



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 itself is published on the Association’s website <http://www.nswbar.asn.au/docs/professional/silks/SCProt190407.pdf>. It sets out the essential criteria for appointment as Senior Counsel. Having examined the matter recently the Bar Council does not believe that any redefinition of the qualities of those eligible for appointment as Senior Counsel is required. Those qualities are set out in the Protocol, which also explains the process that is undertaken for the appointment of Senior Counsel. This guide does however offer some 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. The Selection Committee follows the Protocol in its work. This guide does not amend or re-interpret the Protocol.

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

4. Pursuant to the Protocol the Bar Association calls for applications for appointment as Senior Counsel on 1 July. From that date a timetable for the appointment process will operate which will result in the announcement of the appointments of Senior Counsel before 5 October this year. That timetable includes the preparation of the final list of applicants for 2007, the distribution of that list to the proposed consultation group and the making of the final selection decisions. All of these tasks are undertaken by the Selection Committee themselves with the assistance of one or two Bar Association staff members. The cost of the process is borne by the Bar Association. Consideration has been given to introducing an application fee to cater the costs of undertaking the process which are not insubstantial. For the present it has been decided not to introduce a fee whilst the cost of the process is being tracked. A more detailed timetable of the process is set out in the document that follows entitled “2007 Senior Counsel Timetable”.

### *A Recent Review*

5. Experience of the process in recent years indicated to the Bar Council that a review should be undertaken. That review occurred in February and March of this year with the matter being discussed by the Bar Council in April. That review did not result in amendment to the Protocol but led to the Bar Council

making recommendations to improve the quality of information available to the Selection Committee and other aspects of the process. One of those recommendations was that this guide should be published at the time that applications for the appointment of Senior Counsel for 2007 were called.

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 all 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 to appoint Queens 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 by the independent Bar itself of the process is important in ensuring that the Bar's future leadership is moulded by the Bar itself.
9. The present system for the appointment of Senior Counsel has been operating since 1993. Appointments have been made every year since then. Since 1993 Senior Counsel appointed under the protocol have subsequently been appointed to the benches of all New South Wales State Courts and Federal Courts.

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

10. Clause 9 of the Protocol provides for the President and the Senior Vice President of the Bar to be ex officio members of the Selection Committee. Three other members nominated by the President also comprise the Committee. The President of the Bar Association takes a leading role in explaining the process of the selection of Senior Counsel to members of the Bar and the general public. The President and often either the Senior Vice President or another member of the Selection Committee participates in the interviews which are offered to unsuccessful applicants at the conclusion of the selection process each year.
11. Last year of the 128 applicants for appointment as Senior Counsel 17 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. On average these interviews took about half an hour.

12. On 26 June 2007 the President conducted a seminar in relation to the process. He was assisted by Garling SC, who served on the 2005 Selection Committee. In the course of that seminar the President offered to speak to any potential applicant who has difficulty in following any aspect of the process after reading the Protocol and this guide. He also offered again to see any unsuccessful applicant from last year who had not already taken the opportunity to have an interview following the 2006 selection process.
13. 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. 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.

#### *The Consultation Process*

14. 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 legal practitioners, 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 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 consultation group is one of the early tasks of the Selection Committee. Change in the Consultation Group helps ensure that particular legal practitioners do not have influence over the selection process over time.
15. 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 in recent years, many other courts and tribunals have been consulted apart from those specifically identified in the Protocol.
16. In practice also a far larger number of legal practitioners are consulted as part of the Consultation Group than the minimum numbers prescribed by Clause 11 of the Protocol. In 2006 for example a total of more than 420 judges and other members of the profession were consulted as part of the Consultation Group and the Judicial Consultation Group.
17. 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.
18. In the light of this consultation process, if any applicant wishes any special feature of his or her practice (such as the conduct of a substantial interstate or

overseas practice or involvement in a single long case in recent years) to be noted in the consultation process then he or she can of course raise that issue in the application.

19. It should be noted that the High Court of Australia does not form part of the Judicial Consultation Group. Some applicants will however often appear in the High Court. The appearances of applicants before the High Court will be taken into account through the consultation of other legal practitioners appearing in the High Court.
20. The Chief Justice of New South Wales is referred to in the Protocol 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 of applications at the same time as the rest of the Judicial Consultation Group. His involvement in the consultation process is reserved for the exercise of the functions provided for by Clause 23 of the Protocol.
21. 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 about applicants. 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.

#### *The Process this Year*

22. One change to the process this year is the provision of further information about the operation of the Protocol. This guide and the holding of the seminar by the President on 26 June are examples of this approach.
23. A second change this year is the improvement of the consultation forms so that each of the consultation groups are required to indicate whether they have 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.
24. Selection Committees have generally not conducted interviews with applicants in the past. 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 Content of the Application Form*

25. The application form is downloaded from the Bar Association's website and is relatively simple. <http://www.nswbar.asn.au/docs/professional/silks/Silk-Invitation-and-Cover-sheet-2007.pdf>. 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 have been referred to in this Guide. Some more appear in this section.

26. In practice a wide range of choices are made by applicants about how they provide information to the selection committee. The choices made often reflect both the nature of the practices and the personal approach of the applicants. The way that the application is prepared will often help in providing some part of the committee's overall impression of applicants.
27. An applicant will usually provide information in his or her application which the applicant believes will assist the Selection Committee in considering that the applicant has the qualities in the high degree required by Clause 6 of the Protocol for appointment as Senior Counsel. For example this would include a sufficient description of the experience of each applicant so as to give a clear picture of the applicant's experience to the Selection Committee for the purpose of applying Clause 6 (g) of the Protocol. Applicants often listed their appearances in the various superior courts over the last two or three years and provided brief commentary on some cases that they believe may assist the Selection Committee
28. Some applicants who practice extensively in interstate tribunals that are not consulted, or who practice in fields which either involve substantial chambers practices, or where they are almost invariably led due to the size of the cases (and taxation and Part IV of the *Trade Practices Act*) should note that in their applications so that appropriate attention to their special circumstances can be given by the Selection Committee.
29. The seniority of applicants is considered by the Selection Committee as dating 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 often note that prior experience in their applications.
30. Applicants should include in their application 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 about such matter or circumstances.

Michael Slattery QC  
President

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