PROPOSED REFORMS
VICTORIAN MODEL

Two reforms are proposed to the system for the selection of Senior Counsel:

(1) To allow an unsuccessful candidate to obtain feed-back regarding his or her lack of success;

(2) To allow an unsuccessful candidate to obtain a re-consideration of the decision.

INTRODUCTION

1. Implementation of the reforms will be left to the Bar Council, obviously in conjunction with the Chief Justice. They will not impinge upon the role of the Chief Justice.

2. The proposed reforms represent minimal reform. They are calculated to introduce some transparency and procedural fairness into the system. In particular, they are intended to provide relief of the considerable frustration and bewilderment which results from the rejection of applications without any explanation or reason.

3. Without change, the selection task is an impossible one, given the present structure and the lack of a secretariat. The result is that a considerable number of outstanding barristers are overlooked, or at least excluded, each year. The answer cannot be simply to deny any relief.

ERRORS IN THE SELECTION PROCESS

The System

5. Silk provides considerable rewards. It guarantees work of considerably greater complexity and entitles far higher fees. It defines careers. The institution is deeply etched in the traditions of the Bar. Demonstrably, it should only be conferred after scrupulous and effective enquiry. 'Excellent' barristers should not be overlooked.

6. The system has changed little since its introduction in the 17th century. The Chief Justice is asked to carry out the selection. Once, most barristers became Queen's Counsel. As a result, there were no issues. With burgeoning numbers, this is no longer so. Selection has become far more difficult. The system, as currently structured, is no longer capable of ascertaining all excellent barristers. There is a mindset against change.

7. Other jurisdictions have recognised the increasing problems produced by the adoption of modern rigorous standards. The United Kingdom reconsidered its system in 2004. It carried out an exhaustive enquiry involving thousands of submissions from lawyers and all relevant bodies, departments, consumer bodies and the like. The result was a total reconstruction. The framework settled upon was expressed to "serve the public interest, offering a fair and transparent means of identifying excellence ....". The Western Australian and New South Wales systems have also been revised. They have much to offer us.

8. Victoria remains rooted in the past. It has refused to change or investigate its system. It has a deep aversion to reform. It persists with an ancient system, rejecting contemporary precepts such as transparency. It remains

shrouded in secrecy. Procedural fairness is ignored. It is dramatically out of kilter with modern standards. Not surprisingly, this results in injustice. All exceptional barristers are not identified. Secrecy ensures that barristers do not know why.

Scuttlebutt

9. Behind closed doors, it is impossible to eliminate personal considerations creeping into the process. Secrecy fosters it. A selection committee may have no personal knowledge of most of the applicants and may be swayed by adverse comment, hearsay or misinformation.

10. This problem has been dealt with in other jurisdictions. In the United Kingdom, references are restricted to those who "have personally seen the candidate". In New South Wales, a "no scuttlebutt" rule was introduced last year, requiring that all persons consulted have "direct knowledge of the candidate in question".

Defects

12. There are no protocols, no criteria. Excellence is not defined. Does excellence in mediation count? Does service to the profession count? Is age relevant? We are not told. It is secret. By way of contrast, in the UK, Western Australia and New South Wales, there are comprehensive criteria. An effective process of appointment will be fostered with the introduction of public scrutiny. No healthy institution can provide fairness in the dark. Why were the two sub-committees discovered last year labouring in secret? Why does the Court refuse to disclose the identity of their members? Disclosure and due process promote confidence in the system.

13. Excellent barristers can easily fall between the cracks. Some sub-committees make recommendations without any systematic canvassing of all judges of the Court, particularly in the County Court. Another impediment in the path of County Court practitioners is that they have to nominate two Supreme Court Judges although they do not practice in that jurisdiction. To add insult to injury, their trial judges are then not consulted.

14. Confusion in this ill-defined process is highlighted by the complaints of Supreme Court judges that their candidates are overlooked. They provide references, perhaps in glowing terms. To their amazement, no one even returns to discuss their views.

15. The Family Court is a mystery. No appointments have been made of Family Court barristers for years. The reason for that is unknown. It is certainly not a lack of excellence. It is simply a secret. Bar specialist committees are consulted. However, they are then ignored. The process is seen as the preserve of the judiciary.

16. The secretness of the system has allowed some social engineering. A quota has been applied. The number of selections has been arbitrarily held down to 13 without any justification. There are many “excellent” barristers beyond 13 who merit appointment as senior counsel. They miss out.

PROPOSED REFORMS

17. The reforms are proposed not only to provide procedural fairness but also to enable a comprehension of the system and, as a result, to ensure its effective operation. The proposed reforms rely heavily on the UK, New South Wales and Western Australian experience. The cost of the UK system has been the subject of comment. However, if we cannot provide fairness, as being too expensive, we should abandon the system.

Feed-back

18. Feedback is provided for in the UK, New South Wales and Western Australia:

- In the UK, it is described as "assisting focus on improvement by the identification of the areas in which the candidate needs to demonstrate more evidence or to improve his/her standards further".
- In Western Australia, the Chief Justice may have a meeting with an unsuccessful candidate "for the purpose of discussing their application or the reasons for its refusal".
- In New South Wales, the President of the Bar Association will meet with an unsuccessful candidate "to discuss" his or her application.

20. There is a considerable amount of hurt amongst disappointed applicants in Victoria. Not surprisingly. Sometimes they have applied for years. They often have no comprehension why their application has failed. Often they sense some personal grudge. Despite their very real and human concerns, they are simply met by a crude rejection with no explanation. It is difficult to see why Victorian barristers have to labour under such an

unsympathetic and harmful system. We should treat our fellow barristers in a far better way.

21. Feedback does not require disclosure of the views of the referees or whether they supported the candidate. The word “feed-back” comes from the UK system. The definition there is more than capable of providing assistance to disappointed applicants. Feedback can play a constructive role in pointing out a candidate’s shortcomings for future improvement or in adjusting the candidate’s expectation to a more realistic level.

22. It is unlikely that many barristers will seek feed-back. To the extent they do, it need not constitute any significant burden, particularly on the Chief Justice. Either a member of an advisory committee, the Chairman of the Bar Council (ideally as a member of the advisory committee) or some other suitable person could carry out the task.

Re-consideration

23. The UK protocols provide for complaints in respect of “the operation of the system”. That is a reference to a complaint in respect of selection. The rule provides that if a complaint is made out, the application may be referred back to the selection panel. Why shouldn’t we adopt a similar safeguard?

24. The provision of reform to allow some form of re-consideration is critical. It ensures that justice is done. It is not enough to recite, “we get it right”. We don’t. If critical matters are overlooked, and they will be, this reform enables an applicant, at interview, to ensure that all relevant steps were taken, all relevant considerations were taken into account and all relevant

judges consulted. The UK and NSW protocols allow for that interview before selection. We could do that.

25. It is said that such a facility is inappropriate as it represents an appeal from the Chief Justice. That is simply wrong on many counts. First, the Chief Justice is not acting in a judicial capacity. She is acting in an administrative capacity. It is not an appeal. If there is any analogy, it is akin to an application to re-open. Second, even if the Chief Justice were acting in a judicial capacity, a right of appeal exists from the Chief Justice in a judicial context. Third, what is sought is not an appeal but only the identification of the steps taken to ensure proper enquiry. There is nothing remarkable about this.

26. If errors are demonstrated, surely they should be addressed. We would all want them to be addressed. To deny relief where there is an error works a serious injustice. It only needs a person appointed by the Chief Justice, whether a member of the advisory committee, the Chairman of the Bar Council or otherwise, to see the applicant in conference and to hear the concern. The Chief Justice will only be asked to take part if a recommendation for the appointment of silk is made. Of course, she retains her veto. Is it unfair in our system that a wrong decision, which means so much, should be corrected? Surely, as lawyers, that is what we are all about.

27. Once again, a reconsideration would rarely be sought. Perhaps, in some years, not at all.

Conclusions

28. The UK system has introduced interviews with referees and candidates. Obviously that would be ideal. It permits references from practitioners and clients. Most importantly, it has constructed a secretariat to carry out many of the selection tasks. For example, a member of the secretariat provides the reasons to unsuccessful candidates. The costs of the secretariat appear considerable. However, if it supplies fairness, consideration might be given to the introduction of a limited secretariat.

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