



## Appointment of Silk in New South Wales - 2017

### Guide to Practical Aspects

#### *Introduction*

1. This is a short guide to some of the practical aspects of the operation of the Senior Counsel Protocol ('the Protocol') which experience has shown may be of interest to members of the Bar. It is written for members of the Bar who are considering making application for appointment as Senior Counsel. It is also intended to provide information to members of the public who wish to better understand the process.
2. The Protocol is published on the Association's website (<http://www.nswbar.asn.au/>). It sets out the essential criteria and explains the process for the appointment of Senior Counsel. This guide offers an explanation of how aspects of the Protocol operate in practice.
3. The Protocol is approved by the Bar Council and is the instrument by which Senior Counsel are selected by the Senior Counsel Selection Committee each year. This guide does not amend or re-interpret the Protocol.

#### *Timing for the appointment of Senior Counsel*

4. Pursuant to the Protocol, on 1 July each year the Bar Association calls for applications for appointment as Senior Counsel. **The closing time and date for applications this year is 5.00pm on Friday, 28 July 2017.** A final list of applicants is then prepared, distributed to the proposed consultation group, feedback received and the final selections are made. Best endeavours will be used to ensure announcement of the appointments of Senior Counsel are made on or before the first Friday in October 2017. All of these tasks are undertaken by the Selection Committee with the assistance of a few Bar Association staff.

#### *Recent Reviews*

5. The process is continuously scrutinised. The most recent review of the process was made by the Bar Council in 2017.
6. The Protocol is drafted at a relatively high level of generality. This means that each year the Selection Committee can adapt its procedures to the circumstances of the number and range of practice areas of applicants in that year.

### *Interstate comparisons*

7. The New South Wales Protocol operates differently from the systems for the appointment of Senior Counsel in other States. Victoria, South Australia, Western Australia, Tasmania and the Northern Territory operate on a system in which the selection of senior counsel is made by the judiciary (usually the Chief Justice of the State) in consultation with the Bar. In Queensland, appointments are made by the Governor-in-Council via the Attorney-General on the recommendation of the Chief Justice. In the Australian Capital Territory the appointment is by the President of the Bar. The close involvement of the judiciary in the selection process in those jurisdictions emphasises the general importance of the judiciary in the process and reflects the fact that judges are most often chosen from the ranks of Senior Counsel. The judiciary has a central role in the operation of the New South Wales Protocol, but its involvement is different.
8. In New South Wales the Protocol was adopted by Bar Council after the decision of the New South Wales Government in 1992 to no longer appoint Queen's Counsel after that year. The New South Wales system has the advantage that the independent Bar selects its own leaders, subject only to the operation of clause 31 of the Protocol. Clause 31 prevents the appointment of any applicant in the Selection Committee's final selection whose appointment the Chief Justice opposes. This clause only has the potential to operate in the unlikely event that the Selection Committee makes a final selection that is unacceptable to the Chief Justice. Control of the process by the independent Bar, itself, is important in ensuring that the Bar's future leadership is moulded by the Bar itself.

### *Role of the President and Senior Vice President*

9. Clause 8 of the Protocol provides for the President and the Senior Vice President of the Bar Association to be ex officio members of the Selection Committee. Four other members nominated by the President, and approved by the Bar Council, also comprise the Committee, along with one person who is not a practising barrister but who by virtue of his or her qualifications is an appropriate person to be the non-barrister representative on the Committee and one non-lawyer community representative. The President takes a leading role in explaining the process of the selection of Senior Counsel to both members of the Bar and the general public. The President and often either the Senior Vice President or another member of the Selection Committee conduct meetings which are offered to unsuccessful applicants at the conclusion of the selection process each year.
10. All unsuccessful applicants were offered a meeting to discuss their applications when the result was communicated to them.
11. Members considering applying in a particular year often seek advice from senior members of the Bar or the judiciary about whether or not they should apply. However, the President and members of the Selection Committee will decline to advise an individual member of the Bar whether such a member of the Bar is likely to succeed if he or she makes an application.

## *Applying*

12. Detailed written guidance is not given as to how to fill out the forms. However, a number of matters which may assist applicants with their application forms are mentioned in this Guide.
13. The application form is available on the Bar Association's website (<http://www.nswbar.asn.au/>). Applications must be lodged online. Acceptance of applications will close at 5.00pm on Friday, 28 July 2017. It is highly recommended that applications be lodged well before the cut-off time, to ensure that no last-minute technical problems delay lodgement of the application.
14. In practice, applicants differ in the ways they provide information to the Selection Committee. The differences tend to reflect both the nature of the practices and the personalities of the applicants. The way that the application is prepared may affect the Committee's overall impression of applicants.
15. An applicant should provide such information in his or her application which the applicant believes will assist the Selection Committee in considering that the applicant has the qualities for appointment as Senior Counsel required by Clause 6 of the Protocol. For example, this would include a sufficient description of the experience of each applicant so as to give a clear picture of it to the Selection Committee for the purpose of applying Clause 6(g) of the Protocol. This may include details of an applicant's professional experience before coming to the Bar. Applicants are also asked to include a list of their readers and, if possible, submit a photo with their application.
16. Applicants are asked to provide, in table form, in respect of all cases, including contested interlocutory applications (but excluding directions hearings), in which they have appeared in the last 18 months:
  - (a) the name of the case and, if available, its citation (hyperlinked, if possible);
  - (b) the name of the judicial officer, tribunal, arbitrator or CARS assessor before whom they appeared (if outside of New South Wales, please supply a contact number);
  - (c) the name of any counsel who led them or who they led (if counsel is overseas or outside of New South Wales, please supply a contact number);
  - (d) the name of opposing counsel (if outside of New South Wales, please provide a contact number);
  - (e) the name of their instructing solicitor; and
  - (f) a brief description of the nature of the proceedings.

Applicants are at liberty to provide details of relevant matters that they have been involved in outside of the last 18 months. It is recognised that changes in the provision of legal services occur from time to time. The Selection Committee takes into account the effect these changes have on the practice of barristers and the opportunities for barristers to engage in oral advocacy varies significantly and from time to time. The Selection Committee has regard to the importance of the work performed by giving advice as well as appearing in or sitting on courts and other tribunals and conducting or appearing in alternative dispute resolution, including arbitrations and mediations.

Applicants are also:

- (a) required to provide, as part of their application, a list of their readers/tutors and the years of such pupillage; and
  - (b) requested to submit a photograph with their application (this will assist the Committee members in recognising and placing an applicant who may have been seen in court or at an Association function but whose name s/he did not know).
17. Some applicants who practise overseas, have an extensive interstate practice, have been caught up in a long-running case, practise in fields which involve substantial chambers practices, have had a recent period of maternity or parenting leave, who practise part-time for any reason, or where (because of the size of the cases) they are almost invariably led, should note that in their applications so that appropriate attention can be given to these special circumstances. A part-time or flexible practice is not a bar to appointment as Senior Counsel.
  18. The seniority of applicants is taken from the applicant's admission to the New South Wales Bar. Applicants with extensive advocacy experience interstate or overseas before their admission to the Bar in New South Wales may note that previous experience in their applications.
  19. Applicants should include in their applications notice of any matter or circumstances, either past or anticipated, which may adversely affect their fitness and propriety to hold an appointment as Senior Counsel. Applicants are required to give their consent to the Selection Committee making inquiries of the Legal Services Commissioner and other regulatory bodies about such matter or circumstances.
  20. Selection committees do not conduct interviews with applicants. The Selection Committee may communicate with applicants where it is thought that the communication may help to fill a gap in the committee's knowledge or to help resolve an issue about an applicant. The Selection Committee will rely on its own experience of applicants and that of the persons consulted by the committee.

### *The Consultation Process*

21. The Consultation Group is selected at the invitation of the Selection Committee each year pursuant to Clause 10 of the Protocol. The Consultation Group is comprised of senior counsel, junior counsel and solicitors and is to be distinguished from the Judicial Consultation Group which is provided for by Clause 26 of the Protocol. Apart from the obviously different roles in the legal profession of each of these two consultation groups, they differ in one important respect in the application of the Protocol. The Judicial Consultation Group is comprised of a fixed minimum number of members who are members of the Judicial Consultation Group *ex officio*. The Consultation Group has a minimum number of members but Clause 10 of the Protocol assumes there will be both a degree of turnover in this Group and also a degree of continuity in its membership. In practice, considerable change occurs in the membership of the Consultation Group each year. Deciding upon the make up of the consultation group is one of the early tasks of the

Selection Committee. Change in the Consultation Group helps ensure that particular practitioners do not have influence over the selection process over time.

22. Most judges in each of the State and Federal Courts referred to in the Protocol are consulted as part of the Judicial Consultation Group. Because of the wide range of practice areas of the applicants, judges in many other courts and tribunals have been consulted apart from those specifically identified in the Protocol. Most judges respond to the consultation request made of them.
23. The High Court of Australia does not form part of the Judicial Consultation Group. Some applicants will appear in the High Court. The appearances of applicants before the High Court are taken into account through the consultation with other legal practitioners appearing in the High Court.
24. In practice, a far larger number of practitioners are consulted as part of the Consultation Group than the minimum numbers prescribed by Clause 10 of the Protocol. The Selection Committee endeavours to keep the Consultation Group to less than 400 practitioners and members of the judiciary. Most practitioners respond to the consultation request made of them. The practitioners are chosen for inclusion in the consultation group by the Selection Committee to ensure that the principal areas of practice of all the applicants are adequately represented by experienced practitioners who are likely to have knowledge of applicants practising in that area. The Consultation Group includes some of the counsel and solicitors mentioned in the individual applications.
25. Applicants may nominate not more than three members of the profession who are familiar with their recent work and qualities. They may also provide not more than two written references of not more than three pages each from those they have nominated. The references should not be from judicial officers.
26. The consultation form requires each member of the consultation group to indicate whether he or she has had direct personal experience of the candidate conducting professional practice either in court or in other identifiable circumstances in recent years. This is to ensure that old information or indirectly acquired information is not unduly influential in the regard given to the opinions provided by the consultation groups.
27. The Chief Justice of New South Wales does not provide an opinion about individual applicants in the course of the Selection Committee's consideration. Rather, his involvement is reserved for the exercise of his veto power as provided for by Clause 31 of the Protocol.
28. The responses of the two consultation groups are collated and analysed in respect of each applicant for the consideration of the Selection Committee. The members of the Selection Committee rely upon their own knowledge of applicants and also make their own inquiries. Additional general research is undertaken at the direction of and on behalf of the Selection Committee. This will include, for example, looking at the available public record of appearances by each applicant. The Selection Committee has a broad practice background but sometimes specific inquiries are necessary in specialised areas of practice.

29. The Selection Committee works through each application. The application form is the primary source of information available to the Committee. It is the usual practice of the Committee for the barrister members to make inquiries of a group of consultees, and then advise the rest of the Committee of the result of those inquiries. Members of the committee may also make their own separate inquiries. It may not be necessary for all persons nominated as a referee by each applicant to be contacted by a member of the Selection Committee. It is generally assumed that a referee report will be favourable to the applicant. It is the practice that Selection Committee decisions are made by consensus.
30. The collection of information relating to appointment of Senior Counsel is governed by Australian Privacy Principle 6 and will not be used or disclosed for a purpose other than the selection of Senior Counsel and the giving of counselling by the President to unsuccessful applicants.
31. In accordance with Australian Privacy Principle 11, to protect the confidentiality of the material it gathers, the Bar Association destroys or permanently de-identifies all documentation in its possession in relation to the selection process as soon as practicable after the appointments are announced.
32. All applicants for appointment of Senior Counsel will be asked to acknowledge that information collected by the Bar Association in conjunction with their application, including information obtained from third parties, is confidential information in terms of Australian Privacy Principle 12.3(b). Specifically, information obtained about the applicant from other parties will be kept confidential between the Selection Committee and those third parties. Further, information produced by the Selection Committee will be kept confidential to the Selection Committee. This information will not be made available to persons outside the Selection Committee and its secretariat.
33. In the event that an applicant declines to provide such an acknowledgement, the application will not be rejected but that fact will be communicated to all persons who may be consulted about that application.

Arthur Moses SC  
President

25 May 2017