obligations . Furthermore these forums provide a useful and specialist environment for the testing, questioning, and resolution of particular points of law which may be controversial or emerging within the state or nationally.

Each year, counsel must acquire at least 10 CPD points. Included in those points are 3 compulsory topics:

- (a) Ethics;
- (b) Practice Management;
- (c) Professional Skills.

### **Section 12: 'Effective and responsive legal services – A responsive legal profession'**

#### **Paras 92-102: Legal education and skills – safeguarding confidence in the Bar**

The Tasmanian Bar does not conduct bar examinations, nor does it provide a bar practice course.

The Tasmanian Bar conducts professional development seminars for barristers with points accruing towards the requirement that all legal practitioners in Tasmania holding a practising certificate accrue a minimum of 10 CPD points per annum.

For Tasmanian barristers these points must be accrued in the following areas:

- (a) Ethics;
- (b) Professional Skills;
- (c) Substantive Law.

Every barrister who commences private practice shall serve a period of pupillage of not less than 2 years.<sup>11</sup>

The pupil is to have two masters namely a senior master, being a senior counsel or a barrister of not less than 10 years' standing in practice as a barrister, and a junior master, being a junior barrister of not less than 5 years' standing and practice as a barrister. The appointment of both masters is subject to the approval of the Council of the Law Society of Tasmania on the recommendation of The Tasmanian Bar.

The pupil is reviewed monthly by his senior or junior master and must undertake a minimum period of court orientated work. The masters must make themselves available (as is practically possible) to enable their pupil to obtain assistance from them as required.

A pupil must attend any legal education events directed by The Tasmanian Bar from time to time. Directions are issued for pupils to attend the CPD seminars conducted by The Tasmanian Bar.

At the end of the period of pupillage each master must certify in writing whether or not the pupil has to his or her satisfaction undertaken pupillage as required. The period of pupillage can be extended.<sup>12</sup>

In the first 6 months of pupillage a pupil is prohibited from accepting a "direct access" brief unless he or she has obtained the written approval of their senior or junior master and submitted the written approval to the Executive Director of the Law Society prior to acceptance of the brief.

---

<sup>11</sup> The Law Society of Tasmania Barrister Pupillage Policy para 7.2 provides that the Law Society may exempt a barrister from full or part compliance with the Policy having regard to all relevant circumstances including his or her prior experience in performing barrister's work.

## WESTERN AUSTRALIAN BAR ASSOCIATION

### ***Paragraphs 92-112:***

All new entrants to the Western Australian Bar Association are required to complete a Bar Reader's Course, comprising four modules: Advocacy; Evidence; Ethics; and Jurisdiction and Procedure. The Bar Reader's Course is an important part of the WABA's commitment to the highest standards of practice. It is designed to ensure that WABA barristers meet the recommended Australian Bar Association standards, reflecting international best practice.

In addition, the Western Australian Bar Association is an approved CPD Provider, and provides ongoing Continuing Professional Development to its members through, workshops, seminars and forums.

### **Paras 103-111: Billing practices**

## AUSTRALIAN CAPITAL TERRITORY BAR ASSOCIATION

### ***Paras 103-111: Billing practices***

The practice in the Territory is similar in substance to that set out in the NSW submissions.

## BAR ASSOCIATION OF QUEENSLAND

### ***Paras 103-111: Billing practices***

The corresponding Queensland legislation is the *Legal Profession Act 2007* (Qld) which operates in the same manner as the New South Wales legislation referred to in the submission.

## SOUTH AUSTRALIAN BAR ASSOCIATION

### ***Paras 103-111: Billing practices***

The corresponding legislation is the *Legal Practitioners (Miscellaneous) Amendment Act 2013*. It is likely to come in to force at the beginning of 2014 and will operate in the same manner as the NSW legislation referred to in the submission.

The process of briefing a barrister at the Independent Bar necessarily requires a party's case to be put to an independent external analysis and assessment, considering not only matters of law but also the facts and evidence required in order to establish a claim or defence. In this way the SA Bar Association and the Independent Bar provide a level of testing of matters which often results in claims or defences which have little prospect of success, being settled. This in turn avoids unnecessary legal costs being incurred by parties.

A further efficiency benefit of the Independent Bar is that much of the skills and specialist expertise of Bar members can be accessed in a cost-effective way through the sliding scale of costs for hourly charges rendered by barristers at different levels of experience. It would be common for members of the junior bar to have a lower charge-out rate (\$100-\$150/hour less) than a solicitor of equal post-admission experience.

## TASMANIAN INDEPENDENT BAR

### ***Paras.103-111: Billing practices***

By r.92, *Rules of Practice 1994*, a Tasmanian barrister must not enter an agreement for the variation of fees in relation to a matter according to the result or outcome of the matter unless as a result of that agreement the barrister is entitled in certain circumstances to a reduced or no fee. A barrister who undertakes work for an assisted person under any scheme relating to legal assistance may enter an agreement for the variation of fees which entitles the barrister to charge a normal fee as a barrister if the assisted person obtains an order for costs against the opposing party or a fee in accordance with the scheme relating to legal assistance.<sup>13</sup>

Part 3.3 of the *Legal Profession Act 2007* (Tas) requires a Tasmanian barrister to:

- (a) disclose the basis upon which his or her fees will be calculated and an estimate of his or her total fees in the matter<sup>14</sup>;
- (b) the avenues open to dispute his or her costs, including by way of a costs assessment, setting aside of a costs agreement or the making of a complaint;
- (c) an estimate of the costs that may be recovered if the client is successful in the litigation or the client may be ordered to pay if unsuccessful;

By s.309 *Legal Profession Act 2007* a barrister must not enter into a costs agreement under which the amount payable to him or her is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in the proceedings to which the agreement relates.

## WESTERN AUSTRALIAN BAR ASSOCIATION

### ***Paragraphs 103-111***

Legal fees are regulated under the *Legal Profession Act 2008* (WA). The provisions of that Act provide requirements for costs disclosure and the regulation of recovery costs, including by Costs Determinations made by the Legal Costs Committee. The efficiency of service provided by Barristers is generally reflected in those Costs Scales of lower hourly rates in respect of Counsel than those applicable to solicitors of comparable experience.

---

<sup>13</sup> R.92, *Rules of Practice 1994*.

<sup>14</sup> Subject to the exceptions in s.295.

## **Paras 116-136: Legal Assistance Services**

### **AUSTRALIAN CAPITAL TERRITORY BAR ASSOCIATION**

#### ***Paras 116-136: Legal Assistance Services***

Members of the Association regularly engage in Legally Aided work. Such work is undertaken at a rate well below the regular rate for such work. Frequently Legal Aid work is conducted at a rate between one half and one third of the accepted rate for a barrister conducting such work on a non-legally aided brief. Often the work undertaken is complex and with significant implications for the person involved in the proceedings. It is noteworthy that the Legal Aid scales of costs in the Territory do not even adjust to reflect changes in the CPI. That is, the real value of the grant is in decline.

Despite undertaking the work at such reduced rates, it is a matter of grave concern to the Bar that so few resources are available to the Legal Aid Commission that a means test is applied of such stringency that it does not properly incorporate persons who are unable to fund their own legal representation. That is, there is a significant gap between those who qualify for legal aid and those who can afford their own representation. This represents a significant barrier to access to justice in order to properly resolve a legal dispute.

Further, the classes of matters for which a grant of legal aid may be given do not properly represent the classes of matters for which persons have a genuine interest in the resolution of a legal dispute.

### **BAR ASSOCIATION OF QUEENSLAND**

#### ***Paras 116-136: Legal Assistance Services***

Members of the Bar Association of Queensland provide pro bono services at most community legal centres across the state.

The Bar Association of Queensland works closely with QPILCH, which is the first point of contact for many self-represented litigants seeking assistance.

The Self-Representation Service, the Bar Pro Bono Service and the Magistrates Court Service are dealt with in this memo under section 6 above.

### **SOUTH AUSTRALIAN BAR ASSOCIATION**

#### ***Paras 116-136: Legal Assistance Services***

The SA Bar Association does not currently have a legal assistance scheme. However Barristers form part of a network of lawyers who provide pro – bono legal assistance to individuals and charitable not- for –profit organisation that cannot afford a lawyer. These services are coordinated by SA's Justice Net and ensure that low income and disadvantaged South Australians have access to legal advice services . In addition individual barristers contribute countless hours of pro- bono work on their own initiative.



## TASMANIAN INDEPENDENT BAR

### **Paras 116-136: Legal Assistance Service**

The Tasmanian Bar does not currently have a legal assistance scheme, but some barristers have nominated for the list of barristers to be appointed by the Law Society of Tasmania *pro bono* clearing house scheme (which will shortly be jointly run with the Tasmanian Bar). In addition, individual barristers contribute countless hours of *pro bono* work of their own motion.

### **Section 13: 'Funding for litigation' Paras 139-142: Contingent Billing**

## BAR ASSOCIATION OF QUEENSLAND

### **Section 13: 'Funding for litigation' Paras 139-142: Contingent Billing**

In Queensland, the *Legal Profession Act 2007* (Qld) allows for an uplift in conditional costs agreements of not exceeding 25 per cent (see s 324 *Legal Profession Act 2007* (Qld)).

The prohibition contained in the New South Wales Act on a law practice entering into an uplift fee agreement in relation to a claim for damages is not replicated in the Queensland Act.

## SOUTH AUSTRALIAN BAR ASSOCIATION

### **Section 13: 'Funding for litigation' Paras 139-142: Contingent Billing**

Section 42(6) of the current *Legal Practitioners Act* (SA) allows legal practitioners to make agreements for contingency fees, subject to the Law Society's Professional Conduct Rules.

The *Legal Practitioners (Miscellaneous) Amendment Act 2013* is likely to come in to force at the beginning of 2014. It makes it a criminal offence to enter a contingency fee agreement calculated by reference to the amount of any award or settlement. It permits uplift fees and conditional costs agreements, restricted to a maximum of 25% uplift of the legal costs otherwise payable.

## TASMANIAN INDEPENDENT BAR

### **Section 13: 'Funding for litigation' Paras 139-142: Contingent Billing**

See above in relation to r.92, *Rules of Practice 1994* and s.309 *Legal Profession Act 2007*.

There are no other provisions dealing with contingent billing in Tasmania.

## Paras 169-172: Class actions

### BAR ASSOCIATION OF QUEENSLAND

#### **Paras 169-172: Class actions**

There is no set framework under the UCPR (Qld) for the bringing and management of representative proceedings. However, rule 75 of the *UCPR* (Qld) provides:

*"A proceeding may be started and continued by or against one or more persons who have the same interest in the subject matter of the proceeding as representing all of the persons who have the same interest and could have been parties in the proceeding."*

Two useful papers concerning the difficult position concerning class actions in the Queensland jurisdiction are found in the following links:

[http://www.hearsay.org.au/index.php?option=com\\_content&task=view&id=1514&Itemid=48](http://www.hearsay.org.au/index.php?option=com_content&task=view&id=1514&Itemid=48)

<http://portal.barweb.com.au/uploads/Professor%20Peter%20Cashman%20Paper.pdf>

### SOUTH AUSTRALIAN BAR ASSOCIATION

#### **Paras 169-172 : Class actions**

There are no equivalent provisions in SA dealing with costs in class actions. Class actions in SA are very rare.

### TASMANIAN INDEPENDENT BAR

#### **Section 13: 'Funding for litigation'**

#### **Paras 169-172: Class actions**

There are no equivalent provisions in Tasmania dealing with costs in class actions.

**Michael Colbran QC**  
**President**  
**Australian Bar Association**