

**THE NEW SOUTH WALES BAR ASSOCIATION
BAR COUNCIL**

MINUTES OF PROCEEDINGS

**Thursday 21 March 2013
in the Boardroom of the New South Wales Bar Association
at 4.30 pm**

PRESENT: Boulten SC; Needham SC; Temby QC; Traill; Hutley SC; Street SC; Game SC; Moses SC; McGrath SC; McHugh SC; Lydiard; Walker; Healey; Toomey; Hyde Page; McMahon.

APOLOGIES: Stone; Hunt; Steggall

IN ATTENDANCE: Executive Director; Deputy Executive Director; Director, Professional Conduct (for professional conduct matters); Executive Assistant.

PRESIDENT'S REPORT

Right to Silence legislation

The President reported on the progress of the *Evidence Amendment (Evidence of Silence) Bill 2013* and the *Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Bill 201*. Both Bills passed the Legislative Council on 20 March. The Association had conducted a concerted public media and lobbying campaign against the Bills. The Opposition and Greens voted to oppose the legislation, and the Shooters and Fishers party had advised the Association earlier in the week that they also opposed the Bills. However, at second reading stage the two Shooters representatives voted in favour of the Bills, securing their passage by one vote. The Association's briefing materials were quoted extensively in the course of the debate in both Houses of Parliament.

The Bar Council thanked the President and Association staff for their efforts to prevent the passage of the legislation.

The Bar Council noted that, now the legislation had passed, CPD seminars are being organised as a matter of urgency to ensure that members are aware of their obligations under the new provisions. The seminars will be held in the Common Room, 'downtown' Sydney and Newcastle.

Meeting with President and Deputy President, Industrial Relations Court of NSW

The President advised that he and Moses SC had met earlier in the day with President Boland and Deputy President Walton of the Industrial Relations Court of NSW to discuss

the future of the Court. As a result of recent legislative changes, the Court had lost most of its jurisdiction.

FINANCE

Financial statements for February 2013.

Noted.

FOR CONSIDERATION

Memorandum to the Bar Council from Andrew Stone dated 20 March 2013 – CTP Reform.

Bar Council considered the memorandum and draft submission to the Minister for Finance concerning the Government's proposed CTP reforms.

The Council agreed that it was preferable that the Bar Association and Law Society make a joint submission to the Government.

It was noted that the Law Society was likely to contribute half the costs of engaging an actuary to cost the Bar Association's alternative proposal for CTP reform.

RESOLVED:

1. Noting that a final version of the submission will be provided for its approval, to approve the current draft in principle (subject to further editing/revision) for the purposes of enabling actuarial assessment of the proposals;
2. to approve re-allocation of funding previously approved to make an amount of up to \$27,500 available for actuarial advice as approved by the Executive Director; and
3. that the introduction to the submission be amended to emphasise that more time should be provided for the analysis and preparation of a detailed response to the issues in the Government's Discussion Paper, but that the submission contains the Association's best efforts to respond in the limited time available.

Senior Counsel Process – 2014

- **Bar Council Senior Counsel Selection Process Review 2013**
- **Memorandum to the Bar Council from the Director, Organisation & Development dated 20 March 2013 – Senior Counsel Selection Process – Administrative Consideration**
- **Memorandum to the Bar Council from Mary Walker dated 21 March 2013 – Review of the Senior Counsel Protocol**

At its meetings of 13 February, 21 February and 14 March 2013 the Bar Council reached the following decisions concerning the 2013 Senior Counsel Selection Process.

1. That a system for the appointment of Senior Counsel in NSW be retained.
2. That the Senior Counsel Selection Committee be comprised of: (a) the President; (b) the Senior Vice-President; (c) four other senior counsel nominated by the President and approved by the Bar Council, not more than one of whom may be a member of Bar Council; (d) one person who is not a practising barrister; *plus* (e) one non-lawyer community representative.

It was agreed that the Guide to Practical Aspects and explanatory letter be amended to state: 'It has been the practice that Selection Committee decisions are made by consensus'.

3. There should be no limit on which, when or how often barristers may apply for Senior Counsel.
4. The judiciary should continue to participate and be consulted in the process. All judges (including NSW Federal Circuit Judges) should be consulted on all applications. Their responses are to be kept confidential. Clause 23 of the Protocol is to be amended to include the Chief Judge of the Federal Court Circuit and the Chief Magistrate.
5. The Consultation Group should comprise 1/ the judiciary; 2/ a group of senior practitioners (barristers and solicitors, and retired judges practising as mediators etc), and 3/ some of the persons listed in the applications against whom an applicant has appeared, appeared with, and been briefed by. The Consultation Group ideally should not exceed 400 in total, and will include some of those persons mentioned in individual applications. The Council, noting that potentially the consultation list could run in to many hundreds, agreed that the Committee should edit the list as appropriate. The existing form of the poll be retained for 2013.
6. The opinions of *all* consultees should be kept confidential. As with members of the judiciary, that confidentiality should extend not only to consultation form responses, but also to any discussions with Committee members.
7. That applicants may provide a maximum of three references, in respect of which two can be written references. The references should not be from judicial officers. It should be made clear in the Guide to Practical Aspects that the referees may not always be consulted. This is a matter entirely at the committee's discretion.
8. The opinions of referees should be kept confidential.

9. Senior Counsel applicants should not be interviewed.
10. No fee should be charged in connection with senior counsel applications.
11. The present Undertaking continue to be requested.
12. The President to hold the usual 'Silk applicants' briefing session, emphasising the value of the consultation process, and the use made of the information gathered- and that there is no 'blackballing'.
13. The Bar Council noted that whatever process is used, it is very likely the list of applicants (or a partial list) will be published by an outside party.
14. The existing system of optional 'exit' interviews should be maintained. It is entirely at the discretion of the President what the applicant is told.
15. No other criteria in the Protocol requires amendment.
16. There should be no review of the Committee's decisions.
17. The Bar Council, recognising it is a long term project, should press the ABA to push for a national scheme of silk selection – and the common use of the title 'Senior counsel'.

After some discussion of options, including a personalised consultation form and whether there should be any change to the consultation group in 2014, Bar Council RESOLVED that the same consultation system as agreed for 2013 should apply in 2014.

Bar Council FURTHER RESOLVED that the Senior Council Selection Committee has the authority to reduce the size of the consultation list to ensure that it does not reach unmanageable levels.

The Bar Council noted that the proposed changes to the Protocol and procedures will be discussed by the President with the Chief Justice.

An application is to be made to the Information Commissioner for an exemption from the *Privacy Act* as soon as the Bar Council has approved the new Protocol.

The Bar Council noted Mary Walker's memorandum concerning amendments to the Senior Counsel Protocol and the Guide to Practical Aspects, which will be taken into account in the drafting of amendments to the Protocol, Guide to Practical aspects and related documents in accordance with Bar Council's decisions on the 2013 selection process.

Bar Council agreed that the President issue a special memorandum to the Bar by way of a stand-alone *In-Brief* item outlining the proposed changes to the silk selection system,

seeking comment on the changes, and emphasising the particularly detailed consideration that the Bar Council has given to this issue this year. The Council will consider comments received.

The Executive Director was asked to prepare a revised Protocol, Guide to Practical Aspects and related documentation for endorsement by the Bar Council.

FOR INFORMATION

Minutes of the meetings of the Common Law Committee held on 18 February and 12 March 2013.

Noted.

Article in *Lawyers Weekly* dated 8 March 2013 – ‘In-house counsel cut out lawyers’.

Noted.

The following papers were circulated via e-mail prior to the Council meeting.

- Law Council of Australia – Inquiries and Consultation Lists as at 12 March 2013.
- Evidence Amendment (Evidence of Silence) Bill 2013; Criminal Procedure Amendment (Mandatory Pre-Trial Defence Disclosure) Bill 2013; Legislative Assembly - Second reading speech.
- Article from the *Sydney Morning Herald* dated 14 March 2013 – Push for unpopular laws that reduce safeguards.
- Transcript – 702 ABC Sydney, Mornings – 8.48am, 14 March 2013 – The President speaks regarding the Government’s right to silence proposals.
- Transcript – ABC News 24 – 7.15pm, 13 March 2013 - The President speaks regarding the Government’s right to silence proposals.
- Minutes of the meeting of the Bar Council of 7 March 2013 – approved at a special Bar Council meeting of 14 March 2013 called to discuss the Senior Counsel Selection Process.

The meeting closed at 6.40pm.

Confirmed as a correct record:

Phillip Boulten SC
President