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SENIOR COUNSEL SELECTION COMMITTEE: 2010

A view from the inside

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One recommendation of the 2010 Gyles Report into the silk selection process was that a person who is not a practising barrister "but who by virtue of his or her qualifications is an appropriate person" should be a member of the Selection Committee. The President tapped me on the shoulder and I thus became a participant and observer in a fascinating and exhaustive process. I participated fully in all discussions, while choosing not to express views about the prospects of any candidate or voting as to his or her inclusion.

The warning by Bathurst QC as to what would be involved given to me and the other members of the Committee would have escaped the easy toils of the *Dederer* negligence test, but would have struggled with the Fair Trading Act. There turned out to be a lot of work for the five other members of the Committee (Bathurst QC, Coles QC, Adamson SC, Hamill SC and [Stephen] Campbell SC. Letherbarrow SC had been an early nominee, but he opted for a long sentence on the District Court in lieu of hanging around to collect the bouquets and brickbats offered to Committee members at the end of this process. Stephen Campbell replaced him after the first meeting.

The Committee was most ably assisted by Corinne Brown who worked tirelessly meeting sometimes incredible deadlines.

The number and names of the 128 applicants became public knowledge very early on the piece through the usual channels for disseminating gossip in Phillip Street, "the street of tongues".

The Committee met on nine occasions (once by telephone conferencing) and spent approximately 16 hours in joint discussions. On top of this, the other members spent probably three times as many more hours reading the applications: being earbashed by sponsors, well-wishers and not-so-well wishers of particular candidates; and, most importantly, following up additional enquiries as recommended by the Committee or prompted by the member's own study of the applications. Naturally, there was some division of responsibility for primary enquiry, but in the end all decisions were based on full discussion within the Committee.

A feature of the 2010 Protocol was that each applicant had to include details of all cases, including contested interlocutory applications, in which he or she had appeared in the last 18 months. To my observation, corroborated by what was reported by the President who alone had done this before, these folders supplied a lot of previously unavailable and highly useful information. It showed the Committee a lot about the extent and nature of the applicant's *current* practice as well as offering a list of authorised and unauthorised referees who were judges, leaders, juniors, opponents and solicitors. For some candidates, the folders revealed a slender "junior" current practice (which was not to be mistaken for a practice in which a candidate had been tied up in a handful of huge cases).

With the details of applicants' practice areas that were also provided, the Committee was able to prepare and refine the list of consultees whose views on each candidate were sought. Care was taken to ensure that the names of applicants in the more specialist areas such as tax and family law were placed before suitable practitioners in their fields. And particular care was taken to ensure that there was a fair spread of consultees across jurisdictions, chambers, law firms and locations in the State.

Ultimately 625 consultees were asked to complete the form, indicating as to each candidate they cared to report on YES, NO or NOT YET, together with the all important addendum indicating whether or not the opinion was based on professional experience (PE) in the past three years. The consultees approached included judges, senior counsel, junior counsel, solicitors and some recently retired people.

The responses were tabulated in various ways enabling the Committee to see at a glance the numbers of YES, NO and NOT YET responses for every applicant, the identity of the respondent and (most importantly) whether the response was based on PE. A further tabulation enabled the Committee to see these statistics broken down into judicial, senior counsel, junior counsel and solicitor categories. Over 80% per cent of those whose views were sought responded and everyone approached subsequently for further information gave it freely (unless uncontactable due to absence).

Naturally no one responded as to every candidate. The Committee observed that sometimes there was no response from judges who had heard cases in a candidate's nominated practice area even though other barristers practising in that area were reported on by those judges. This often prompted a follow-up enquiry before any possibly negative inference were drawn.

Some patterns were detected in the responses. Some of the consultees appeared comparatively generous (even fulsome) in the number of their YES or NO responses; others parsimonious. Some consultees when contacted, qualified or modified their written response in significant ways. For example, when approached for further and better particulars, some indicated that their "PE NOT YET" meant "Definitely not, but I was being polite!". Others supplemented their responses with details or with statements ranking or comparing the several persons whose claims they had addressed.

The consultees were specifically asked to disregard rumour and gossip. The Committee approached its task in similar manner.

Under the heading of Essential Criteria, the Protocol stipulates that the system for the designation of Senior Counsel must be administered so as to restrict appointment to those counsel whose achievement of seven listed qualities "displays and presages their ability to provide exceptional service as advocates and advisers in the administration of justice". The qualities are learning, skill, integrity and honesty, independence, disinterestedness, diligence and experience.

From start to finish the Committee adopted the position that:

- Silk was not a reward for long years of faithful service as a competent junior
- There would be no pre-determined quota, minimum or maximum number of years of practice at the Bar, or gender allocation

- Whether or not this was an applicant's first or fifth application (and this was never researched anyway) would be irrelevant
- This was not a beauty competition in which only the bland, popular or "conventional" advocate would be considered: a healthy Bar needs leading counsel of many shapes and sizes and an abrasive personality is not necessarily a barrier to leadership
- Under the Protocol entitlement to silk has to be positively established, not assumed.

To state that the process involved the progressive culling of applicants would convey a misleading impression. This, in form, is what happened over the final five meetings. However, as indicated, the Committee kept focus upon the question whether an applicant established that he or she had satisfied the published criteria. For a handful of the candidates, the collocation of their own application details and the clear absence of support from the consultees meant that their names were culled on the first occasion that the candidates were discussed one by one (see Protocol para 16). But for the great majority, applicants were given the benefit of the doubt on the first working through of the names. One of the Committee was then assigned the task of making follow up enquiries from some of the consultees (and in some instances the judges or practitioners who appeared strangely silent about a particular applicant whose path must have been crossed). Even when this information was reported and discussed, it often happened that the application was remitted for further enquiry to be followed by more discussion.

The Committee held back from establishing even a prima facie list of successful applicants until the third last of its post-consultation discussions. Even then, candidates' names were added provisionally, often subject to further checking and enquiry. Towards the end of the process the Committee stood back and considered whether consistency or miscarriage required the recommittal of a name that had been included or put aside.

The Committee was alert to the reality that barristers sometimes get handed dud briefs and that they (and those who observe them) sometimes have "bad hair days". A handful of "PE Nos" might prompt further enquiry, but never rejection, unless of course there was only a handful or less of "PE Yes" responses. The views of opponents in hard fought cases were often favourable and when they were not, allowance was made for the possibility of some distortion in assessment. Favourable reports from fellow floor members were treated cautiously. In any event, the process never involved a mere adding up of responses for and against.

While there tended to be some weighting in favour of judicial responses, there was certainly no judicial veto principle. The Committee recognised that a leader of the bar must be assessed from many angles, including the vantage-point of other barristers and solicitors. Judges, like other observers, sometimes disagreed strongly about individual candidates.

One or two issues of principle were wrestled with by the Committee. What is reported below will not bind any successor Committee, but will hopefully assist both the Bar Council as the proponent of the ever-revisable Protocol as well as future applicants.

As indicated, the Committee took the view that entitlement had to be demonstrated and not assumed. This meant that, for a handful of applicants, they were at *some* disadvantage in consequence of not being able to *demonstrate* much experience "on

their feet", especially in cross-examination. One of the qualities required to be shown "to a high degree" is "skill", described in the following terms: "Senior Counsel must be skilled in the presentation and testing of litigants' cases, so as to enhance the likelihood of just outcomes in adversary proceedings". This said, the Committee was not blind to the fact that, in the area of taxation litigation and in some classes of appeals, the stakes may be so high that it is extremely rare for junior counsel to take the leading role.

A related matter involved the place of mediation. The Committee recognised the significance of alternative dispute resolution in the modern law. It also acknowledged that a 2010 amendment to the Protocol had included as one of the non-exhaustive list of "experience" criteria "experience and practice in mediation". By way of analogy, it was also recognised that some great barristers of the past have had a very substantial advice practice in particular areas. The Committee were much troubled and divided about the intent of the Protocol as regards a barrister whose major or sole contemporary practice involves participation in mediations as mediator. It had no difficulty in concluding that such a person is a "practising advocate" who satisfies the stipulation (para 4) that appointment should be restricted to such persons, so long as such an applicant (if a member of the private Bar) stands ready to observe the cab-rank principle. But the majority of the Committee felt that the essential "skill" component referred to above requires it to be demonstrated that an applicant with a mediator's practice can demonstrate (presumably based on prior experience) that he or she presently *has* skill "to a high degree" in "the presentation and testing of litigants' cases". If this is demonstrable, then there would be no impediment stemming from the current mix of the applicant's practice being wholly or exclusively that of a mediator. The Committee invites the Bar Council to clarify the Protocol if it has been misinterpreted.

If an applicant was a floor member of one of the Committee that member disclosed the fact and, unless pressed, refrained from expressing any view for or against the application except for concurring in the final decision of the Committee when it formally and unanimously endorsed the final list. When this attitude looked to disqualify one of the members from expressing a view about the suitability of an applicant whom the member had actually led in a matter I intervened and persuaded the Committee that this was going too far.

Some conclusions

The President made it most clear that I was free to voice any concerns with the process *en passant* and to propose any changes to the Protocol.

I can say that anything I suggested should be done this year was done, even down to the Committee humouring me in working backwards from the Z's at one stage. I was extremely impressed with the diligence and sensitivity of my fellow members. We were all very conscious of the importance of this matter to a large group of barristers and to the system of administration of justice. We were also aware of the elements of true judgment involved within a process where the persons most intimately involved have no means of overseeing the manner in which fairness is struggled for.

As to the Protocol, I would favour the expansion of the disclosure period beyond its present eighteen months. And I invite the Bar Council to consider whether any fine-tuning is called for with regard to the issues identified above.