



THE
VICTORIAN
BAR

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General Meeting of Counsel 1 November 2007

1. The Bar Council opposes the proposed motions to be put at the General Meeting of Counsel on 1 November 2007.
2. The proposed motions assume that the institution of Senior Counsel is to continue. They do not question appointments being made by the Chief Justice nor regulation by Rules of Court – Chapter II Order 14 of the Supreme Court Rules.
3. The process for appointment of Senior Counsel was reviewed by the Bar Council earlier this year. On 22 February 2007 the Council unanimously resolved to confirm its support for the current process.
4. The Bar Council memorandum to members of the Bar dated 23 February 2007 is attached. That memorandum sets out the key elements of the present process and the basis of the unanimous Bar Council resolution in support of the process.
5. The Bar Council identified the issues of feedback and a right of review of the decision as the principal criticisms of the current process and concluded that the advantages of the current process greatly outweigh any perceived disadvantages – see paragraphs 7 to 11 of the memorandum.
6. If the institution of Senior Counsel is to continue to be respected, the appointments must be made by the Court. The appointment is a mark of excellence as an advocate, and that excellence is best judged by the Judges.
7. The only practical alternative is appointment by the Bar Council, and that would open the institution to criticism due to perceptions, fair or otherwise, of cronyism.

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8. Feedback regarding the reasons for the failure of the application would put the Chief Justice, the Court, and everyone involved in the process of furnishing information and contributing their evaluation of the disappointed applicant in an impossible position.
9. It is the strict confidentiality of all information which allows for candour, frankness and honesty in every part of the process: the reports from the two referees nominated by the applicant (superior court judges or judicial officers); any comments from, not only judges, but office holders such as the Chairman of the Bar Council and the Chair of the relevant subject area Bar Association; and the consultation with the Chief Justice's advisory committee. See the description of the process in paragraph 4 of the attached 23 February 2007 Bar Council memorandum and Order 14 Rule 14.14(4) on confidentiality.
10. Such a process, of its nature cannot be fully transparent and open. That was the unanimous conclusion of the Bar Council in paragraph 5 of the attached 23 February 2007 Bar Council memorandum.
11. Appointments are now under the signature of the Chief Justice and the seal of the Court (O. 14 R. 14.15(1)). Neither the Court nor the Chief Justice can reasonably be expected to give the weight of their office to a process that does not have the integrity of the candour allowed for by strict confidence.
12. The "review by way of interview and reconsideration of the decision" sought in proposed motion 2 by way of entitlement is equally inimical to the integrity of the present process and the width, and depth, and confidentiality of consultation and advice in the present process.
13. The Chief Justice's 21 February 2007 Summary of the Current Process referred to in paragraph 4 of the attached Bar Council 23 February 2007 memorandum was published in Volume 40 (Autumn 2007) of *Victorian Bar News* and has been re-posted on the Bar website.
14. Appreciation of the details of the current process is important in considering the proposed motions and the significant consequences were they to pass.



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REVIEW OF THE PROCESS OF REVIEW OF APPOINTMENT OF SENIOR COUNSEL

To members of the Bar:

1. From 2004 the Chief Justice of the Supreme Court of Victoria, at the request of the Victorian Bar Council, has undertaken responsibility for the appointment of senior counsel in Victoria.
2. Following recent criticism of the selection process, the Bar Council has reviewed the process in place for the appointment of senior counsel in Victoria. In so doing the Bar Council was conscious that the current selection process has only been in place for three years and that the nature of the decision being made by the Chief Justice will inevitably lead to some applicants being extremely disappointed.
3. On 22 February 2007, the Bar Council unanimously resolved to confirm its support for the current process of appointment of senior counsel by the Chief Justice.
4. For the purpose of assisting the review by the Bar Council, the Chief Justice released a document (available in full on the Supreme Court website and the Bar's website) summarising the current process for appointment. The process includes the following:
 - (a) The Chief Justice appoints an advisory committee consisting of:
 - (i) two judges of the Court of Appeal
 - (ii) a senior judge from each of the crime, commercial and equity and common law divisions of the Court.
 - (iii) two additional more junior judges.

The committee is provided on a strictly confidential basis with a copy of each application and the reports from referees named by the applicant. The committee meets frequently over a period of 4 to 6 weeks and provides the Chief Justice with its views on the top ranking applicants.

- (b) The Chief Justice then consults with the following office holders concerning those applicants who practise in the office holder's jurisdiction and for that purpose sends to them on a strictly confidential basis a copy of the name or names of all applicants:

Chief Justice of the Federal Court
Chief Justice of the Family Court
Chief Judge of the County Court
President of the Victorian Civil and Administrative Tribunal
(VCAT)
Solicitor-General
Chairperson and Vice-Chairperson of the Bar Council
President of Law Institute of Victoria
Directors of Public Prosecution (Cth and State)
President of the Industrial Relations Commission
Chairperson of the Criminal Bar Association
Chairperson of the Common Law Bar Association
President of the Commercial Bar Association

Where relevant, chairpersons of other Bar Associations may also be consulted. Those consulted, however, are not given copies of the applications or reports from referees.

- (c) Before meeting with the Chief Justice:
- (i) The Chief Justice of the Federal Court consults with the Victorian Federal Court judges;
 - (ii) The Chief Justice of the Family Court does likewise;
 - (iii) The Chief Judge of the County Court consults with 6 judges of his court, 4 senior and 2 junior; and
 - (iv) The President of VCAT usually consults with his Deputy Presidents.
- (d) The Chief Justice next discusses the results of that process of consultation with the committee, which then further considers the ranking of the applicants having regard to the results of the consultation. This ordinarily occupies two or three meetings of the committee and, by early November, the committee furnishes the Chief Justice with its list of recommended appointees.

- (e) In the meantime, the Chief Justice herself further considers the matter and consults further with –
 - (i) the Senior Puisne Judge of the Court; and
 - (ii) the President of the Court of Appeal;
 - (f) The Chief Justice makes the appointments.
5. The Bar Council agrees with the observations of the Chief Justice that the particular strengths of the above process include the width and depth of consultation, the confidentiality of the process which allows for candour in the consultation process as well as the tangible contribution to the decision-making process from those knowledgeable and experienced in the relevant jurisdiction. Such a process of its nature cannot be fully transparent and open.
6. Further, the Bar Council considered that there are the following further advantages:
- (a) The selection process is principally in the hands of the most senior judicial officers in the State;
 - (b) By reason of her position, the Chief Justice has an unparalleled capacity to engage in candid consultation with the many members of Courts and Tribunals in the State; and
 - (c) Because of the significance of the quality of the performance of barristers in court, the Bar Council considered that the best selection process would maximise the input from judges and tribunal members, who actually observe the barristers at work.
7. The principal criticisms of the current process are that they do not include provisions for feedback or a right of review. With respect to these matters, the Bar Council reviewed the processes currently in place in New South Wales and England.
8. In New South Wales, after publication of the list of successful applicants, any unsuccessful applicant may discuss his or her application with the President of the New South Wales Bar Association, who is a member of the Selection Committee. With respect to such a provision the Bar Council noted the following:
- (a) There is no obligation on the President to disclose any matters to the unsuccessful applicant and presumably, if references are given in confidence, the President would be unable to disclose such confidential information as the basis for rejection.

- (b) As the person appointing Senior Counsel in Victoria is the most senior judicial officer in the State, it would be unreasonably onerous to expect her to consult with unsuccessful candidates on an individual basis.
9. In England, there is provision for a complaints committee to receive complaints “about the operation of the system”. It is not a review of the merits of the application. Because Victorian Senior Counsel are appointed by the most senior Judge in Victoria, the Bar Council considers it inappropriate that there should be provision for appeal from her decision.
10. In summary, the Bar Council considered that the advantages of the current process greatly outweighed any perceived disadvantages. It needs to be understood that every process of appointment will have its disappointed applicants.
11. From time to time, the Bar Council may request the Chief Justice to consider adjusting the selection process if it considers improvements can be made to it within the existing framework of the process.

MICHAEL SHAND
Chairman
Victorian Bar Council

23 February 2007