



The New South Wales Bar Association

Appointment of Silk in New South Wales

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 special 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 should also provide useful information to members of the public who wish to understand the process better.
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 date for applications is 31 July 2010 (or the first working day thereafter if it is not a working day). A final list of applicants is then prepared, distributed to the proposed consultation group, feedback received and then the final selections are made. The announcement of the appointments of Senior Counsel will then be made on or before 1 October 2010. All of these tasks are undertaken by the Selection Committee with the assistance of Bar Association staff.

Recent Reviews

5. The process is continuously scrutinised. The most recent review of the process was conducted by the Hon R V Gyles AO QC and released in May 2010. The Gyles Review recommended some changes to the Protocol and selection process, and resulted in the amendment of the Protocol at clauses 6 (g)(vi), 9(d) and 12a.
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. Queensland, Victoria and Western Australia 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. 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 23 of the Protocol. Clause 23 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 9 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. Three 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. 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 conducts interviews which are offered to unsuccessful applicants at the conclusion of the selection process each year.
10. Last year, of the 120 applicants for appointment as Senior Counsel, 18 were successful. All unsuccessful applicants were offered interviews to discuss their applications when the result was communicated to them. Approximately 50 of the unsuccessful applicants sought and were granted interviews.
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. The application form can be downloaded from the Bar Association's website (<http://www.nswbar.asn.au/>). 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. Some more appear in this section.

13. 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.
14. 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. Applicants are asked to provide in respect of all cases, including contesting interlocutory applications (but excluding directions hearings), in which they have appeared in the last 18 months:
 - (a) the name of the case, if available, its citation;
 - (b) the name of the judicial officer, tribunal, arbitrator or CARS assessor before whom you appeared;
 - (c) the name of any counsel who led them or who they led;
 - (d) the name of opposing counsel; and
 - (e) the name of their instructing solicitor.
15. Some applicants who practise overseas, have an extensive interstate practice, have been caught up in a long-running case practise in fields which either involve substantial chambers practices, 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 their special circumstances.
16. 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.
17. 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 will be 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.
18. Selection committees have not conducted 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 may 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

19. The Consultation Group is selected at the invitation of the Selection Committee each year pursuant to Clause 11 of the Protocol. This 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 18 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 11 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.

20. In recent years 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.
21. In practice also a far larger number of practitioners are consulted as part of the Consultation Group than the minimum numbers prescribed by Clause 11 of the Protocol. Most judges and legal practitioners respond to the consultation requests made to them. Judges and legal practitioners are chosen for the consultation group by the Selection Committee each year to ensure that the principal areas of practice of all the applicants in that application year in question are adequately represented by one or more experienced practitioners who are likely to have knowledge of applicants practising in that area and nominate counsel and judges who could be consulted.
22. The consultation forms were revised in 2007 so that each member of the consultation group is required 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 which is taken of the opinions provided by the consultation groups.
23. It should be noted that 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 will be taken into account through the consultation with other legal practitioners appearing in the High Court.
24. The Protocol refers to the Chief Justice of New South Wales as a member of the Judicial Consultation Group. In practice the Chief Justice 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 23 of the Protocol.
25. The responses of the two consultation groups are collated and analysed in respect of each applicant for the consideration of the members 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.

A handwritten signature in black ink, appearing to read 'Tom Bathurst', written in a cursive style.

Tom Bathurst QC
President
1 July 2010