

26 February 2013

The Members
Law Society of Western Australia

Dear Members

FINAL PAPER: THE APPOINTMENT OF SENIOR COUNSEL IN WESTERN AUSTRALIA POSITION OF THE SOCIETY AS AT NOVEMBER 2012

The Law Society of Western Australia reviewed the process for the appointment of Senior Counsel in Western Australia over the past year. A Final Paper has now been approved by Council and it is my pleasure to provide it to you.

It is the genuine wish of the Council that this paper contributes in a positive way to improving this key feature of the legal profession.

While the paper could not adopt everyone's view the thoroughness of the work, consultation and conferral will at least have seen each view carefully considered. The report treated those, often disparate, views with great deference. I hope that those that read the paper treat it with equal regard.

That process of engagement with the various people and institutions that contribute or affect the appointment process is ongoing. The Society holds no authority to make change, it can only advocate for change. I anticipate that the process of change will take time and the Society will work encourage the improvement set out in this paper.

With that in mind, this final paper was provided to the Chief Justice of Western Australia and to the Bar Association of Western Australia before it was released to Members.

Please note

It is important to note in reading this paper, that the Chief Justice has informed the Society that he does not consider that either the most recent paper, or the discussion paper previously published by the Society as part of the consultation process accurately describe the current process for the appointment of Senior Counsel.

Recommendations

Importantly, there are seven recommendations:

1. The Society continues to support the retention of Senior Counsel in Western Australia.
2. The Society continues to support the criteria for appointment listed in paragraph 4 of Practice Direction 10.3. However, the Society recommends the addition of a further element of "leadership in the practice and ethics of law" to the list of criteria in the Practice Direction.
3. The Society recommends that appointment of Senior Counsel continue to be open to solicitors and barristers and that the criteria for appointment be modified to ensure non-discrimination on the basis of mode of practice.
4. The Society continues to support the current appointment process and recommends that the Presidents (or their nominee) of the Law Society of Western Australia, the Western Australian Bar Association and Women Lawyers WA be added to the Chief Justice's Consultation Committee.
5. The Society recommends that paragraph 13 of Consolidated Practice Direction 10.3 be amended to require all applicants to address the criteria in paragraph 4 and to provide at least three referees in their application.
6. The Society amended its Protocol for the Appointment of Senior Counsel to include a member of the Young Lawyers Committee who is also a member of the Law Society Council.
7. The Society recommends that unsuccessful applicants be advised in writing of the reasons why they were unsuccessful.

Three of these points stand out as suitable improvements for the appointment process to be adopted as soon as practicable being:

2. The criteria for appointment listed in paragraph 4 of Practice Direction 10.3 be amended to add a further element of "leadership in the practice and ethics of law".
3. That appointment of Senior Counsel be open to solicitors and barristers and that the criteria for appointment be modified to ensure non-discrimination on the basis of mode of practice.
5. That paragraph 13 of Consolidated Practice Direction 10.3 be amended to require all applicants to address the criteria in paragraph 4 and to provide at least three referees in their application.

The Society has already amended its Protocol for the Appointment of Senior Counsel to include a member of the Young Lawyers Committee who is also a member of the Law Society Council. Such a person participated in the Society's consultation process for the appointment senior counsel in 2012.

I hope you take some time to consider the paper and take the recommendations as proposals intended to improve the standing of the appointment process and respect for the position of senior counsel in the legal profession.

Thank you again to those who provided feedback in this matter and contributed to the depth and width of the consultation. I am grateful for that assistance as is the Council.

Yours sincerely

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

Craig Slater
President

THE APPOINTMENT OF SENIOR COUNSEL IN WESTERN AUSTRALIA

THE LAW SOCIETY OF WESTERN AUSTRALIA

Final Paper Prepared by the Executive of the Law Society of Western Australia for consideration by the Council of the Law Society of Western Australia

21 November 2012

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Introduction

1. In May 2012, the Council of the Law Society of Western Australia (**Council**) held a Special Council Meeting to consider the position of the Law Society on the appointment of Senior Counsel in Western Australia.
2. This meeting arose after a lengthy period of consultation with Society members and relevant stakeholders (discussed in detail below). Its purpose was to consider a Draft Policy Paper prepared by the Executive of the Law Society of Western Australia that outlined the history of the appointment of Senior Counsel in Western Australia, as well as the current process for appointment of Senior Counsel throughout Australia and internationally.
3. Whilst no final decisions were made or recommendations passed at the May 2012 Special Council Meeting, the Council requested that the Executive re-draft the Draft Policy Paper prepared for the Special Council Meeting and prepare a Final Paper to enable that Paper to serve as explanation of the Council's position to third parties and to take into consideration the many issues discussed at the May 2012 Special Council Meeting.
4. In summary, the conclusions articulated at the May 2012 Special Council Meeting as important and arising from a process of consideration, consultation and debate in relation to the appointment of Senior Counsel in Western Australia were as follows:
 1. The Society continue to support the retention of Senior Counsel in Western Australia.
 2. The Society continue to support the criteria for appointment listed in paragraph 4 of Practice Direction 10.3. However, the Society recommend that the Chief Justice of Western Australia add a further element of "leadership in the practice and ethics of law" to the list of criteria in the Practice Direction.
 3. The Society recommend to the Chief Justice of Western Australia that appointment of Senior Counsel continue to be open to solicitors and barristers and that the criteria for appointment be modified to ensure non-discrimination on the basis of mode of practice.

4. The Society continue to support the current appointment process and recommend to the Chief Justice of Western Australia that the Presidents (or their nominee) of the Law Society of Western Australia, the Western Australian Bar Association and Women Lawyers WA be added to the Chief Justice's Consultation Committee.
 5. The Society recommend to the Chief Justice of Western Australia that paragraph 13 of Consolidated Practice Direction 10.3 be amended to require all applicants to address the criteria in paragraph 4 and to provide at least three referees in their application.
 6. The Society amend its Protocol for the Appointment of Senior Counsel to include a member of the Young Lawyers Committee who is also a member of the Law Society Council.
 7. The Society recommend to the Chief Justice of Western Australia that unsuccessful applicants be advised by the Chief Justice in writing of the reasons why they were unsuccessful.
5. In substance, all of these points reflect the Council's objective that the Law Society should be a leader in ensuring that the processes for appointment remain relevant and consultative.
 6. This Final Paper has been prepared by the Executive of the Law Society of Western Australia for the consideration of the Council at its November 2012 Council meeting. It provides an overview of the historical and current criteria and appointment processes for Senior Counsel in Western Australia and compares these to the processes currently used in all other Australian and some overseas jurisdictions. Finally, it summarises submissions received by the Council and outlines in detail seven recommendations based on these submissions and discussions with relevant stakeholders throughout 2011 and 2012. Council will be asked to approve or reject these seven recommendations at its November 2012 Council meeting.

Background

The 2011 Ad Hoc Committee on the Appointment of Senior Counsel

7. At a meeting of the Council of the Law Society of Western Australia held on 9 August 2010 the Law Society adopted, on an interim basis, a Protocol to assist the President (or his/her nominee) to meaningfully participate in the consultation process as required by paragraph 10.3 (18)(d) of the Consolidated Practice Directions.
8. The Society's Protocol was introduced shortly after the WA Bar Association released its own protocol.
9. At the 9 August 2010 meeting, questions were asked about whether the Law Society Protocol required clarification or amendment to ensure that contributions made by the Society were appropriate to the process as a whole.
10. Other concerns raised at this meeting were akin to some of the concerns raised in 2010 by the then President of the WA Bar Association when outlining the Bar's decision to introduce the WA Bar Association Protocol. The WA Bar Association's protocol aimed to improve the Bar's consultation and advisory process. The Bar President noted that the Bar's decision to adopt its protocol stemmed from concerns raised in relation to:¹
 - (a) confidentiality of the process;
 - (b) the need for wider consultation;
 - (c) uncertainty in relation to the meaning of the word "eminence" as that word appears in the relevant Practice Direction; and
 - (d) the need for constructive feedback for unsuccessful applicants.
11. At the August 2010 Council meeting, the Council resolved to establish an Ad Hoc Committee to consider the Society's role in the current consultation process and to prepare a Discussion Paper to that effect for consideration by Council (**Ad Hoc Committee**).

¹ Grant Donaldson SC, "Silk Protocol" (2010) 8 *Western Australian Bar Association Review* 7-9.

12. The Ad Hoc Committee first met in early 2011. At its first meeting, it adopted the following terms of reference:
- (a) Should the Law Society of Western Australia support the appointment of Senior Counsel in the State of Western Australia?
 - (b) If yes, are the current criteria and procedure for the appointment of Senior Counsel, as set out in Practice Direction 10.3, satisfactory?
 - (c) If no:
 - i. what changes to the current procedure should be implemented?
 - ii. should the Society continue to participate in the consultation process envisaged in paragraph 10.3(18)(d) of the Practice Direction?
 - (d) If yes, is the Society's conferral protocol appropriate and, if not, what changes should be made to it?
13. The Ad Hoc Committee's Discussion Paper was given to the Council in November 2011. It made the following recommendations:
- (a) Provided the flaws in the system of appointment are addressed by appropriate reform of the system, the Law Society should continue to support the appointment of Senior Counsel in Western Australia.
 - (b) The overarching criteria for appointment should be eminence in the practice of law and leadership of the profession.
 - (c) Accordingly, the criteria for appointment should include a requirement that the applicant:
 - i. is a recognised leader within the areas of law in which he or she practises;
 - ii. has demonstrated a commitment to equality of opportunity and fair and unbiased treatment of fellow practitioners irrespective of gender, race, sexual orientation or religion; and
 - iii. will be available to advise members of the profession on matters of ethics and practice.

- (d) The criteria for appointment should not discriminate between practitioners practising at the Bar and those practising elsewhere. The criterion which limits appointments only to those practitioners who are available generally to prospective clients and are not restricted by client relationships should be removed.
- (e) The appointment process should be under the control of a committee comprising members of the judiciary and representatives of Western Australian Bar Association (Inc), the Law Society of Western Australia, Women Lawyers of WA (Inc), Criminal Lawyers Association of WA and Family Law Practitioners Association (WA).
- (f) The process of appointment should not contain any element of automatic consultation or secret soundings but should focus on assessment based only on those persons who have personally seen or dealt with the applicant.
- (g) The Chief Justice's only role in the appointment process should be a power to veto recommendations made by the committee.
- (h) The Law Society should not continue to participate in the consultation process envisaged in paragraph 10.3(18)(d) of the Practice Direction whilst it remains flawed.

Council Seeks Consultation after Receipt of the Ad Hoc Committee's Discussion Paper

- 14. At its December 2011 Council meeting, Council noted the Ad Hoc Committee's Discussion Paper but deferred a decision regarding the recommendations in the Discussion Paper pending consultation with the wider profession.
- 15. It was agreed that, given the content and recommendations of the Ad Hoc Committee's Discussion Paper, a copy of the Paper should first be provided to the Chief Justice for comment.
- 16. Further, it was agreed that the Society's substantive law committees and the Young Lawyers Committee, the WA Bar Association, Women Lawyers WA, the Criminal Lawyers Association, the Family Law Practitioners Association and the Corporate Lawyers Association of Perth would be provided with a copy of the Ad Hoc Committee's Discussion Paper and invited to submit comments.

17. A copy of the Ad Hoc Committee's Discussion Paper was provided to the Chief Justice in January 2012. His Honour wrote a letter to the Society outlining concerns regarding the content of the Paper.
18. Following receipt of the Chief Justice's letter, Council agreed that the Ad Hoc Committee Discussion Paper should be released for comment to members with a watermark, to read as follows: "Ad Hoc Committee Discussion Paper for Consideration by the Law Society of Western Australia Council".
19. It was also agreed that a highlighted note would appear on the bottom of each page of the Ad Hoc Committee's Discussion Paper, to read as follows: "Note: The Society has not adopted a position in relation to any of the matters traversed in the Discussion Paper. The Society's Council has resolved only to consult widely from its constituents in relation to the issues and recommendations in the Discussion Paper."
20. It was further agreed that in the 3 February 2012 edition of Friday Facts Law Society members would be given the opportunity to review the Ad Hoc Committee's Discussion Paper and to submit any comments and views to the Society by 2 March 2012. The Discussion Paper would only be made available via the Society's website in the "Members Only" section.
21. It was further resolved that all submissions received would be considered by the Society's Council in May 2012. It was agreed that the Council would not adopt any position in relation to the Discussion Paper's content and recommendations, any of the submissions received or the process of appointment generally until that time.

List of Submissions Received

22. In addition to the information provided in the Ad Hoc Committee's Discussion Paper and the comments made by the Chief Justice in his letter to the Society dated 31 January 2012, the Council has relied, in confidence, on submissions and comments received from the following individuals, organisations and Law Society Committees in determining how best to address this issue:
 - (a) The WA Bar Association, written submission dated 28 February 2012;
 - (b) Grant Donaldson SC, letter dated 13 February 2012;
 - (c) Steven Penglis, letter dated 9 February 2012;
 - (d) The Young Lawyers Committee, written submission 2 March 2012;
 - (e) The Women Lawyers of Western Australia (Inc), letter dated 2 March 2012;

- (f) John A Tregonning, email comments dated 14 March 2012;
- (g) Katja Levy, written submission dated 29 February 2012;
- (h) Geoffrey Hancy, written submission dated 22 April 2012;
- (i) Stephen Davies SC, letter dated 9 March 2012;
- (j) The Alternative Dispute Resolution Committee, comments;
- (k) Anonymous committee member, comments;
- (l) The Costs Committee, comments;
- (m) The Courts Committee, comments;
- (n) The Ethics Committee, comments;
- (o) The Joint Law Society/Women Lawyers Committee, comments;
- (p) The Personal Injuries and Workers Compensation Committee, comments;
- (q) The Property Law Committee, comments;
- (r) The Employee Relations Committee, comments;
- (s) The Criminal Law Committee, comments; and
- (t) The Taxation Committee, comments.

23. It was agreed by the Law Society's Council that all responses received in relation to the Ad Hoc Committee's Discussion Paper were to be treated as confidential and would not be released to the public generally. The Law Society relies heavily on the frank assistance of its membership and the profession generally and believes that it would not fostering further assistance if it were to publicise all of the responses received. The Law Society's role is to filter, appropriately, the responses it received in order to address their substance and to do so without reference to any preconceived opinions about the source.

24. The Society thanks all those who contributed submissions and comment for their time and effort. The comments received were extremely informative and valuable. The Society also thanks all those involved in the writing of the Ad Hoc Committee's Report on the Appointment of Senior Counsel in Western Australia in 2011. All contributions were provided voluntarily and without any expectation of reward. Thank you also to the Society staff that assisted with this project.

Structure of this Final Paper

25. In determining how best to proceed, the Society has been guided by:

- the history of appointment of Senior Counsel in Western Australia,
- the current practices in other jurisdictions and,

- importantly, the submissions received by the Society in relation to the 2011 Ad Hoc Committee's Discussion Paper.

26. What follows is a summary of this material, followed by an analysis of the seven recommendations now made to Council.

Current Process and Criteria for Appointment of Senior Counsel in Western Australia

27. Prior to 2001, the state government was responsible for the appointment of Queen's Counsel in Western Australia.

28. In 2001 the government announced that it would no longer be involved in the appointment process.

29. Following this announcement, the government gazetted The Queen's Counsel (Procedure for Appointment) Repeal Regulations 2001.

30. In September 2001, the Supreme Court of Western Australia issued a Practice Direction in relation to the appointment of Senior Counsel to take effect on and from the date of gazettal of the Repeal Regulations. This Practice Direction was replaced by Practice Direction 10.3 (the "Practice Direction") of the Consolidated Practice Directions of the Supreme Court of Western Australia.²

31. As a result of the Practice Direction, the office of Senior Counsel is continued in Western Australia.

32. Paragraph 4 of the Practice Direction outlines the four principal criteria for appointment as Senior Counsel:

- (a) Eminence in the practice of law, especially in advocacy;
- (b) Integrity;
- (c) Availability; and
- (d) Independence.

33. Paragraph 5 states that "eminence" includes:

² A copy of Practice Direction 10.3 can be found at:
<http://www.supremecourt.wa.gov.au/publications/pdf/SCPracticeDirections.pdf>

- (a) high intellectual capacity, comprehensive and up to date knowledge of the law and procedures in the chosen field of practice, and of legal method; and
- (b) a demonstrated commitment to the provision of the highest level of service and the pursuit of excellence.

34. Paragraph 6 adds:

These attributes are likely to be reflected in the appointee having a substantial and high quality practice, largely based on demanding cases.

35. Paragraph 7 states that “integrity” includes:

- (a) a history of and reputation for honesty, discretion and plain dealing with the courts, professional colleagues, and lay and professional clients;
- (b) independence of mind and moral courage;
- (c) professional standing, namely, having the respect of the judiciary and the profession with respect to observing duties to the courts and to the administration of justice, while preparing and presenting a client’s case with dedication and skill, and having the trust and confidence of professional colleagues; and
- (d) maturity of judgment and balance based on many years practice of the law.

36. “Availability” is defined in paragraph 8 as:

Availability involves a practitioner adopting a mode of practice which ensures that his or her services are available generally to prospective clients and are not restricted by client relationships (whether between the practitioner and clients or others associated with the practitioner, such as partners).

37. “Independence” is defined in paragraph 9 as:

Independence is essential to objectivity and detachment which are, in turn, fundamental to sound judgment and the observance of duties to the courts. Independence has a practical aspect, namely the absence of connections which may unduly restrict the availability of a practitioner. It also has an intellectual and moral aspect, namely the perception, courage and experience to make decisions which serve the best interests of the client and the administration of justice.

38. Finally, paragraphs 10 to 12 read:

10. The interests of the administration of justice will only be served if appointees are, and are recognised as, persons of conspicuous ability. With the development of a national legal profession in Australia, the applicable criteria shall have regard to the highest standards achieved and expected to be achieved by counsel in Australia.
11. These criteria are not intended to diminish the overall and fundamental requirement that an appointee shall have demonstrated over many years outstanding ability as counsel.
12. These criteria apply to all counsel, save that the criterion of availability does not apply to those counsel holding statutory offices or otherwise employed by the State and its instrumentalities.

39. Paragraphs 15 to 23 of the Practice Direction outline the process of consultation, as follows:

Consultation

15. For the purposes of consultation in relation to applications for appointment, the Judges and Master of the Supreme Court have resolved to create a Committee (the Committee) comprising:

The Chief Justice;

President, Court of Appeal;

Senior Puisne Judge;

President of the State Administrative Tribunal;

Chief Judge of the Family Court of Western Australia or his or her nominee;

Chief Judge of the District Court of Western Australia or his or her nominee; and

Senior Judge of the Federal Court resident in Western Australia or his or her nominee.

16. The Chief Justice will consult with the Committee. Without limiting the nature or extent of that consultation, the Chief Justice will provide to the Committee for its comment the list of applicants, their applications and any comments received in the process of consultation.

17. After the period has passed in any year for applications to be made for appointment, the Chief Justice will circulate a list of the names of applicants to all members of the Supreme Court for comment if they wish. Copies of applications made will be available to members of the Court upon request.
18. The Chief Justice will also consult:
 - (a) the President of the Industrial Relations Commission;
 - (b) the Chief Magistrate in Western Australia;
 - (c) the Solicitor General for the State of Western Australia;
 - (d) the President or other nominee of the Law Society of Western Australia;
 - (e) the President or other nominee of the Western Australian Bar Association (Inc);
 - (f) the President or other nominee of Women Lawyers of WA (Inc);
 - (g) representatives of existing Senior Counsel (including Queen's Counsel);
 - (h) the President or other nominee of the Criminal Lawyers Association of WA;
and
 - (i) the President or other nominee of the Family Law Practitioners Association (WA)and may consult anyone else the Chief Justice or the Committee considers appropriate.
19. The Senior Judge of the Federal Court resident in Western Australia or his or her nominee may convey to the Committee the results of such consultation with the Judges of the Federal Court resident in Western Australia as the Senior Judge considers appropriate.
20. The Chief Judge of the Family Court of Western Australia or his or her nominee may convey to the Committee the results of such consultation with Family Court Judges and the Family Law Practitioners Association of WA (Inc) as the Chief Judge considers appropriate.
21. The Chief Judge of the District Court of Western Australia or his or her nominee may convey to the Committee the results of such consultation with District Court Judges as the Chief Judge considers appropriate.

22. The fact that an application has been made, and its terms, shall be regarded as confidential, and only disclosed to the extent necessary to enable the processes of consultation and the workings of the Committee referred to herein. Those consulted by the Chief Justice, and members of the Committee, are at liberty to consult with others within the organisation or court of which they are a member on a confidential basis, and for that purpose may disclose the fact that an application or applications have been made, and the content of that application or applications. All consultations should be undertaken with discretion, respecting as far as possible the privacy of applicants.
23. Where a specific allegation adverse to an applicant is made in the course of the process of consultation or the deliberations of the Committee, the applicant will be given the opportunity to respond to the allegation, either in writing or, at the invitation of the Chief Justice, personally. Where a general question of suitability arises, the Committee will ensure that it has sufficient information to make a judgment on the application, but will not necessarily put that question to the applicant for his or her comment.

Historical Overview

40. It is useful in this context to first analyse what, historically, has already been said or actioned in relation to the appointment of Queen's Counsel and Senior Counsel in Western Australia.
41. The role of Senior Counsel in Western Australia finds its source and justification in United Kingdom precedent.
42. Although the writers of this paper are not generally inclined to quote from Wikipedia, the following does appear to be historically sound:

The Attorney-General, Solicitor-General, and King's Serjeants were King's Counsel in Ordinary in the Kingdom of England. The first Queen's Counsel Extraordinary was Sir Francis Bacon, who was given a patent giving him precedence at the Bar in 1597, and formally styled King's Counsel in 1603.

The new rank of Queen's Counsel contributed to the gradual obsolescence of the formerly more senior Serjeant-at-law by superseding it. The Attorney-General and Solicitor-General had similarly succeeded the King's Serjeants as leaders of the Bar in Tudor times, though not technically senior until 1623

(except for the two senior King's Serjeants) and 1813 respectively. But the Queen's Counsel only emerged into eminence in the early 1830s, prior to when they were relatively few in number. It became the standard means of recognising that a barrister was a senior member of the profession, and the numbers multiplied accordingly. It became of greater professional importance to become a QC, and the serjeants gradually declined. The QCs inherited not merely the prestige of the serjeants, but their priority before the courts. The earliest English law list, published in 1775, lists 165 members of the Bar, of whom 14 were Queen's Counsel, a proportion of about 8.5%.

Queen's Counsel and serjeants were initially prohibited, at least from the mid-nineteenth century, from drafting pleadings alone; a junior barrister had to be retained. They were also not permitted to appear in Court without a junior barrister, and they had to have chambers in London. From the beginning, they were not allowed to appear against the Crown without a special licence, but this was generally given as a formality. This was particularly important in criminal cases, which are mostly brought in the name of the Crown, with the result that, until 1920 in England and Wales, King's and Queen's Counsel had to have a licence to appear in criminal cases for the defence.

These restrictive practices had a number of consequences: they made the taking of silk something of a professional risk, because appointment abolished at a stroke some of the staple work of the junior barrister; they made the use of leading Counsel more expensive, and therefore ensured that they were retained only in more important cases, and they protected the work of the junior bar, which could not be excluded by the retention of leading Counsel. By the end of the twentieth century, however, all of these rules had been abolished one by one, so that appointment is now a matter of status and prestige only, with no formal disadvantages.³

The 1980 Clarkson Committee Report

43. The most comprehensive review of the appointment of Queen's Counsel in Western Australia was undertaken in 1980 by the Clarkson Committee - a Committee chaired by Gresley Clarkson QC (as he then was) and established by the WA government to

³ See: http://en.wikipedia.org/wiki/Queen%27s_Counsel.

enquire into and make recommendations regarding the legal profession as a whole.⁴ Relevantly, the issues covered by the Clarkson Committee included the appointment of Queens Counsel.

44. The writers of this Paper repeat and provide in detail below those sections of the 1983 Clarkson Committee Report (found at pages 278-300 of the Clarkson Committee Report) that are most relevant to the current inquiry.
45. As outlined in the Clarkson Committee Report, the Queen's Counsel Appointment Regulations 1900 commenced on 5 October 1900, with all appointments made by the Governor in Executive Council upon the Chief Justice's recommendation transmitted by the Attorney General through Cabinet. The Clarkson Committee Report notes⁵ that the legal framework set out in Regulation 1 of regulations made by the Governor in Council, dated 19th September 1900, provided as follows:
 - (a) No barrister shall be appointed Her (His) Majesty's Counsel except on the recommendation of the Chief Justice to the Governor in Council.
 - (b) On every such appointment, a fee of three guineas shall be paid for the patent, at the Office of the Colonial Treasurer.
 - (c) No Queen's Counsel shall in any case appear against the Crown, unless he shall have previously obtained the permission of the Governor in Council.
46. The Committee highlighted⁶ that the word "barrister" is used above, rather than "legal practitioner", which is defined in s. 3 of the Legal Practitioners Act 1893 to mean "a person admitted entitled to and practise as a barrister, solicitor, attorney, and proctor of the Supreme Court of Western Australia or one or more of these capacities."
47. There were a few minor amendments to the regulations (most pertaining to fees) in the years that followed, but in 1936 the Governor in Executive Council resolved to amend the regulations as follows:

Regulation 1 ... relating to the appointment of His Majesty's Counsel shall not apply to any person who is a Senior Law Officer of the Crown, viz the Solicitor

⁴ See: Clarkson Committee, *Inquiry into the Future Organisation of the Legal Profession in Western Australia: Report* (Perth: Government Printer, 1983), 352 pages.

⁵ Ibid. at 279.

⁶ Ibid. at 280.

General or the Crown Solicitor, and the Governor may act on his own initiative in appointing any such person as Counsel.⁷

48. The Clarkson Committee Report explains that, in relation to the appointment of practitioners not practising at the Bar (ie, those from private practice), there had been considerable discussion by the legal profession in Western Australia. In August 1970, for example, a general meeting of the Law Society of Western Australia resolved that it was of the opinion that Queen's Counsel should not be selected merely from practitioners practising as barristers only.⁸
49. It is further noted by the Clarkson Committee⁹ that this resolution was relayed to the Chief Justice, Sir Lawrence Jackson K.C.M.G., who replied to the Society. The then President of the Society summarised the Chief Justice's response in the Society's January 1971 circular as follows:

The Honourable The Chief Justice has now made known to the Council of the Law Society in a letter to me his views concerning the above problem following the meeting of the Society in August when it resolved that it was of the opinion that Queen's Counsel should not be selected merely from people practising as Barristers only.

His Honour has advised that after giving careful consideration to the resolution of the Society the Judges are unanimously of the opinion that His Honour should adhere to the view previously expressed in his letter to my predecessor in office, namely that he should not recommend for appointment as Queen's Counsel members of the profession who intend to continue to practise as solicitors.

The reasons His Honour advanced in support of his reaffirmation of his earlier decision in short, are that "the purpose of the appointment of Queen's Counsel is to advance the administration of justice, not to honour or enrich an individual. The appointment is a public declaration, based on professional judgement, that the appointee is competent to undertake the more difficult and more important forensic work, as distinct from the advisory and regulatory work of the profession.

⁷ Ibid. at 279-280.

⁸ Ibid. at 281.

⁹ Ibid at 282-283.

The public purpose is only achieved if the “silk” is available to do the work for which he was appointed. If this is not so then the public interest did not require that appointment. If a "silk" continues to practise as a solicitor, such practice necessarily impinges on his availability as counsel both directly, and also indirectly, by his being drawn into permanent interest situations either personally or through his firm.

His Honour pointed out that if it was thought proper to recognise and honour a solicitor for his ability and distinction in the profession, some term other than Queen's Counsel should be sought.

As to future practice concerning the appointment of silk, His Honour pointed out that it was his view that he should invite the practitioner to apply for appointment rather than the practitioner initiate the application but this procedure did not of course prevent a practitioner applying to His Honour if he thinks his claims have been overlooked."

50. In 1980, in a letter to the Clarkson Inquiry,¹⁰ Sir Lawrence Jackson further explained:

“Put shortly, I do not consider it desirable that a solicitor, practising as such, should be appointed a Queen's Counsel unless he undertakes to practise thereafter only as a barrister. It is simply a misnomer to call a solicitor a Queen's Counsel. If a person practises both as a barrister and as a solicitor, he should not be appointed a Queen's Counsel if he wishes to continue in both roles, because there is no way in which a line of demarcation can be drawn between his two roles; and because his availability as Counsel is limited by his solicitor's practice, both as to time and as to conflicting interests.”

51. In relation to this issue, the Clarkson Committee Report notes that on 15 August 1978 a general meeting of the Law Society debated a motion (on notice) prior to which “for” and “against” arguments had been circulated to the members of the Society. The Society resolved by 64 votes to 43 that appointment should not be restricted to those practising or undertaking to practise solely as barristers.¹¹

52. The Clarkson Committee Report explains that a Law Society Committee was then appointed to raise the entire issue with the Chief Justice, Sir Francis Burt. As a result

¹⁰ Ibid. at 283-284.

¹¹ Ibid. at 284.

of these discussions, it became clear that the Chief Justice had written to the Attorney-General in 1977 informing him that an undertaking that the appointee would practise solely as a barrister (rather than as a member of a firm) would not be required as a condition of appointment.¹²

53. As stated to the Clarkson Inquiry in submissions from both the Law Society and the Western Australian Bar Association, the Chief Justice had made it clear to them that the criterion for appointment was “displayed eminence in counsel work”, such that in the case of a person practising within a firm of barristers and solicitors, the applicant would need to show that he was practising within the firm exclusively or virtually exclusively as a barrister.¹³
54. The Clarkson Inquiry further noted that it had been advised by the Chief Justice that it would be “exceedingly difficult in practice to satisfy him on this point because of the demands made upon the time of a person practising within a firm.” The then present Chief Justice, so the submissions advised the Inquiry, made it clear that he was willing to entertain an application from any lawyer who considers himself suitably qualified.¹⁴
55. As outlined in the Clarkson Committee Report,¹⁵ both the Law Society and the WA Bar Association were of the view that the Chief Justice’s statements made it clear that the relevant criteria for the appointment of Queen’s Counsel in Western Australia could be summarised as follows:
 - (a) eminence in the field of advocacy, including a competency to undertake the more difficult and more important forensic work as distinct from the advisory and regulatory work of the profession;
 - (b) availability in the sense of being free from client relationships (although this does not preclude retainers); and
 - (c) freedom in mode of practice from the usual administrative burdens of the solicitors office and from personal involvement, to any significant degree, in the process of preparing the brief or getting up the case for trial.

¹² Ibid. at 284.

¹³ Id.

¹⁴ Id.

¹⁵ Ibid. at 285.

56. The Clarkson Committee Report summarise these criteria as “eminence”, “availability” and “freedom in mode of practice” (elsewhere, according to the Committee, described as “independence”).
57. The Clarkson Committee Report then analyses these criteria in detail and provides as follows.¹⁶

“In its submission, the Law Society of Western Australia, after stating that there is general support within the profession in Western Australia for the criterion of eminence measured by eminence in the field of advocacy, pointed to a basic division of thinking amongst members of the legal profession - between those who believe that eminence should, by and large, be the determining criterion to be applied in making appointments and those who support the application of additional criteria bearing upon the availability and freedom in mode of practice. (The Society) stated:-

... from a practical stand point the dividing issue is whether or not an appointee should be free to remain a member of a firm within the amalgam profession practising as both a barrister and solicitor or whether the conditions of appointment should be such as really require him to practise thereafter solely as a barrister.¹⁷

58. The Clarkson Committee Report notes that, in its submission to the Committee, the Law Society summarised arguments supporting both views. Further, the WA Bar Association argued that “availability” and “freedom in mode of practice” should continue to constitute part of the criteria for appointment. The WA Bar Association explained:

It is conceivable that a practitioner could satisfy the requirements of ... [freedom in mode of practice] and availability while remaining a practitioner in the amalgam, but the WABA considers that it would be extremely difficult to do so. Consequently, it is envisaged that appointment as Queen's Counsel of a practitioner intending to practise in the amalgam is likely only in rare and exceptional cases.¹⁸

¹⁶ Ibid. at 285-295.

¹⁷ Ibid at 286.

¹⁸ Id.

59. The Clarkson Committee Report then proceeds to analyse matters which, in the opinion of the Committee, are relevant to any discussion of this issue and which are unique to Western Australia.

60. Firstly, the Report notes that the profession is "fused" not "divided", such that a person admitted to practise law in Western Australia, who thereby becomes a legal practitioner, is a person admitted and entitled to practise as a barrister, solicitor, attorney and proctor of the Supreme Court of Western Australia, or in any one or more of those capacities.¹⁹

61. The Report further notes that the WA Bar Association had told the Clarkson Inquiry that:-

Technically, however, there is no reason why a person should not be admitted as a barrister or solicitor only.²⁰

62. The Report notes, however, that no person had ever been admitted under the Act as a barrister only or solicitor only. The Report explains that the general position is that the Western Australian profession is a fused profession – not a divided profession as in England.²¹

63. The Report also explains that there had been Queen's Counsel practising in partnership in Western Australia:

Until 1960 all Queen's Counsel practised as members of firms. Since 1960 there have been nineteen resident practitioners appointed, in practice only two of whom have been in firms. The reason for this change was a policy introduced by Sir Albert Wolff, then Chief Justice early in the 1960's (following the development of the voluntary bar) under which he would only recommend for appointment as Queen's Counsel those who were practising at the voluntary bar or those who undertook to him so to do.²²

64. The Report further explains that the position was confused by the fact that after some years where no appointment of Queen's Counsel was made except from among those practising at the voluntary bar, the second most recent appointment (at the time of the

¹⁹ Ibid. at 286-287.

²⁰ Ibid. at 287.

²¹ Id.

²² Id.

Inquiry) from among Western Australian legal practitioners was of a person practising as a barrister in a partnership.²³

65. This led the Clarkson Committee to conclude that “the result is that the present criteria may be taken to be applicable both to those who practise at the voluntary bar and those who practise in partnership”.²⁴
66. The Committee Report then highlights that in Western Australia, before the formation of the voluntary bar in 1961, it seems that eminence as an advocate was most significant in relation to the appointment of silk:

Necessarily those appointed before 1961 were in almost every case also practising in fields other than advocacy. The appointment of a Master of the Supreme Court and of a Parliamentary Counsel were clearly not based on standing as an advocate but on a broader understanding of eminence in and service to the law. On the English model both Masters and Parliamentary Counsel would have been barristers by admission who had achieved a degree of eminence in and service to the law by their work as Master or Parliamentary Counsel.²⁵

67. The Committee noted that since the formation of the voluntary bar one appointment (that of P.R. Adams QC) also reflects a basis for appointment which is wider than eminence as an advocate. As explained in the Committee Report, “Mr. Adams was a practitioner of unquestioned standing and eminence in commercial matters, particularly revenue, who practised successfully at the voluntary bar - but who had a limited practice as an advocate.” Despite this, the Committee stressed, his appointment “was accepted as a fitting and entirely appropriate recognition of his eminence and style of practice as a barrister principally in non-litigious advisory work.”²⁶
68. The Committee also notes that it had long been the case that some of the men who had held office as Attorney-General had been awarded silk after their appointment as Attorney-General.²⁷

²³ Id.

²⁴ Id.

²⁵ Ibid. at 289.

²⁶ Ibid. at 289-290.

²⁷ Id.

69. The Committee further notes that on two occasions the members of the Law Society of Western Australia had voted against the proposal that Queen's Counsel should be drawn only from those who practise at the voluntary bar.²⁸
70. Finally, the Committee notes that it "is only in relatively recent years that the application of these criteria has resulted in appointments of Queen's Counsel being made almost exclusively from among those who practise or who are prepared to practise not only as barristers but also separately from solicitors."²⁹
71. These factors, against the background of the distinctive features of the practice of the law as it has developed in Western Australia, led the Clarkson Committee to form views about the basis for appointment of Queen's Counsel which appear appropriate for a profession so widely based on a fused professional structure. It notes:

The views we have come to do not displace distinction as an advocate as the primary basis for appointment as Queen's Counsel. What we suggest is that eminence in other fields of practice might also be appropriate for appointment as Queen's Counsel and that this should receive more express acknowledgement than is presently the case.

Our views on this aspect are necessarily interrelated to the question of the style of practice appropriate for a silk and we will consider that briefly.³⁰

72. The Committee Report then proceeded to outline its views in relation to the present styles of practice of Queen's Counsel in Western Australia.³¹ It found that at the time of the Inquiry (1979-1980) there were three ways in which persons other than Law Officers of the Crown could practise as Queen's Counsel in Western Australia.
- 1) As a barrister as a member of the voluntary bar (whether as a member of the Western Australian Bar Association or not) but not in partnership. Such barrister does not take instructions directly from clients but is briefed by solicitors.
 - 2) As a barrister in partnership where the partnership is so organised that the barrister receives briefs from solicitors within or outside the firm.

²⁸ Ibid at 290.

²⁹ Id.

³⁰ Ibid. at 290-291.

³¹ Ibid. at 292.

- 3) As a barrister and solicitor whether in partnership or sole practice. In this case the Queen's Counsel takes instructions directly from clients and may be briefed by solicitors within or outside the firm.

73. This then led the Committee³² to consider two aspects in relation to Western Australia:-

- a) Whether a Queen's Counsel should be appointed from among persons who continue after such appointment to practise as barrister and solicitor;
- b) Whether a member of a partnership who practises as a barrister only should be precluded from being appointed as Queen's Counsel if otherwise suitable for such appointment.

The Criterion of Eminence

74. The Clarkson Committee concluded that "eminence in the law" was a fundamental criterion for appointment of Queen's Counsel.

75. Whilst accepting that eminence as an advocate is the primary basis for appointment as Queen's Counsel, however, the Committee also considered³³ that eminence in advisory work should also be recognisable by appointment of Queen's Counsel in Western Australia because of:-

- (a) The history of the office of Queen's Counsel and appointments to that office in England and elsewhere of persons who have attained eminence in law other than in advocacy.
- (b) The history of appointments to the office in Western Australia.
- (c) The changes in the nature of non-litigious legal work as a consequence of which it is not the case that the more difficult and more important work is the preserve of those practising in litigious work or that litigious work requires a greater degree of legal skill.
- (d) The desirability that eminence in the law should be identified to the public and the legal profession.

³² Ibid. at 291-292.

³³ Ibid. at 292.

The Criterion of Availability

76. The Clarkson Committee accepted that the appointment of Queen's Counsel "is a public declaration" and that, quoting Sir Lawrence Jackson, "the public purpose is only achieved if the 'silk' is available to do the work for which he was appointed. If this is not so then the public interest did not require that appointment."³⁴

77. In the view of the Clarkson Committee,³⁵ it followed that availability for the purpose of the appointment must inevitably be a criterion for such appointment. However, the Committee explained that "availability" is a matter of degree and noted that barristers who are members of the WA Bar Association were governed by a rule which provided:-

"If after the commencement of any proceedings to which a general retainer applies:

(a) no brief or special retainer is delivered to the retained counsel within a reasonable time;

or

(b) the retained counsel has enquired of the solicitor or agent acting for the lay client in such a proceeding whether he is to receive a brief or special retainer and has not received the brief or special retainer within three days, or has received an answer in the negative, counsel may treat the general retainer as determined and may accept a brief or special retainer from another party."

78. The Clarkson Committee Report continues:³⁶

This retainer system is sometimes wrongly understood to stand as a continuing barrier to the availability of the barrister. That is not so. The barrister may at his option free himself of the limitation on his availability unless he is thereupon briefed or given a special retainer by the solicitor who gave the general retainer.

A member of a partnership may be unavailable where conflicts of interest between clients of the partnership inhibit him from acting. The larger a partnership the more likely that conflicts of interest will produce unavailability.

³⁴ Ibid. at 293.

³⁵ Id.

³⁶ Ibid. at 294.

Ultimately the question becomes whether the public interest is best served by having a person eminent in the law precluded from identification as Queen's Counsel because he wishes to remain a member of a partnership. In the view of the Committee, this involves balancing the degree of availability against the public interest in having the particular eminence identified.

79. On this question and the criterion of freedom in mode of practice the Committee noted the following paragraph in the First Report of the New South Wales Law Reform Commission in its Legal Profession Reference:³⁷

3.65 On the other hand, the extent and significance of these differences between barristers and solicitors should not be exaggerated. The practice of many barristers rests heavily on a flow of work from a particular client, type of client (such as trade unions), or firm of solicitors. Some have general retainers binding them to accept such work as may be offered by a particular client. These ties can reduce availability and independence. Also, barristers' independence and distance from clients can sometimes lead them to have an inadequate understanding of their clients' needs and an insufficient commitment to provide the best possible service.

The Criterion of Freedom in Mode of Practice

80. The Clarkson Committee Report then explains that “freedom in mode of practice” was used in submissions to the Inquiry to refer to “freedom in mode of practice from the usual administrative burdens of the solicitors office and from personal involvement, to any significant degree, in the process of preparing the brief or getting up the case for trial”.
81. The Committee then notes that it considered such freedom to be desirable in Queen's Counsel - both to ensure their availability in terms of time, as well as to ensure their application to matters for which their eminence suits them. Again, however, the Committee concludes that such freedom is “a matter of degree”:³⁸

Membership of a firm, in the view of the committee, does not necessarily of itself produce such an infringement of freedom in mode of practice as will make appointment of a firm member as Queen's Counsel inappropriate. The question

³⁷ Ibid. at 294-295.

³⁸ Ibid. at 295.

is how the person within a firm is able to organise his practice to ensure the greatest degree of freedom in mode of practice.

Applying the Criteria to the Style of Practice

82. The Clarkson Committee agreed that to attain the greatest degree of availability and freedom in mode of practice a Queen's Counsel should practise in the style of a barrister as the Committee defined that word. Of the three styles listed above by the Committee, the Committee did not consider that the third style (where a Queen's Counsel also practices as a solicitor) was appropriate to provide sufficient availability and freedom in mode of practice.³⁹
83. The Committee concludes that Queen's Counsel should be able to practise in either styles 1 or 2 (ie, at the voluntary bar or as a barrister in a partnership) each of which, the Committee held, had the essential feature that Queen's Counsel must receive briefs only from other legal practitioners. The Committee explains:⁴⁰

The Committee recognises that style 1 is the traditional mode of practice for Queen's Counsel in divided professions. Style 2 is, in the view of the Committee, appropriate because of the fused nature of the legal profession in Western Australia, the special features of which together with the history of appointments of Queen's Counsel are set out in paragraph 10.8....

We recognise that appointments of silk from persons not at the voluntary bar will be likely to be less frequent than those of persons whose mode of practice (at the voluntary bar) makes their availability more apparent. However, we do not see any ground for precluding persons of appropriate eminence from taking silk if they are able to satisfy the Chief Justice (as the authority recommending appointments) that their practice is or will be so organised as to establish a degree of availability and freedom in mode of practice acceptable to him.

While thus recommending that membership of a partnership should not of itself preclude an appointment as Queen's Counsel in Western Australia we do recommend that availability and freedom in mode of practice be important criteria together with eminence. Availability and freedom in mode of practice of a member of a partnership should be demonstrated:

³⁹ Id.

⁴⁰ Ibid. at 296 and 297.

- 1) By proven briefs, ie an applicant should be required to demonstrate to the Chief Justice the applicant's availability to the public by means of briefs actually undertaken from outside the partnership.
- 2) By the applicant giving an undertaking that, although the member of a partnership, he will organise his practice so as to maintain his availability as in (1) and practise only as a barrister (ie only when briefed by other legal practitioners).

It is appreciated by the Committee that it is important that the conditions of availability and freedom in mode of practice should continue after appointment as Queen's Counsel. It is apparent that practice in Style 1 (as a barrister at the voluntary bar) is structurally more likely to guarantee continuance of those conditions. Practice in Style 2 (as barrister, within partnership) entails the possibility that the mode of practice will not be continued or will diminish with consequent effect on availability and freedom in mode of practice. Against this possibility the Committee has considered:

- its recommendation that a person practising wholly or partly as a solicitor should not be appointed as Queen's Counsel.
- the undertaking to be given by the appointee in the terms recommended above to the Chief Justice as a condition of recommendation for appointment.
- the eminence in the legal profession of appointees so that there is considerably diminished likelihood of their non-observance of conditions accepted by them at the time of their appointment.

The Committee relies on these matters in support of its view that practice as a barrister by a Queen's Counsel who is a member of a partnership would be conducted after appointment to that office in the mode recommended by the Committee so that adequate availability and independence should be assured.

In addition, the Committee recommends that the appropriate regulations be amended by addition of a provision that Executive Council may withdraw an appointment of Queen's Counsel on the recommendation of the Chief Justice.

Clarkson Committee's Recommendations Concerning Criteria

84. Ultimately, the Clarkson Committee recommends that the criteria to be applied in appointment of Queen's Counsel should be as follows:⁴¹

- (a) eminence in the law in either litigious or advisory work which, in accordance with the definition above, includes non-litigious advisory work.
- (b) availability and freedom in mode of practice by practising either:
 - i. as a barrister at the voluntary bar, or
 - ii. as a barrister within a partnership

85. The Clarkson Committee continues:

In the case of an appointee who is to remain a member of a partnership he should be required, on consideration for appointment, to demonstrate to the Chief Justice his availability to the public by means of briefs actually undertaken from outside the partnership.

All appointees should be required, on consideration for appointment to undertake to the Chief Justice that if they should practise in a partnership they will maintain their availability to be briefed by practitioners outside the partnership and will practise only in the style of a barrister, ie be briefed only by other practitioners, which may include legal practitioners within the partnership.

We further recommend that:

A person practising wholly or partly as a solicitor not be appointed as Queen's Counsel.

Membership of a partnership does not of itself preclude a person from appointment as Queen's Counsel.

All silks be required to follow what we understand to be the present practice of a silk who is a member of the Western Australian Bar Association and not designate such appointment on the letterhead of chambers or office. This would remove a point frequently made against having silk in partnership - namely, that it is easier for larger

⁴¹ Ibid. at 298.

firms to organise themselves so as to place a partner in a position to take silk and so to gain the advantage of having a silk on its letterhead. Introduction of the recommended requirement would help to remove an objection of self interest so that Queen's Counsel could be in partnership for the disinterested reasons we have outlined above. We note that the New South Wales Bar Association in its 46th Annual Report (1982) p.2 states that the bar and the Law Society in that State have asked the Attorney-General to prohibit a solicitor who is a silk (following the *Legal Practitioners (Amendment) Act 1882 (NSW)*) from advertising the title of QC after his name. As previously explained, Queen's Counsel are briefed by solicitors - there is no need for them to advertise their appointment to the public.

86. Three members of the Clarkson Committee did not agree with the recommendations of the Clarkson Committee. They took the view that Queens Counsel should not be able to practise as a member of a partnership.⁴²
87. A media statement dated 17 March 1991 to R K O'Connor from the office of the Attorney General, Joe Berinson, confirms the then government's support for the Clarkson Committee's conclusions.

1996 Law Society Review

88. In 1996, the Law Society again reviewed its position in relation to the appointment of Queen's Counsel (the "1996 Review Committee"). Members of the 1996 Review Committee were:

Mr Rory Argyle, Ms Julie Bishop, Mr Gregory Boyle, Mr Eric Heenan QC, Mr John Ley, Mr Malcolm McCusker QC, Mr Peter McGowan, Mr Rob Nash, Mr Gary Rutherford, Mr Kevin Sleight, Mr John Syminton (Convenor), Mr Rod Warren, Mr Philip Wilson, Mr Matthew Zilko, Mr Chris Zelestis QC and Mr Geoffrey Miller QC.

89. The 1996 Review Committee noted that the only regulation governing the appointment of Queens Counsel was still that published in the Government Gazette of 5 October 1900, which read as follows:

"No barrister shall be appointed Her Majesty's Counsel except on the recommendation of the Chief Justice to the Governor in Council."

⁴² Ibid. at 300.

90. The 1996 Review Committee analysed in detail the findings of the Clarkson Committee and noted, in particular, the criteria which applied to the appointment of Queen's Counsel.
91. Ultimately, apart from the view expressed by Julie Bishop, all the members of the 1996 Review Committee were of the view that the procedure used as at 1996 and the Clarkson Committee criteria applicable to the appointment of Queens Counsel should continue to apply.
92. The 1996 Review Committee does not appear to have made any comment per se in relation to the appointment of solicitors as Queen's Counsel, although Julie Bishop, in dissent, expressed the view that if prominent, experienced and specialist practitioners were not practising at the Bar and therefore not eligible for appointment as Queen's Counsel, then consideration ought to be given to another form of recognition.
93. This appears to be somewhat inconsistent with the findings of the Clarkson Committee which supported the appointment of practitioners not practising at the Bar.
94. The 1996 Review Committee further noted that the procedure in relation to the appointment of Queens Counsel (which was not set out in the Clarkson Committee Report) could be summarised as follows:
 - (a) Persons who wish to be considered for appointment as Queens Counsel must lodge an application with the Chief Justice prior to 31 August in each year.
 - (b) After receiving an application the Chief Justice then consults with:
 - i. each Judge of the Supreme Court;
 - ii. each Judge of the Federal Court in Perth; and
 - iii. each Judge of the District Court, with regard to each application.
 - (c) In addition, the Chief Justice consults with the President of the Bar Association and the President of the Law Society.
 - (d) The normal procedure is to announce the appointment of Queen's Counsel in December of each year.

95. It was accepted by the 1996 Review Committee that “there is general ignorance in the profession as to the criteria applicable to the appointment of Queens Counsel, and the procedure which has been established relating to appointment.”
96. It was noted, however, “that an article concerning Queen's Counsel prepared by the Chief Justice was published in the August 1996 edition of “Brief”. That article sets out the history and background to the appointment of Queen's Counsel and the procedure and criteria relating to appointment” in 1996.
97. Finally, it was noted that, in the past, specialist Queens Counsel had been appointed. The 1996 Review Committee was of the view that it was appropriate to appoint specialist Queens Counsel. However, “in the case of specialist Queens Counsel, it was recommended that where a person was appointed in respect of a specialised area, a recommendation be made to the Chief Justice that the person appointed give an undertaking to accept instructions only in respect of the specialist area for which the appointment had been made.”

1999 Proposed Amendments by Attorney General Peter Foss

98. In 1999 the then Attorney General Peter Foss proposed amendments to the appointment of Queen's Counsel that would effectively increase the role of government in the appointment process.
99. The Society strongly opposed these amendments. Further, the WA Bar Association resolved that if the Attorney General's amendments were adopted, it would seek to establish a system of appointment by the Chief Justice without any government involvement.
100. These proposed amendments were never implemented.

2001 Labor Government Amendments

101. In early 2001, the then new Labor government indicated that it was disinclined to continue to be involved in the appointment of Queen's Counsel. It subsequently gazetted the *Queen's Counsel (Procedure for Appointment) Repeal Regulations 2001* and a Practice Direction developed by Chief Justice David Malcolm was implemented from September 2001. This is best summarised in correspondence from the Society which reads as follows:

The Society opposed the position of the former Attorney General who had proposed an increased role for Government in the appointment of silks process. Instead, the Society preferred that appointment be based on recommendation by the Chief Justice and, if necessary, a Senior Counsel (SC) system unrelated to appointment by the Governor in Council. In early 2001, the new Government indicated that it was disinclined to continue to be involved in the appointment of Queens Counsel. It subsequently gazetted the *Queen's Counsel (Procedure for Appointment) Repeal Regulations 2001*. The Chief Justice then developed a draft SC protocol by Practice Direction of the Supreme Court with comment from the Society and other parts of the profession. This was implemented in September 2001 as a new practice direction of the Supreme Court.⁴³

102. On 7 May 2002, in response to a request for comment, the Society wrote to then Chief Justice David Malcolm about a proposed protocol on the SC appointment process. The Society's view was the protocol presupposed that all persons to be appointed Senior Counsel were advocates, which it considered inappropriate.
103. The Society advised that it was keen to progress a broader agenda with respect to the appointment of Senior Counsel.
104. It does not appear that the findings and recommendations of the Clarkson Committee Report were discussed with Council or raised with the Chief Justice. Nor is it clear whether or not the Chief Justice was asserting that practitioners not at the Bar were excluded from applying for silk. All that is clear is that the Society's position in 2002 was that, to quote from Society correspondence: "practitioners who practice in a broader spectrum in the profession" should be considered for appointment. The focus here seems to be on practitioners who might not be advocates.

⁴³ *Law Society Annual Report - President's Report (2001)*.

Process for Appointment of Senior Counsel in Other Australian States and Territories

The Australian Capital Territory

105. The process for the appointment of Senior Counsel in the ACT is found in Rule 114 of the Australian Capital Territory Barristers' Rules.⁴⁴

106. Appointment is by the President of the ACT Bar Association. Rules 114.2 – 114.4 read as follows:

114.2 Resident members who have demonstrated over a considerable period of time as practising barristers a capacity for outstanding service as advocates and advisers, may, for the good of the administration of justice, be appointed Senior Counsel for the Australian Capital Territory.

114.3 Members so appointed are entitled to the designation "Senior Counsel", which may be abbreviated "SC".

114.4 Senior Counsel, by seeking and accepting appointment, undertake to use the designation only while they remain practising barristers in private practice or retained under statute by the Crown or an Australian government, or in retirement from legal practice, or while (if appropriate) a judge, or during temporary appointments in a legal capacity to a court or tribunal, or while a member of a parliament of Australia. The President for the time being may revoke the appointment for breach of this undertaking.

107. The President of the ACT Bar is obliged, pursuant to rule 114.7, to consult as follows:

114.7 The selection procedure in each year is as follows:

(a) Applications for appointment are to be made in writing to the President between 1 June and 14 June (or the first working day thereafter).

(b) The President shall at any time from 1 June to 30 June (or the first working day thereafter) inform any member if requested the names of

⁴⁴ A copy of the ACT's Senior Counsel Protocol dated 30 April 2007 can be found on the ACT Bar Association webpage at <http://www.actbar.com.au/images/stories/files/senior%20counsel%20protocol%20as%20at%2030%20april%202007.pdf>

those who have made applications, and may in that time accept further applications for good reason and in the President's discretion.

- (c) The Bar Council shall appoint one resident Senior Counsel or Queens Counsel to assist the President in the selection process ("assisting Senior Counsel").
- (d) The President and the assisting Senior Counsel shall together seek comments on each application from:
 - (i) as many resident judges of the Supreme Court as is practicable;
 - (ii) the senior resident judge of the Federal Court;
 - (iii) the senior resident judge of the Family Court of Australia;
 - (iv) if the applicant practises to a substantial extent in any other court or tribunal, whether in the ACT or elsewhere, the most senior judge or member of such court or tribunal who the President considers is most likely to be able to make useful comment in relation to the Applicant;
 - (v) the President of the Law Society of the ACT;
 - (vi) as many resident practising Queen's Counsel and Senior Counsel as is reasonably practicable;
 - (vii) such other judges, masters, tribunal members, and legal practitioners, within the ACT and elsewhere, as in their discretion they decide;
- (e) The President and assisting Senior Counsel shall, taking into account all comments received, make a selection of proposed appointees.
- (f) The President shall inform the Chief Justice of the selection of proposed appointees.
- (g) The President shall appoint, and appoint only, proposed appointees whose appointment is not opposed by the Chief Justice.

- (h) The process of selection is to be completed so that a public announcement of appointment may be made by the end of July.

114.8 Appointment of Senior Counsel in Exceptional Circumstances:

Separately from the appointment of practising barristers as Senior Counsel, the Bar Council may appoint distinguished Parliamentary Counsel as Senior Counsel.

108. The qualities to be considered for appointment in the ACT are outlined as follows:

ESSENTIAL CRITERIA

1. The system for the designation of Senior Counsel must be administered so as to restrict appointment to those counsel whose achievement of the qualities set out below displays their ability to provide exceptional service as advocates and advisers in the administration of justice.
2. The qualities required to a high degree before appointment as Senior Counsel are:
 - (a) Learning: Senior Counsel must be learned in the law so as to provide sound guidance to their clients and to assist in the judicial interpretation and development of the law.
 - (b) Skill: 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.
 - (c) Integrity and honesty: Senior Counsel must be worthy of confidence and implicit trust by the judiciary and their colleagues at all times, so as to advance the open, fair and efficient administration of justice.
 - (d) Independence: Senior Counsel must be committed to the discharge of counsel's duty to the court, especially in cases where that duty may conflict with clients' interests.
 - (e) Disinterestedness: Senior Counsel who are in private practice must honour the cab-rank rules; namely, the duty to accept briefs to appear for which they are competent and available, regardless of any personal opinions of

the parties or the causes, and subject only to exceptions related to appropriate fees and conflicting obligations.

- (f) Diligence: Senior Counsel must have the capacity and willingness to devote themselves to the vigorous advancement of the clients' interests.
- (g) Experience: Senior Counsel must have the perspective and knowledge of legal practice acquired over a considerable period.

During this time it is expected (without being exhaustive) that the applicants' practices will demonstrate some or all of the following:

- i) experience in arguing cases on appeal;
 - ii) a position of leadership in a specialist jurisdiction;
 - iii) experience in conducting major cases in which the other party is represented by Senior Counsel;
 - iv) experience in conducting cases with a junior;
 - v) considerable practice in giving advice in specialist fields of law.
- 3) Senior Counsel will have demonstrated leadership in:
- i) Developing the diverse community of the Bar; or
 - ii) Making a significant contribution to Australian society as a barrister.

New South Wales

109. New South Wales has a formally divided profession. An extensive review of the process of appointment of silks in New South Wales was conducted in 2009 by Justice Roger Gyles of the NSW Court of Appeal.⁴⁵

110. The Protocol was subsequently updated in May 2012.⁴⁶

⁴⁵ For a summary of Justice Gyles's findings, see: "Opinion: A Review of the Senior Counsel Protocol" (Winter 2010) *Bar News* 9-17.

⁴⁶ Copies of the New South Wales Senior Counsel Protocol and the guide titled "Appointment of Silk in New South Wales: Guide to Practical Aspects" can be found at: <http://www.nswbar.asn.au/silks/protocol.pdf> and <http://www.nswbar.asn.au/silks/practical.pdf>.

111. In New South Wales, appointments are made by the President of the New South Wales Bar Association after extensive consultation by a selection committee.

112. The New South Wales Senior Counsel Protocol provides as follows:

The principles governing the selection and appointment of those to be designated as Senior Counsel by the President of the Bar Association are as follows:

1. The designation as Senior Counsel of certain practising advocates by the President of the Bar Association, in accordance with the following principles and under the following system, is intended to serve the public interest.
2. The designation of Senior Counsel provides a public identification of barristers whose standing and achievements justify an expectation, on the part of those who may need their services as well as on the part of the judiciary and the public, that they can provide outstanding services as advocates and advisers, to the good of the administration of justice.
3. As an accolade awarded on the basis of the opinions of those best placed to judge barristers' qualities, the designation of Senior Counsel also provides a goal for the worthy ambition of junior counsel, and should encourage them to improve and maintain their professional qualities.
4. Appointment as Senior Counsel should be restricted to practising advocates, with acknowledgment of the importance of the work performed by way of 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.

ESSENTIAL CRITERIA

5. The system for the designation of Senior Counsel must be administered so as to restrict appointment to those counsel whose achievement of the qualities set out below displays and presages their ability to provide exceptional service as advocates and advisers in the administration of justice.
6. The qualities required to a high degree before appointment as Senior Counsel are:

- (a) learning: Senior Counsel must be learned in the law so as to provide sound guidance to their clients and to assist in the judicial interpretation and development of the law.
- (b) skill: Senior Counsel must be skilled in the presentation, testing, evaluation and resolution of litigants' cases, so as to enhance the likelihood of just outcomes and/or negotiated resolution in adversarial proceedings, whether in court or otherwise.
- (c) integrity and honesty: Senior Counsel must be worthy of confidence and implicit trust by the judiciary and their colleagues at all times, so as to advance the open, fair and efficient administration of justice.
- (d) independence: Senior Counsel must be committed to the discharge of counsel's duty to the court, especially in cases where that duty may conflict with clients' interests.
- (e) disinterestedness: Senior Counsel who are in private practice must honour the cab-rank rules; namely, the duty to accept briefs to appear for which they are competent and available, regardless of any personal opinions of the parties or the causes, and subject only to exceptions related to appropriate fees and conflicting obligations.
- (f) diligence: Senior Counsel must have the capacity and willingness to devote themselves to the vigorous advancement of the clients' interests.
- (g) experience: Senior Counsel must have the perspective and knowledge of legal practice acquired over a considerable period.

During this time it is expected (without being exhaustive) that the applicant's practice will demonstrate some or all of the following:

- (i) experience in arguing cases on appeal;
- (ii) a position of leadership in a specialist jurisdiction;
- (iii) experience in conducting major cases in which the other party is represented by Senior Counsel;
- (iv) experience in conducting cases with a junior;

- (v) considerable practice in giving advice in specialist fields of law;
 - (vi) experience and practice in alternative dispute resolution, including arbitrations and mediations; and
 - (vii) experience in sitting on courts or tribunals.
7. Senior Counsel will have demonstrated leadership in:
- (a) developing the diverse community of the Bar; or
 - (b) making a significant contribution to Australian society as a barrister.

SELECTION AND APPOINTMENT

The system for the selection and appointment of those to be designated as Senior Counsel is to be conducted as follows:

8. All steps towards the selection of appointees are to be conducted by a Selection Committee (the 'Selection Committee') comprising:
- (a) the President of the New South Wales Bar Association;
 - (b) the Senior Vice President of the New South Wales Bar Association;
 - (c) three other senior counsel (Queen's Counsel or Senior Counsel) nominated by the President, and approved by the Bar Council, not more than one of whom may be a member of that Bar Council; and
 - (d) 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-practising representative on the Committee.
9. The Bar Council is to ensure that the Selection Committee is provided with all administrative, clerical and other assistance reasonably necessary for the discharge of their responsibilities for the selection and appointment of Senior Counsel.
10. Each year the Selection Committee, shall, by invitation, choose at least thirty senior counsel (Queen's Counsel or Senior Counsel), at least thirty junior counsel, and at least thirty solicitors specialising and experienced in the conduct of litigation (the 'Consultation Group') for the purpose of mandatory consultation

with the profession for the selection of appointees. The Consultation Group shall include at least a third of the members of the previous year's Consultation Group. In determining the membership of the Consultation Group, the Selection Committee shall take into account the information provided under clauses 12 and 13 below.

Submission of Applications

11. On or after 1 July in each year, applications may be made in writing to the President by junior counsel with full unrestricted practising certificates who wish to be considered for appointment as Senior Counsel. The appointment of Senior Counsel takes effect from the date of appointment, unless otherwise stated in the notice of appointment.
12. Applicants must provide in respect of all cases, including contested interlocutory applications (but excluding directions hearings), in which they have appeared in the last 18 months, and if desired, a longer period:
 - (a) the name of the case and, if available, its citation;
 - (b) the name of the judicial officer, tribunal, arbitrator or CARS assessor before whom they appeared;
 - (c) the name of any counsel who led them or who they led;
 - (d) the name of opposing counsel;
 - (e) the name of their instructing solicitor; and
 - (f) a brief description of the nature of the proceedings.

The details required in (a) to (f) may be modified in alternative dispute resolution matters or otherwise when confidentiality requires.

13. Applicants may submit with their applications particulars of such other matters as they wish to be taken into account by the Selection Committee, including details of their professional experience before coming to the Bar.
14. Applicants may, if they wish, identify not more than five members of the profession who are familiar with their recent work and qualities. They may also, if

they wish, provide not more than two written references of not more than three pages each from such persons.

15. Any application not conforming with the requirements in clauses 11 and 12 of this Protocol will be rejected. No application will be considered which is received later than the last Friday in July, except in cases of accident or other special circumstances, and then at the discretion of the President.

Confidentiality

16. The collection of information relating to appointment of Senior Counsel is governed by National Privacy Principle 2 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.
17. In accordance with National Privacy Principle 4, to protect the confidentiality of the material it gathers, the Bar Association will destroy or permanently de-identify all documentation in its possession in relation to the selection process as soon as practicable after each year's appointments are announced.
18. All applicants for appointment as 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 the National Privacy Principle 6(1)(c). 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.
19. 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 the application.
20. Applicants are to be made aware that their applications will be the subject of distribution during the selection process and it will therefore be impossible to keep confidential the fact that an application has been made.

Determination of Applications

21. The Selection Committee may determine that any application which it is satisfied does not warrant further consideration should be rejected in a preliminary selection.
22. The Selection Committee must seek comments on all applicants remaining after the preliminary selection from each member of the Consultation Group, to the extent to which they are able and wish to assist.
23. The Selection Committee must seek comments on each applicant remaining after the preliminary selection from the following members of the judiciary (the 'Judicial Consultation Group'), namely:
 - (a) The President of the Court of Appeal;
 - (b) The Chief Judge in each Division of the Supreme Court;
 - (c) The Chief Judge or most senior member of at least one of any other courts or tribunals of New South Wales in which the Selection Committee considers the applicant to have practised to a substantial extent;
 - (d) The Chief Judge or most senior member of at least one court or tribunal of the Commonwealth in which the Selection Committee considers the applicant to have practised to a substantial extent;
 - (e) The Chief Justice of the Federal Court of Australia;
 - (f) The Chief Justice of the Family Court of Australia;
 - (g) At least two other Judges of Appeal or Judges in any Division of the Supreme Court in which the President considers the applicant to have practised to a substantial extent; and
 - (h) At least two other Judges or members of at least one of any other courts or tribunals of the Commonwealth in which the Selection Committee considers the applicant to have practised to a substantial extent.
24. The Selection Committee may, in its discretion, consult with as many other legal practitioners or members of the judiciary or other persons as it considers may be

of assistance in consideration of the applications, in addition to the Consultation Group and the Judicial Consultation Group.

25. The Selection Committee may, in its discretion, consult with any of the persons from whom comments have already been received, for the purposes of further discussion, clarification or other assistance in its consideration of the applications.
26. The Selection Committee shall, after taking into account all comments received, make its final selection of the proposed appointees.
27. The President shall inform the Chief Justice of New South Wales of the Selection Committee's final selection and seek the views of the Chief Justice on those proposed appointees.
28. The President shall not appoint any applicant included in the Selection Committee's final selection whose appointment the Chief Justice opposes.
29. The Selection Committee should use its best endeavours to ensure that the process of selection is completed so as to permit public announcements of the successful applications on or before the first Friday in October. The President shall publish the names of the successful applicants for appointment as Senior Counsel for that year in order of intended seniority.
30. The list of successful applicants shall be available for inspection in the office of the Bar Association and published in such manner as the President directs.
31. After publication of the list of successful applicants, any unsuccessful applicant may discuss his or her application with the President.

UNDERTAKING

34. ...a Senior Counsel, by seeking and achieving appointment, undertake to use the designation only while they remain practising barristers in private practice or retained under statute by the Crown, or during temporary appointments in a legal capacity to a court, tribunal or statutory body, or in retirement from legal practice.
35. Senior Counsel who returns to legal practice as a barrister is entitled to resume the use of the designation.

The Northern Territory

113. Pursuant to section 21 of the Northern Territory's *Legal Profession Act*.

- (1) The Chief Justice may appoint a local legal practitioner as a Queen's Counsel or Senior Counsel.
- (2) An appointment must be made:
 - (a) under applicable rules of the Supreme Court; and
 - (b) only after consultation with:
 - (i) the Attorney-General; and
 - (ii) other Judges; and
 - (iii) the Law Society and Northern Territory Bar Association Incorporated; and
 - (iv) anyone else the Chief Justice considers appropriate.
- (3) The practitioner must pay the Territory the fee prescribed by the regulations.

114. From 16 January 2008, the Northern Territory introduced the designation Senior Counsel, with appointment now regulated by the *Supreme Court (Senior Counsel) Rules 2007*. Relevantly, those Rules provides:

2 Purpose

These Rules state the principles on which the Chief Justice will exercise the power to appoint Senior Counsel under section 21 of the *Legal Profession Act*.

3 General principles governing the exercise of statutory powers

- (1) The Chief Justice will not appoint Queen's Counsel.
- (2) Except in exceptional cases, appointment as a Senior Counsel will be confined to practising advocates.

4 Attributes required for appointment as Senior Counsel

The following attributes are required for appointment as a Senior Counsel:

- (a) exemplary knowledge and understanding of the law;

- (b) a high level of skill as an advocate;
- (c) integrity and trustworthiness;
- (d) commitment to the best traditions of the bar and to the administration of justice;
- (e) maturity of judgment acquired from substantial experience in legal practice.

5 Application for appointment

- (1) A legal practitioner who holds an unrestricted practising certificate may apply to the Chief Justice to be considered for appointment as Senior Counsel.
- (2) The application must be made in writing no later than 31 August.
- (3) The application must:
 - (a) provide evidence the applicant has the attributes required for appointment; and
 - (b) include any undertaking required by the Chief Justice.
- (4) Immediately after the closing date for applications, the Chief Justice must provide a list of the names of all the applicants to the following:
 - (a) the Attorney-General;
 - (b) the President of the Law Society;
 - (c) the President of the Northern Territory Bar Association.
- (5) A person to whom the list is given under sub rule (4) may make it available for inspection by anyone else.

6 Consultation

- (1) For the purposes of section 21(2)(b)(iii) of the *Legal Profession Act*:
 - (a) the President of the Law Society must, in each year, nominate to the Chief Justice at least one solicitor to represent the Society; and
 - (b) the President of the Northern Territory Bar Association Incorporated must, in each year, nominate to the Chief Justice at least one barrister to represent the Association.

- (2) The nominations must be made in writing no later than 31 July.
- (3) The consultation required under section 21(2)(b) of the *Legal Profession Act* is to be conducted as the Chief Justice considers appropriate.
- (4) The Chief Justice may (but is not obliged to) refer adverse comments made about an applicant to the applicant for a response.
- (5) If the Chief Justice refers an adverse comment to the applicant, the Chief Justice is not obliged to disclose the source of the comment.

7 Notification of decision

- (1) The Chief Justice must notify an applicant of the Chief Justice's decision regarding the applicant's application.
- (2) The Chief Justice is not obliged to give reasons for the decision.

Tasmania

115. The principles governing the selection and appointment of those to be designated as Senior Counsel by the Chief Justice of the Supreme Court of Tasmania are detailed in the *Senior Counsel Protocol* of 20 February 2012.⁴⁷ Relevantly, the Protocol provides as follows:

- (i) The designation as Senior Counsel of certain practising counsel by the Chief Justice, in accordance with the following principles and under the following system, is intended to serve the public interest.
- (ii) The designation of Senior Counsel provides a public identification of counsel whose standing and achievements justify an expectation, on the part of those who may need their services as well as on the part of the judiciary and the public, that they can provide outstanding services as counsel and advisers, to the good of the administration of justice.
- (iii) As an accolade awarded on the basis of the opinions of those best placed to judge counsels' qualities, the designation of Senior Counsel also provides a goal

⁴⁷

See: http://www.supremecourt.tas.gov.au/publications/practice_directions/2012/prac_dir_22012

for the worthy ambition of junior counsel, and should encourage them to improve and maintain their professional qualities.

- (iv) Qualities required to a high degree before appointment as Senior Counsel are skill and learning, integrity and honesty, independence, diligence and experience.
- (v) Senior Counsel must be learned in the law so as to provide sound guidance to their clients and to assist in the judicial interpretation and development of the law.
- (vi) 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.
- (vii) Senior Counsel must be worthy of confidence and implicit trust by the judiciary and their colleagues at all times, so as to advance the open, fair and efficient administration of justice.
- (viii) Senior Counsel must be committed to the discharge of counsels' duty to the Court, that is the administration of justice, especially in cases where that duty may conflict with clients' interests.
- (ix) Senior Counsel must honour the duty to accept briefs to appear for which they are competent and available, regardless of any personal opinions of the parties or the causes, and subject only to exceptions related to appropriate fees and conflicting obligations.
- (x) Senior Counsel must have the perspective and knowledge of legal practice acquired over a considerable period.
- (xi) The system for the designation of Senior Counsel must be administered so as to restrict appointment to those counsel whose achievement of the foregoing qualities displays and presages their ability to provide exceptional service as counsel and advisers in the administration of justice.
- (xii) Senior Counsel may be a member of a firm of lawyers, or an employed lawyer, provided that he or she practices as a counsel, although not necessarily exclusively.

- (xiii) Successful applicants will be expected to have demonstrated the required qualities as an advocate in the higher courts or tribunals. Usually, an appointment will not be made if the applicant is not a practising advocate in that sense.

116. The system for the selection and appointment of those to be designated as Senior Counsel is to be conducted as follows:

- (i) The Chief Justice shall each year consider whether the appointment of additional Senior Counsel in and for the State of Tasmania should be made and if it is considered that appointment is called for, shall compile a list of the names of persons who have applied for appointment and whom the Chief Justice considers may be appropriate for appointment.
- (ii) Before making a decision upon the persons whose names are to be included in the list, the Chief Justice shall consult with the other Judges, the President of the Law Society of Tasmania, the President of the Tasmanian Independent Bar and such other persons as the Chief Justice considers may assist in any particular case.
- (iii) Persons who in each year wish to be considered by the Chief Justice for appointment as Senior Counsel in Tasmania shall make written application to the Chief Justice in the First Term in a calendar year. In the application the applicant must specify such details of qualifications, experience and the nature and extent of the applicant's practice as seem relevant.
- (iv) The Chief Justice in making a decision in respect of the applicants shall bear in mind the factors specified in Clause 1 of this protocol.
- (v) When the Chief Justice has made a decision and compiled the final list of those persons selected, the Chief Justice shall promulgate the list as the circumstances call for.

117. The Protocol further provides:

- (i) Subject to the requirements and permission of particular courts, tribunals and other jurisdictions, appointees as Senior Counsel shall wear the court dress worn by Queens Counsel.

- (ii) Appointees as Senior Counsel shall be entitled to describe themselves as "Senior Counsel" to be abbreviated as "SC".
- (iii) Senior Counsel, by seeking and achieving appointment, undertake to use the designation only while they remain practising counsel in private practice or in employment or retained under statute by the Crown, or during temporary appointment in a legal capacity to a court, tribunal or statutory body, or in retirement from legal practice.
- (iv) Senior Counsel may resign the office by notice in writing delivered to the Chief Justice.
- (v) The Chief Justice may from time to time give directions to Senior Counsel who are members of firms as to the use of the title "Senior Counsel" or of its post nominal abbreviation on the letterheads, business cards or plates, web-sites or other means wherein a firm identifies itself or its membership.
- (vi) The Chief Justice may withdraw the office of Senior Counsel if a complaint under the *Legal Profession Act 2007* has been determined unfavourably to that counsel by the Legal Profession Board of Tasmania, the Disciplinary Tribunal or the Court or in such other circumstances as the Chief Justice considers it appropriate to withdraw the office of Senior Counsel.

South Australia

118. The principles and procedures for the appointment of Senior Counsel in South Australia are found in Chapter 12 – Civil Procedure South Australia – Practice Direction 12 of 2006, which took effect in May 2008. Relevantly, the Practice Direction provides:

Direction 12.3

Appointment to the office of Senior Counsel shall be by the Chief Justice on behalf of the Court.

Direction 12.4 – Criteria for Appointment

12.4.1 Appointment as Senior Counsel will be made on the basis of a combination of the following qualities:

- 12.4.1.1 sufficient standing, evidenced by a high level of professional eminence and distinction;
- 12.4.1.2 wide experience in advocacy;
- 12.4.1.3 highly developed advocacy skills;
- 12.4.1.4 legal learning, such that the applicant may properly be described as learned in the law;
- 12.4.1.5 integrity, such that the applicant's honesty and candour is beyond question;
- 12.4.1.6 availability;
- 12.4.1.7 independence.

12.4.2 **Integrity** includes:

- 12.4.2.1 a reputation for honesty, discretion and plain dealing with the courts, professional colleagues and clients;
- 12.4.2.2 independence of mind;
- 12.4.2.3 professional standing, namely, having the respect of the judiciary and the profession with respect to observing duties to the courts and to the administration of justice, while preparing and presenting a client's case with dedication and skill, and having the trust and confidence of professional colleagues.

12.4.3 **Availability** involves a practitioner adopting a mode of practice which ensures that his or her services are available generally to prospective clients and are not unduly restricted by client or business relationships. This does not preclude the acceptance of a general or special retainer on behalf of a client. Senior Counsel must honour the duty to accept briefs to appear within their area of practice and for which they are available, regardless of any personal opinions about the parties or about the causes, and subject only to exceptions relating to appropriate fees and conflicting obligations. The criterion of availability does not apply to

counsel holding a statutory office or in the employment of the Crown or the Legal Services Commission.

- 12.4.4 **Independence** includes objectivity and detachment. Besides absence of connections which restrict availability, it involves the ability and courage to give advice and to make decisions which serve the best interest of the client and the administration of justice.

Direction 12.6 – Consultation

- 12.6.1 As soon as practicable after 30 June in each year the Chief Justice will provide a list of the current year's applicants and copies of the relevant applications, including revised applications, to:

- 12.6.1.1 the Attorney-General;
- 12.6.1.2 Judges of the Supreme Court;
- 12.6.1.3 Masters of the Supreme Court;
- 12.6.1.4 the senior resident Judge of the Federal Court of Australia;
- 12.6.1.5 the senior resident Judge of the Family Court of Australia;
- 12.6.1.6 the Chief Judge of the District Court;
- 12.6.1.7 the Senior Judge of the Industrial Relations Court;
- 12.6.1.8 the Chief Magistrate of the Magistrates Court;
- 12.6.1.9 the Senior Resident Member of the Administrative Appeals Tribunal;
- 12.6.1.10 the Solicitor-General;
- 12.6.1.12 the President of the South Australian Bar Association;
- 12.6.1.13 the President of the Law Society of South Australia;
- 12.6.1.14 the President of the Women Lawyers Association;
- 12.6.1.15 the Director of Public Prosecutions;

12.6.1.16 the Chief Counsel of the Legal Services Commission.

12.6.2 It is expected that the persons referred to below will consult as specified in the following sub-paragraphs:

12.6.2.1 in the case of the senior resident Judge of the Federal Court and the Family Court, the other Judges of those courts resident in the jurisdiction and the other Judges of those courts before whom the applicant has appeared, if thought fit;

12.6.2.2 in the case of the Chief Judge of the District Court, the Judges of the District Court;

12.6.2.3 in the case of the Presidents of the South Australian Bar Association and the Law Society of South Australia, their respective council or executive as the case may be and such other members of those bodies as the respective Presidents consider appropriate;

12.6.2.4 in the case of the head of another jurisdiction, judicial officers of that jurisdiction before whom the applicant has appeared.

12.6.3 The fact that an application has been made, and its terms, shall be treated as confidential, and shall only be disclosed to the extent necessary to enable the processes of consultation referred to in this Practice Direction. All consultations should be undertaken with discretion, respecting as far as possible the privacy of applicants.

12.6.4 As soon as practicable after providing a copy of the applications, the Chief Justice will appoint a time for the following persons to meet as a group with the Chief Justice for the purpose of consultation on the applications:

- The Attorney-General or the Attorney-General's nominee;
- The Solicitor-General;

- The President of the Law Society of South Australia or the President's nominee;
- The President of the South Australian Bar Association or the President's nominee;
- The President of the Women Lawyers' Association or the President's Nominee;
- The Director of Public Prosecutions (SA);
- The Chief Counsel of the Legal Services Commission.

12.6.5 As soon as practicable after consulting with the persons referred to in 12.6.4, the Chief Justice will appoint a time for the following persons to meet as a group with the Chief Justice for the purpose of consultation on the applications:

- The senior puisne Judge of the Supreme Court and the junior puisne Judge of the Supreme Court;
- The Chief Judge of the District Court;
- The Chief Magistrate;
- The senior resident Judge of the Federal Court of Australia;
- The senior resident Judge of the Family Court of Australia;
- The senior Judge of the Industrial Relations Court;
- The senior resident member of the Administrative Appeals Tribunal.

12.6.6 The Judges and Masters of the Supreme Court may comment to the Chief Justice on the applications if they wish. The Chief Justice will meet with any of the Judges or Masters who wish to comment.

12.6.7 If an applicant nominates for consultation a head of another jurisdiction in which the applicant practises, the Chief Justice will forward a copy of the application to the head of that jurisdiction, and will invite that person to comment on the application.

Direction 12.7 – Appointment

- 12.7.1 After taking account of the opinions of the persons consulted pursuant to this Practice Direction, the Chief Justice will decide which applicants will be appointed to the office of Senior Counsel, and will advise each applicant in writing of the outcome of their application. The appointment of Senior Counsel shall be announced publicly, and shall be published in the South Australian Government Gazette.
- 12.7.2 The Chief Justice will not usually provide reasons for declining to appoint an applicant. However, the Chief Justice may, of his or her own volition, or at the request of a person with whom the Chief Justice is required to consult, offer to meet with an unsuccessful applicant to discuss the application and the reason for its refusal. An unsuccessful applicant may request such a meeting.
- 12.7.3 Appointments will be made under the hand of the Chief Justice by an instrument in writing bearing the seal of the Supreme Court and will, if practicable, be announced no later than the 30th day of November in each year.

Victoria

119. In April 2011, the Chief Justice of the Supreme Court of Victoria, the Honourable Marilyn Warren AC, informed the Victorian Bar Council that she would no longer have the necessary time available to devote to the appointment of Senior Counsel in and for the State of Victoria, and would return the responsibility for the appointment to the Bar. At that time, the Chief Justice indicated that she would be pleased to consider and assist with the new model for selection that the Bar Council develops. However, the Chief Justice has not yet committed to accepting any new process. That resolution awaits the outcome of a consultation process by the Bar.
120. Throughout 2011, the Victorian Bar developed a proposal for the appointment of Senior Counsel in Victoria in 2012. That proposal reflects the Bar Council's strong preference for a Court-based system, with the Chief Justice being centrally involved.⁴⁸

⁴⁸ For a copy of the Victorian Bar Discussion Paper on the Appointment of Senior Council see: <http://www.vicbar.com.au/webdata/pdf/Bar%20Council%20Discussion%20Paper%20-%209%20December%202011%20-%20Proposal%20regarding%20Silk%20Selection%20Process.pdf>

121. As explained in the Victorian Bar Discussion Paper, under the current structure, applicants apply directly to the Chief Justice. Her Honour then discusses all applications with an Advisory Committee comprising:

- two judges of the Court of Appeal – the senior appellate judge is the Chair of the Committee;
- a senior judge from each division – Crime, Commercial and Equity and Common Law; and
- two more junior judges.

122. This Advisory Committee gives the Chief its views on who, in its opinion, are the top-ranking applicants.

123. The Chief Justice then consults with:

- The Chief Justice of the Federal Court
- The Chief Justice of the Family Court
- The Chief Justice of the County Court
- The President of the VCAT
- The Solicitor-General
- The Chair and Vice Chair of the Bar Council
- The President of the Law Institute of Victoria
- The State DPP
- The Commonwealth DPP
- The President of the Industrial Relations Commission
- The Chair of the Criminal Bar Association
- The Chair of the Common Law Bar Association

- The President of the Commercial Bar Association.
124. The Chief Justice then meets again with the Advisory Committee and makes her final decision.
125. The criteria for appointment, as usually listed in a notice issued by the Court when calling for nominations in any given year are as follows:
- Excellence in the practice of law, especially in advocacy;
 - Integrity,
 - Independence,
 - Standing in the profession.
126. The Victorian Bar Discussion Paper proposes the following reformulation of the criteria:
1. The designation of Senior Counsel provides a public identification of barristers whose standing and achievements justify an expectation, on the part of those who may need their services as well as on the part of the judiciary and the public, that they can provide outstanding services as advocates and advisers, to the good of the administration of justice.
 2. Excellence in the practice of law, especially in advocacy:
 - Learning: Senior Counsel must be learned in the law so as to provide sound guidance to their clients and to assist in the judicial interpretation and development of the law.
 - Skill: Senior Counsel must be skilled and exercise judgment in the presentation and testing of litigants' cases in adversary proceedings, so as to enhance the likelihood of just outcomes and serve the public interest.
 - Diligence: Senior Counsel must have the capacity and willingness to devote themselves to the vigorous advancement of the client's interests.
 - Experience: Senior Counsel must have the perspective and knowledge of legal practice that is usually acquired over a considerable period. It is

expected (without being exhaustive) that the applicant's practice will make apparent some or all of the following:

- i. experience in contested matters, especially trials;
- ii. experience in arguing cases on appeal;
- iii. experience in conducting major cases in which the other party is represented by Senior Counsel;
- iv. experience in conducting cases with a junior;
- v. considerable practice in giving advice in specialist fields of law; and
- vi. a position of leadership, either generally or in a specialist jurisdiction.

3. Integrity:

- Integrity and honesty: Senior Counsel must be worthy of confidence and implicit trust by the judiciary and their colleagues at all times, so as to advance the open, fair and efficient administration of justice.

4. Independence:

- Senior Counsel must be committed to the discharge of counsel's duty to the court, especially in cases where that duty may conflict with the client's interests.
- Senior Counsel who are in private practice must honour the cab rank rule: the duty to accept briefs to appear for which they are competent and available, regardless of their personal opinions of the parties or the causes, and subject only to exceptions related to appropriate fees and conflicting obligations.

5. Standing in the profession:

- Senior Counsel will have demonstrated leadership in: (a) contributing to the community of the Bar or participating in the legal profession more generally; or (b) making a significant contribution to Australian society as a legal practitioner.

The guidelines for candidates should make clear that unless they have been regularly appearing in superior jurisdictions (including the County Court) or in significant arbitrations; they will not demonstrate the requisite experience.

Application Form

The application form could be expanded to require a candidate to provide significantly more, but focused, material, so as to enable a preliminary evaluation of the candidate to occur, and also to assist the Chief Justice with the ultimate consideration of his or her application.

The guidelines should indicate that attention to detail in the completion of the application form will be taken into consideration in evaluation of the application.

Requiring additional specific information of candidates should also focus the minds of prospective applicants as to whether they realistically meet the criteria.

Suggested matters to be covered in the application form (in addition to matters already covered) are as follows:

1. In respect of all cases,* including contested interlocutory applications (but excluding directions hearings), in which you have appeared in the last 18 months, please supply:
 - (a) the name of the case and, if available, its citation;
 - (b) the name of the judicial officer, tribunal, or arbitrator before whom you appeared;
 - (c) the name of any counsel who led you or whom you led;
 - (d) the name of opposing counsel; and
 - (e) the name of your instructing solicitor.

You may also provide details of significant matters in which you have been involved in court or other proceedings outside the last 18 months.

* If you have appeared in more than 30 cases in the last 18 months, you do not need to list all cases but may choose to list only the 30 most significant cases.

2. State succinctly the reasons you hold the view that you are an appropriate candidate for the office of Senior Counsel including, but without being exhaustive, why you believe that you satisfy the criteria.
3. Areas of Practice. Please indicate in the boxes provided those areas which fairly characterise your main areas of practice and which would therefore provide the focus for assessment of your application.

[Prepare and insert list of practice areas]

Courts: please indicate in the boxes provided the courts and/or tribunals in which you predominantly practise:

[Prepare and insert list of courts and tribunals]

4. Provide a single paragraph summary of your practice areas and experience which may form the basis for a short biographical publication in the event that your application is successful.
5. State the year of first application (if applicable) and number of applications.
6. Complaints etc history. Provide details of any upheld disciplinary complaints (including where counsel has been counselled), unresolved complaints, convictions for serious offences (including pleas of guilty) and any bankruptcy (providing details).
7. Certifications and acknowledgements, eg. as follows:
 - I certify that the information provided in this application is correct to the best of my knowledge and belief.
 - I acknowledge that the Chief Justice, the Court, the Preliminary Evaluation Committee [discussed below] and persons the Chief Justice may consult may make enquiries of the persons referred to in paragraph 1 above and such other persons as it or they think fit in relation to my application.
 - I authorise such enquiries to be made and acknowledge that it will be done on a confidential basis and that the information received from such enquiries and provided by such third parties is confidential as against me and may not be disclosed to me. I agree to confidential

enquiries being made of the Legal Services Commissioner or any other regulatory body about any matter or circumstances, either past or anticipated, that may adversely affect my fitness or propriety to hold an appointment as Senior Counsel. I also agree that the Legal Services Commissioner and any such other regulatory body as may be consulted may provide to the Preliminary Evaluation Committee and the Chief Justice, on a confidential basis, all information necessary to answer such enquiries.

- I acknowledge that any evaluation undertaken by the Preliminary Evaluation Committee or any decision of the Chief Justice or the Court is not reviewable.
- I undertake to notify the Chief Justice in the event that any new matter arises that would be required to be disclosed under paragraph 6 above.

As part of the application process, candidates would continue to nominate 4 judicial referees as under the current system. The application form could make clear that it is open to the Chief Justice not to contact these referees unless the candidate proceeds to the second stage of the process (see further below).

Preliminary evaluation process

It is suggested that the Chief Justice might be assisted if a preliminary evaluation were undertaken by a committee to be established by her, with the objective of producing a list of those applicants who are considered by the committee to satisfy sufficient of the criteria for appointment as to be suitable for consideration for appointment. It is envisaged, based on the size of the Bar, that this is likely to be a list of approximately 30.

Under this suggestion, the Chief Justice would refer on a confidential basis the entire list of applicants and copies of their application forms to the committee for preliminary evaluation.

The Committee could be styled the Preliminary Evaluation Committee (or some other title the Chief Justice considered appropriate) with its composition comprising:

- The Chairman and Senior Vice-Chairman of the Bar Council;

- A retired superior court Judge;
- Four Senior Counsel, with the objective that they represent practice areas not covered by the Chairman and Senior Vice-Chairman;
- A solicitor.

Apart from the Chairman and Senior Vice-Chairman, it is envisaged that the Chief Justice would appoint the other members of the Committee.

Although the above suggested composition does not provide for a lay member of the Committee, it is considered that the retired Judge member would provide appropriate oversight of the process.

There should be a turnover of people on the Committee, while retaining some continuity. Therefore a maximum term of 2 years for any person on the Committee, but with staggered terms may be appropriate.

Decisions of the Committee would be by majority vote.

The Preliminary Evaluation Committee's consideration could be based initially on the application forms (expanded to include the additional material referred to above) submitted by candidates.

[For consideration: Applicants could be required to provide the names of two non-judicial referees, who could be barristers, solicitors or corporate counsel, who have direct, recent experience of the candidate's work in Court. The Committee could consult confidentially with these non-judicial referees.]

The Committee may, if it thinks appropriate, seek further information, on a confidential basis, from any applicant or any person who, in its opinion, would be able to assist it in its deliberation.

The Committee may consult with the Chief Justice or her nominee from the Court, on a confidential basis, before making its preliminary evaluation for consideration by the Chief Justice.

Judicial references would be for the Court to obtain, as discussed below.

At the conclusion of this process, the Committee would provide its preliminary evaluation list to the Chief Justice. Further, any information gathered by the

Committee would be available to the Chief Justice to consider at the Chief Justice's sole discretion. Candidates would not be informed at this point whether or not they have been included in the list. Following the announcement of the successful candidates, unsuccessful candidates could seek feedback (see below).

[To consider: whether it would be preferable not to have the Committee structure or process formalised as set out above, but rather leave it to the direction of the Chief Justice.]

Second stage of the process

After the preliminary evaluation list is provided to the Chief Justice (around the end of August), the second stage of the process could take place, i.e. the Chief Justice choosing the candidates to be appointed Senior Counsel.

It would be open to the Chief Justice not to obtain judicial references for those candidates not on the preliminary evaluation list. It is envisaged that the Chief Justice would consult with the same designated groups/people as under the present process. We envisage that judicial references would not be sought until after the preliminary evaluation has taken place.

The Chief Justice could appoint a candidate not on the preliminary evaluation list.

Application structure

Order 14 rule 9 of Chapter II – Supreme Court (Miscellaneous Civil Proceedings) Rules 2008 states that an application is to be made to the Chief Justice. Under the suggestions outlined above, all applications will continue to be made to the Chief Justice and then referred by her to the Preliminary Evaluation Committee.

Feedback

The current feedback mechanism, whereby an unsuccessful candidate may seek feedback from the Chief Justice via the Chairman of the Bar Council, would continue. Candidates seeking feedback would be informed if they made the Committee's preliminary evaluation list. Further, without disclosing any confidences, the Chairman would be able to provide feedback to a candidate

about matters that the Committee considered relevant in that candidate not making the preliminary evaluation list.

Information session

It would be desirable for the Bar to conduct an information session for prospective candidates each year, in about April, to outline the selection process. One of the messages that would likely be conveyed at the information session is that multiple unsuccessful applications will not enhance, and could hinder, a candidate's prospects of success.

Queensland

127. In Queensland, the "Criteria for Appointment" (as approved by the Council of the Queensland Bar Association on 20 July 2009)⁴⁹ read as follows:

The designation of Senior Counsel provides a public identification of barristers whose standing and achievements justify an expectation, on the part of those who may need their services as well as on the part of the judiciary and the public, that they can provide outstanding services as advocates and advisers, to the good of the administration of justice.

As a recognition based on the opinions of those best placed to judge barristers' qualities, the designation of Senior Counsel also provides a goal for the worthy ambition of junior counsel, and should encourage them to improve and maintain their professional qualities.

1. Applicants are normally expected to have at least twelve years experience at the Bar before they apply. Applicants with less than this time in practice are unlikely to have sufficient experience to enable them to fulfil the criteria and are therefore unlikely to be successful in their application.
2. Unless there are exceptional circumstances, appointment as Senior Counsel will be restricted to practising banisters.

⁴⁹ See: http://www.qldbar.asn.au/index.php?option=com_content&task=view&id=39&Itemid=41

3. The qualities required to a high degree before appointment as Senior Counsel are skill and learning, integrity and honesty, independence, diligence and experience.
 - a. Senior Counsel must be learned in the law so as to provide sound guidance to their clients and to assist in the judicial interpretation and development of the law.
 - b. Senior Counsel must be skilled in the presentation and testing of litigants' cases, so as to enhance the likelihood of just outcomes in adversarial proceedings.
 - c. Senior Counsel must be accomplished in the giving of advice: both as to the most appropriate way to conduct litigation, and as to the most appropriate way in which problems might be resolved outside the traditional system, such as through mediation and other non-judicial means of achieving resolution of conflict.
 - d. Senior Counsel must be worthy of confidence and implicit trust by the judiciary and their colleagues at all times, so as to advance the open, fair and efficient administration of justice. Senior Counsel must have a history of honesty, discretion and plain dealing with professional colleagues, lay and professional clients and the courts.
 - e. Senior Counsel must be committed to the discharge of counsel's duty to the court, especially in cases where that duty may conflict with clients' interests.
 - f. Senior Counsel who are in private practice must honour the cab-rank rules; namely, the duty to accept briefs to appear for which they are competent and available, regardless of any personal opinions of the parties or the causes, and subject only to exceptions related to appropriate fees and conflicting obligations.
 - g. Senior Counsel must have the capacity and willingness to devote themselves to the vigorous advancement of their clients' interests and to have demonstrated an independence of mind and moral courage in so doing.

- h. Senior Counsel must have the perspective and knowledge of legal practice acquired over a considerable period.
- i. Senior Counsel must have demonstrated a commitment to the advancement of justice and the profession.
- j. In order for the foregoing qualities to have been properly developed and tested, it is expected that applicants for appointment as Senior Counsel should have practised for a considerable time. During this time it is expected (without being exhaustive) that the applicants' practices will demonstrate some or all of the following: experience in arguing cases on appeal; a position of leadership in a specialist jurisdiction; experience in conducting major cases in which the other party is represented by senior counsel; considerable practice in giving advice in specialist fields of law; and experience in conducting cases with a junior.

128. In Queensland, the relevant sections of the “Appointment and Consultation Process” of Senior Counsel (as approved by Council of the Queensland Bar Association on 20 July 2009) reads as follows:

The process for the appointment of Senior Counsel shall be as follows:

1. At the meeting of the Bar Council in May of each year the Senior Counsel Consultation Group (SCCG) shall be appointed. The SCCG shall consist of: the President, the Vice-President, and six senior counsel nominated by the President, and approved by the Council, not more than one of whom may be a member of the Council, and comprising to the extent that Council considers it practicable, one silk practising in each of the jurisdictions of Planning and Environment, Commercial and Equity, Common Law and Personal Injury, Family Law, Administrative Law and Criminal Law.
2. Any barrister wishing to apply for appointment must make application by completing the approved form and sending it to the Secretary so that it is received no later than the last Friday in August in that year. The President may, in exceptional circumstances accept a later application provided that it is received within seven (7) days of the last Friday in August of that year.
3. In addition to other matters in the approved form of application, the applicant:

- (a) should name substantive matters in which the applicant has recently been involved;
 - (b) should identify in respect of each such matter the opponent or opponents of the applicant in that matter.
 - (c) may nominate a number of referees including, if desired by the applicant, solicitors by whom the applicant has been briefed in recent litigation, and who may be consulted by the SCCG in respect of the application.
- 4. A full list of all those who have sought appointment will be made available to any member who wishes to see it.
- 5. On the first working day after the final day on which late applications may be accepted by the President, the Secretary shall provide to each member of the SCCG a complete copy of all applications which were made in accordance with these provisions.
- 6. The members of the SCCG shall consider the applications and, by reference to the information contained in them and the Criteria for Appointment, seek comments from people who would have knowledge of a particular applicant or applicants, in the following categories:
 - (a) Senior counsel in actual practice,
 - (b) Junior counsel in actual practice who have not made application for silk during the year in question, and
 - (c) Members of courts and tribunals (whose comments may be sought through the senior judge or member of the court or tribunal concerned).
- 7. The SCCG shall only seek, and have regard to, comment based upon personal knowledge of the applicant.
- 8. A member or members of the SCCG shall seek to interview the recent opponents of the applicants identified by the applicants and may interview referees identified by the applicants, and shall report to the SCCG accordingly.
- 9. The SCCG may, if it thinks appropriate, seek further information from any applicant or any person who, in its opinion, would be able to assist it in its deliberations.

10. By no later than 30 September, the SCCG shall provide the President with a list of those applicants who are considered by it to satisfy sufficient of the Criteria for Appointment to be suitable for consideration for appointment.
11. On the first working day after receipt of the list from the SCCG the President shall provide the Chief Justice with:
 - (a) A list of all applicants (together with their applications)
 - (b) The list provided by the SCCG.
12. Upon receipt of that information the Chief Justice shall consider:
 - (a) whether any additional Senior Counsel in and for the State of Queensland should be appointed in that year, and
 - (b) if any such appointments are to be made, who should be appointed.
13. Before making either of the decisions referred to above, the Chief Justice shall consult with the judges of the Supreme Court, the Chief Justice of the Federal Court and the President of the Bar Association. Where it is clear that the practice of an applicant is one which is substantially in courts or tribunals other than the Supreme Court or the Federal Court, then the Chief Justice shall consult with the Chief Justice (or nominee) of that court or presiding officer (or nominee) of the tribunal, as the case may be. The Chief Justice may also consult with any other person who in his or her opinion would assist in the process of appointment.
14. In making a decision to appoint an applicant as Senior Counsel the Chief Justice shall take into account the Criteria for Appointment.
15. By the third Wednesday in November the Chief Justice shall:
 - (a) cause the names of those to be appointed as Senior Counsel to be posted on the Supreme Court web site,
 - (b) provide the President of the Bar Association with a list of those names, and
 - (c) make available to the Chief Executive of the Bar Association letters addressed to each of the applicants advising them of the outcome of their application.

17. An unsuccessful applicant may ask the President whether his or her name was on the list referred to in paragraph 11(b) and the President shall tell the unsuccessful applicant.
18. Where an applicant unsuccessfully applies for appointment as Senior Counsel, the President shall upon the request of the applicant discuss with the applicant his or her application.

Overseas Jurisdictions

New Zealand

129. In February 2010, the New Zealand government introduced the *Lawyers and Conveyancers Amendment Bill 2010*.⁵⁰ The Bill proposes significant changes to the appointment of Senior Counsel in Zealand.
130. The aim of this Bill is to amend the Lawyers and Conveyancers Act 2006 (the Act), inter alia, to restore the rank of Queen's Counsel and restrict eligibility for appointment to that rank.
131. The Bill provides the following background in relation to the appointment of silks in New Zealand:

Queen's Counsel in England

The offices of Attorney General and Solicitor General, the law officers of the Crown, date from the fifteenth century. By the end of the sixteenth century there had also grown up a body of "Her Majesty's learned counsel", retained by the Crown to assist the law officers in their work. The first King's Counsel to be established by patent was Francis Bacon. Further King's Counsel were appointed by the Stuart kings, and in 1670 Charles II in the Privy Council decided that King's Counsel [took precedence over most other lawyers]. As the number of King's Counsel increased, they ceased in any real sense to be counsel to the Crown and became simply a class of counsel who, by eminence or favour, had been given a rank superior to that of ordinary barristers. One survival of their original function was that, until 1920, they remained unable to appear in a case against the Crown without a licence from the Crown. In the nineteenth century a practice emerged that King's Counsel would not appear as advocates in any

⁵⁰ <http://www.legislation.govt.nz/bill/government/2010/0120/latest/DLM2765205.html>

court of law unless a junior was also instructed. This practice eventually hardened into a rule of professional conduct. The rule has since been abolished.

Queen's Counsel in New Zealand

The English situation also, generally, pertained in New Zealand until the passage of the Act. The Act created the office of Senior Counsel to replace the office of Queen's Counsel. Senior Counsel are appointed by the Governor-General on the recommendation of the Attorney-General. The previous situation was that a barrister of the rank of Queen's Counsel was not permitted to practise as a solicitor, either alone or in partnership with any other practitioner, nor to hold a practising certificate as a barrister and solicitor.

132. Under the current Act, Senior Counsel may:

- hold practising certificates as barrister or barrister and solicitor;
- practise alone or in partnership with other lawyers;
- be a director or shareholder of an incorporated firm; and
- be an employee or statutory officer.

133. The proposed Bill provides that the purpose of Part 1 of the Bill (relating to Queen's Counsel) is to:

- end the renaming as Senior Counsel of the office or rank that before 1 August 2008 was, and after 2 December 2012 is again to be, known as Queen's Counsel; and
- restrict standard eligibility for appointment, under the Royal prerogative, to that office or rank to a specified category of lawyers practising independently as barristers sole; and
- require people who hold that rank, and who when appointed to it were lawyers in that specified category, to practise in ways that maintain its independence (Part 1, Clause 4).

134. The Bill provides that a person holding a current practising certificate as a barrister (but not as a barrister and solicitor) is eligible for appointment, under the Royal prerogative, as Queen's Counsel if that person:

- practises alone (that is, not in partnership with any other lawyer); and
- is not actively involved in the provision by an incorporated law firm (other than one in which he or she is the only voting shareholder) of legal services; and

- (whether or not he or she is a statutory officer) is not an employee.
135. However, other persons who do not meet the above criteria may be appointed Queen's Counsel under the Royal prerogative (Part 1, Clause 6, inserting new sections 118A and 119C into the Act).
136. The Bill provides that a person who holds the rank of Queen's Counsel, and who when appointed to that rank was in the categories set out above:
- must not practise in partnership with any other lawyer; and
 - must not be actively involved in the provision by an incorporated law firm (other than one in which he or she is the only voting shareholder) of legal services; and
 - must not be an employee; but
 - is not precluded, by reason only of the fact that he or she holds that rank, from being a statutory officer.
137. The Bill also provides the following closing comment:
- The effect of New Sections 118A and 118B is to restrict standard eligibility for appointment, under the Royal prerogative, to that office or rank to a specified category of lawyers practising independently as barristers sole and require people who hold that rank, and who when appointed to it were lawyers in that specified category, to practise in ways that maintain its independence.
138. The Bill does not appear to have passed through final reading.
139. The Bill has not been without its critics. In that regard, the Western Australian Law Society notes the Report of the New Zealand Justice and Electoral Committee and the reported minority view of the NZ Labour Party.⁵¹
140. The Western Australian Law Society also notes the submissions of the New Zealand Law Society⁵² who found itself unable to draw any firm conclusions in relation to the proposed Bill:
- 1.3 Many lawyers will be expecting us to take a firm stance on these latest policy shifts but we are in no better position with the Bill than we were with the Act. Opinion amongst lawyers is simply too divided for us to advance any single view

⁵¹ <http://www.legislation.govt.nz/bill/government/2010/0120/latest/whole.html>.

⁵² http://www.lawsociety.org.nz/_data/assets/pdf_file/0007/32389/lawyers-and-conveyancers-amendment-bill.pdf.

likely to meet favour with a significant majority of lawyers. Even within the ranks of various groupings of lawyers, where a degree of unanimity might usually be expected (including large firms and members of the separate bar) there are still quite strongly held opposing positions.

141. It is also worth noting the New Zealand Law Society's position in relation to the qualifications and experience needed from Queen's Counsel:

2.2 We take no exception to the substituted section 119 under which the various matters relating to appointments continue to be left to regulations. We take no exception, either, to the fact that these regulations may, as with the current situation, authorise the Chief Justice and the Attorney-General to issue guidelines in relation to requisite qualifications and experience, as well as the process by which candidates may be recommended for appointment. All we are saying in these submissions is that for public and professional acceptance of the worth of preserving the rank, determined efforts need to be applied to these issues. The objective must be the appointment of only the best people, distinguished by their outstanding all-round qualities of excellence, integrity, judgement and leadership.

142. Currently, Regulations 4 and 5 of *Lawyers and Conveyancers Act (Lawyers: Senior Counsel and Queen's Counsel) Regulations 2008* govern the appointment of silks in New Zealand.

143. Regulation 4, in relation to the composition of the selection panel, reads as follows:

- (1) The Attorney-General must convene a selection panel to provide advice to him or her on candidates for appointment as Senior Counsel.
- (2) A selection panel convened under subclause (1) must consist of the Solicitor-General, who is the chairperson of the panel, and -
 - (a) the president of the New Zealand Law Society or his or her nominee; and
 - (b) a member of the New Zealand Law Society nominated by the president of the New Zealand Law Society; and
 - (c) the president of the New Zealand Bar Association or his or her nominee; and

- (d) a member of the New Zealand Bar Association nominated by the president of the New Zealand Bar Association.

(3) The selection panel may determine its own process.

144. The panel advises the Solicitor General and the Chief Justice for final recommendation to the Governor General.

145. Regulation 5 reads:

Guidelines for Candidates

The Chief Justice and Attorney-General may issue guidelines in relation to both the qualifications and experience that should be possessed by candidates for appointment as Senior Counsel and the process by which such candidates may be recommended for appointment.

146. In 2008, the criteria set down by the Chief Justice and the Attorney-General were explained as follows:

The criteria for recommendation of candidates for Senior Counsel reflect the position of the office as the top echelon of advocates in New Zealand. Appointment requires in-depth legal knowledge and ability as litigator, as well as personal qualities including maturity of judgement and integrity.

The criteria which the selection panel will be considering in formulating their advice to the Attorney-General and Chief Justice are set out below. Applicants should give serious consideration to these criteria when considering whether to apply for silk.

Candidates are invited to address each of the criteria and set out examples from their practice and experience which demonstrate their attainment of these criteria:

Learning: Senior Counsel must be learned in the law so as to provide sound guidance to their clients and to assist in the judicial interpretation and development of the law.

Skill: Senior Counsel must be skilled in the presentation and testing of litigants' cases, so as to enhance the likelihood of just outcomes in proceedings.

Integrity and honesty: Senior Counsel must be worthy of confidence and implicit trust by the judiciary and their colleagues at all times, so as to advance the open, fair and efficient administration of justice.

Commitment to duty to the courts: Senior Counsel must be committed to the discharge of counsel's duty to the court, especially in cases where that duty may conflict with clients' interests.

Independence: Senior Counsel must have the independence, capacity and willingness to devote him or herself to the vigorous advancement of the client's interests, without taking account of other interests.

Experience and excellence: Senior Counsel must have the perspective and knowledge of legal practice acquired over a considerable period and represent standards of excellence. It is expected (without being exhaustive) that the applicant's practice will demonstrate some or all of the following:

- a) experience in arguing cases on appeal;
- b) a position of leadership in a specialist area of the law;
- c) experience in conducting major cases;
- d) experience in conducting cases with a junior;
- e) considerable practice in giving advice in specialist fields of law.

England and Wales

147. By far the most administratively demanding system for appointment of Senior Counsel is that currently used in England and Wales. The following historical overview⁵³ provides a useful summary:

Queen's Counsel were traditionally selected from barristers, rather than from lawyers in general, because they were counsel appointed to conduct court work on behalf of the Crown. Although the limitations on private instruction were gradually relaxed, QCs continued to be selected from barristers, who had the sole right of audience in the higher courts. However, in 1994 solicitors of England and Wales became entitled to gain rights of audience in the higher courts, and some 275 were so entitled in 1995. In 1995, these solicitors alone became entitled to apply for appointment as Queen's Counsel and the first two solicitors were appointed on 27 March 1997, out of 68 new QCs. These were Arthur Marriott (53), partner of the London office of the American law firm of Wilmer Cutler and Pickering, and Dr Lawrence Collins (55), a partner of the

⁵³ See: http://en.wikipedia.org/wiki/Queen's_Counsel#England_and_Wales.

City law firm of Herbert Smith who was subsequently appointed as a High Court Judge and ultimately Justice of the Supreme Court of the United Kingdom.

The appointment of new Queen's Counsel was suspended in 2003, and it was widely expected that the system would be abolished. However, a vigorous campaign was mounted in defence of the system, including those who supported it as an independent indication of excellence valued by outsiders (especially foreign commercial litigants). The Government's focus then switched from abolition to reform and, in particular, reform of what had been referred to as the "secret soundings" of Judges and other establishment legal figures upon which the old system was based - said, by some, to be inappropriate and unfair given the size of the modern profession, a possible source of improper Government patronage (since the final recommendations were made by the Lord Chancellor, who is a member of the Government), and discriminatory against part-time workers (especially women) and ethnic minorities.

148. The new system of appointment was introduced on 23 November 2006. This new process of appointment for selection of Queen's Counsel was developed by the Bar Council and the Law Society with support from the Ministry of Justice. The scheme is administered by its own Secretariat with its own premises independently of the Bar Council and the Law Society.

149. Currently, Applicants and Assessors are provided the following information⁵⁴:

- Application Form 2012-13
- Guidance for Applicants 2012-13
- Assessment Form 2011-12
- Assessment Form 2011-12 RTF
- Assessor Guidance 2011-12

150. Relevantly, the QC Appointments Website describes the new process as follows:

The award of Queen's Counsel is for excellence in advocacy in the higher courts. It is made to experienced advocates, both barristers and solicitors, who have rights of audience in the higher courts of England and Wales and have demonstrated the competencies in the Competency Framework to a standard of excellence.

⁵⁴ All forms can be found at: <http://www.qcappointments.org/>.

Advocacy includes both written and oral advocacy before the higher courts, arbitrations and tribunals and equivalent bodies. The advocacy may be in written or oral form but must relate to developing and advancing a client's or employer's case to secure the best outcome for the client in a dispute. That outcome may, for example, be secured through arbitration, court determination or a settlement agreement. Oral advocacy includes advocacy in a court or tribunal, mediation, arbitration or in negotiation. There is no specific requirement as to the amount of written advocacy or in-court advocacy, so long as there is sufficient evidence for the Panel to reach a conclusion as to excellence in respect of each aspect of advocacy.

The scheme is entirely self-financing. To cover the costs of the process applicants have to pay an application fee of £1950 + VAT. There will be a further appointment fee of £3500 (+ VAT) paid by successful applicants.

The Selection Panel's recommendations will be passed to the Lord Chancellor, who will put recommendations to The Queen. The Lord Chancellor has no power to veto names or to add names of his own.

151. The Selection Panel consists of a minimum of 9 people. It must include a senior judge, senior lawyers (both barristers and solicitors) and distinguished lay people. There must be an equal numbers of lawyers and lay people, excluding any judicial member. The Chair must be a distinguished lay person. Members are remunerated at a rate that reflects the importance and seniority of their positions.
152. The Selection Panel is independent of the legal professional bodies and Government but the Panel is chosen by the Chairman of the Bar and the Law Society and receives training and is supported by suitable expert advice on equal opportunities and competency-based selection.
153. The final list of applicants goes to the Secretary of State for Constitutional Affairs/Ministry of Justice and thence to the Queen for the issue of letters patent. Appointment is conferred at a ceremony presided over by the Secretary of State.
154. Feedback to unsuccessful applicants is provided by the Secretariat.
155. The "Competency Framework" referred to above is attached to the Guide for Applicants. It is provided below.
156. The Panel will judge how far an applicant meets the competencies as described by the passage in italics. The examples provided are intended to assist applicants,

assessors and others. Consideration of the demonstration of the competency is not limited to the examples quoted.

157. To merit recommendation for appointment all competencies must be demonstrated to a standard of excellence in the applicant's professional life. In general the Selection Panel will be looking for the demonstration of the competencies in cases of substance, complexity, or particular difficulty or sensitivity. Competency B (Written and oral advocacy) must be demonstrated in such cases.

A. Understanding and using the law

Has expert, up-to-date legal knowledge and uses it accurately and relevantly, and becomes familiar with new areas of law quickly and reliably.

Examples:

- ✓ Is up to date with law and precedent relevant to each case dealt with, or will quickly and reliably make self familiar with new areas of law.
- ✓ Draws on law accurately for case points and applies relevant legal principles to particular facts of case.

B. Written and oral advocacy

Develops and advances client's case to secure the best outcome for the client by gaining a rapid, incisive overview of complex material, identifying the best course of action, communicating the case persuasively, and rapidly assimilating the implications of new evidence and argument and responding appropriately.

The Panel will be looking both at the written and oral aspects of advocacy. Oral advocacy includes advocacy in a court or tribunal, mediation, arbitration or negotiation.

Examples (Written advocacy):

- ✓ Writes arguments accurately, coherently and simply, and in an accessible style.
- ✓ Presents facts and structures arguments in a coherent, balanced and focused manner.
- ✓ Deals effectively with necessary preliminary stages of legal disputes.

- ✓ Gains and gives an accurate understanding of complex and voluminous case material.
- ✓ Appreciates aspects of the case that are particularly important, sensitive or difficult and appreciates the relative importance of each item of evidence.
- ✓ Prepares thoroughly for the case by identifying the best arguments to pursue and preparing alternative strategies.
- ✓ Anticipates points that will challenge an argument

Examples (Oral advocacy)

- ✓ Deals responsibly with difficult points of case management and disclosure.
- ✓ Presents facts and structures arguments in a coherent, balanced and focused manner.
- ✓ Assimilates new information and arguments rapidly and accurately.
- ✓ Immediately sees implications of answers by witness and responds appropriately.
- ✓ Listens attentively to what is said paying keen attention to others' understanding and reactions.
- ✓ Accurately sees the point of questions from the tribunal and answers effectively.
- ✓ Gives priority to non-court resolution throughout the case where appropriate, identifies possible bases for settlement and takes effective action.
- ✓ Prepared and able to change tack or to persist, as appropriate.
- ✓ Deals effectively with points which challenge an argument.

C. Working with others

Establishes productive working relationships with all, including professional and lay clients, the judge and other parties' representatives and members of own team; is involved in the preparation of the case and leads the team before the court or other tribunal.

Examples:

- ✓ Behaves in a consistent and open way in all professional dealings.
- ✓ Establishes an appropriate rapport with all others in court and in conference.
- ✓ Advances arguments in a way that reflects appropriate consideration of perspective of everyone involved in the case.
- ✓ Helps the client focus on relevant points and is candid with the client.
- ✓ Explains law and court procedure to client and ensures the client understands and can decide the best action.
- ✓ Keeps lay and professional clients informed of progress.
- ✓ Is prepared to advance an argument that might not be popular and to stand up to the judge.
- ✓ Responds to the needs and circumstances of client (including client's means and importance of case to client and bearing in mind duty to legal aid fund) and advises client accordingly.
- ✓ Meets commitments and appointments.
- ✓ Accepts ultimate responsibility for case when leading the team.
- ✓ Motivates, listens to and works with other members of own team.
- ✓ Aware of own limitations and seeks to ensure that they are compensated for by others in team.
- ✓ Able to take key decisions with authority and after listening to views.
- ✓ Identifies priorities and allocates tasks and roles when leading the team.

D. Diversity

Demonstrates an understanding of diversity and cultural issues, and is proactive in addressing the needs of people from all backgrounds and promoting diversity and equality of opportunity

Examples:

- ✓ Is aware of the diverse needs of individuals resulting from differences in gender, sexual orientation, ethnic origin, age and educational attainment and physical or mental disability or other reason, and responds appropriately and sensitively.
- ✓ Is aware of the impact of diversity and cultural issues on witnesses, parties to proceedings and others as well as on own client, and adjusts own behaviour accordingly.
- ✓ Takes positive action to promote diversity and equality of opportunity.
- ✓ Understands needs and circumstances of others and acts accordingly.
- ✓ Confronts discrimination and prejudice when observed in others; does not let it pass unchecked.
- ✓ Acts as a role model for others in handling diversity and cultural issues.

E. Integrity

Is honest and straightforward in professional dealings, including with the court and all parties

Examples:

- ✓ Does not mislead, conceal or create a false impression.
- ✓ Honours professional codes of conduct.
- ✓ Where appropriate refers to authorities adverse to the client's case.
- ✓ Always behaves so as to command the confidence of the tribunal and others involved in the case, as well as client.
- ✓ Acts in professional life in such a way as to maintain the high reputation of advocates and Queen's Counsel.

Discussion: Submissions Received by the Society in Relation to the 2011 Ad Hoc Committee Discussion Paper

158. This section outlines and addresses submissions received by the Law Society of Western Australia in relation to the appointment of Senior Counsel.

Support for Continued Law Society Participation

159. The Ad Hoc Committee Discussion Paper resolved broadly that there was appropriate reform of the current system, the Law Society should continue to support the appointment of Senior Counsel in Western Australia.

160. Among the submissions received by the Society from members and relevant stakeholders in early 2012, there was general agreement that the Law Society should continue to participate in the consultation process as presently articulated. The responses also acknowledged in many circumstances that further clarification of criteria and process was important.

Criteria for Appointment

161. The Ad Hoc Committee Discussion Paper resolved that the overarching criteria for appointment should be eminence in the practice of law and leadership of the profession.

162. The Ad Hoc Committee Discussion Paper resolved that the criteria for appointment should include a requirement that the applicant:

- i. is a recognised leader within the areas of law in which he or she practises;
- ii. has demonstrated a commitment to equality of opportunity and fair and unbiased treatment of fellow practitioners irrespective of gender, race, sexual orientation or religion; and
- iii. will be available to advise members of the profession on matters of ethics and practice.

163. The criteria for appointment attracted significant attention by those who responded to the Society's request for submissions. A key theme in that regard was eminence in the practice of law and acknowledged leadership.

164. Another key response related to the need to affirm the criteria of independence and availability.

165. Several responses noted the need for consistency across jurisdictions.
166. As with the historical debates on this issue, as outlined above, the question of whether Senior Counsel should be reserved for advocates was again important. Several responses suggested that non advocates ought to be afforded the right to be appointed.
167. The extension of the title of Senior Counsel to solicitors in the United Kingdom in recent years and indeed the acceptance of some appointments in Western Australia in the past suggests that the appointment from time to time of Senior Counsel from practitioners in the amalgam will occur and is generally seen as beneficial for the profession.
168. Leadership was also highlighted in a number of responses as being a key criteria. This would appear to support the recommendations of the Ad Hoc Committee. The Ad Hoc Committee did suggest replacement of the current criteria, but rather inclusion of a further clarifying set of criteria. The WA Bar Association, in its submission to the Society, stated that the relevant criterion was not eminence or leadership, but rather a commitment and understanding of ethical duties arising from the nature of a practitioner's practice.
169. It was clear from the responses received that a demonstrated commitment to improving standards of practice and ethics was important to all who responded.
170. Consistent with those responses, it would be appropriate to adopt a policy that encourages the appointment of Senior Counsel who are leaders in the sense of improving standards of practice and ethics.
171. Some responses suggested the need to seek objective evidence of criteria. Most responses acknowledged that, to some extent, the assessment is not capable of being objectively determined. Acknowledging that a process that relied only on objective assessments would be easily administered and fair it must be conceded that for the most part the assessment required for historical reasons and in practical terms in the future will need to make subjective assessments.
172. That said, the importance of the process to both the interests of the profession in the position of Senior Counsel and the reputation of the process in this state requires that the criteria be assessed as objectively as possible.

173. After discussion at Council in May 2012, it was felt by many on Council that acknowledging that there is some importance in continuing to refine the selection criteria, it was agreed that the Law Society should adopt as a policy a process of engagement with the Chief Justice to refine the criteria consistent with national criteria and the modernisation of the profession in Western Australia.
174. There were observations by the Ad Hoc Committee on some elements of the current criteria which caused significant concern to some respondents. The proposals to modify or abolish the criteria of independence and availability, for example, attracted considerable comment.
175. There was also much discussion on the question of independence (both as a mindset in approaching the preparation of a client's matter and in the sense of being free from significant conflicts of interests) and availability (also encompassing the notion of being free from significant conflicts of interests).
176. Because independence and availability remain important criteria across most of the jurisdictions where the appointment of Senior Counsel is retained there can be only limited merit in suggesting a policy that is significantly different.
177. In light of the submissions received on these two criteria it is not appropriate to support abandoning the criteria of independence and availability.
178. That said, where those criteria are perceived to operate in a discriminatory way between those at the Bar and those in the amalgam the criteria ought to be clarified. This is discussed below.

The “Practice Discrimination” Argument

179. The Ad Hoc Committee Discussion Paper resolved that the criteria for appointment should not discriminate between practitioners practising at the Bar and those practising elsewhere. It concluded that any criterion which strictly limits appointments only to those practitioners who are available generally to prospective clients and are not restricted by client relationships should be removed.
180. Virtually no responses to the Ad Hoc Committee Discussion Paper suggested that a blanket discrimination against practitioners who operate in the amalgam ought to be enforced. Nor, as is clear from the historical overview provided above, does the history of appointment in Western Australia support such an approach.

181. Most of the responses received by the Society were directed to the reason in practice for most Senior Counsel being selected from practitioners who choose to practise from the independent bar. In that regard, a detailed submission from the WA Bar Association identified why barristers are more likely to be selected as Senior Counsel.
182. Ultimately, the WA Bar Association itself agreed that there will be occasions when a practitioner who is not at the Bar could appropriately be appointed Senior Counsel. Indeed, the Bar noted that this had occurred on several occasions in this State. The Society supports these conclusions.

Improvement of the Process

183. The Ad Hoc Committee Discussion Paper resolved that the appointment process should be under the control of a committee comprising members of the judiciary and representatives of WA Bar Association (Inc), the Law Society, Women Lawyers of WA (Inc), Criminal Lawyers Association of WA and Family Law Practitioners Association (WA).
184. There were several submissions which supported the proposal that the consultation committee reporting to the Chief Justice ought to contain permanent members appointed by significant professional associations, at least the Law Society and the WA Bar Association.
185. Acknowledging those responses and noting that the process for appointment ought to be kept simple at least for Western Australia (given the size of its profession) it was agreed by many on Council that continued participation in consultation would be a sufficient interim position.
186. It was the suggestion of the Young Lawyers Committee of the Law Society that the Society's own consultation committee also contain a representative of Society's Young Lawyers Committee who is also a member of the Law Society Council. This was supported by the Council and has been adopted by the Law Society.
187. The Ad Hoc Committee Discussion Paper resolved that the process of appointment should not contain any element of "automatic consultation or secret soundings" but should focus on assessment based only on those persons who have personally seen or dealt with the applicant.
188. For many, this resolution was a key observation as to process. It resulted in significant comment. The Ad Hoc Committee's Discussion Paper did not conclude that there was

no process. Rather, it concluded that any concerns being articulated related to the absence of any formality to the process of consultation and the fear (whether well founded or not) that the consultation process, without some rigour, would not always result in a good outcome.

189. Acknowledging that the current consultation process is not significantly different to the process used in other equivalent jurisdictions, the importance of this process for applicants and the need to apply rigour when analysing all applications, it was agreed that the Society should meet with the Chief Justice and explain to him the type of enquiry which the Society intends to undertake for the purposes of its own consultation process, the means by which it will justify its conclusions and the evidence it will offer in support.
190. The experience of some other jurisdictions (where disappointed applicants have sought court or administrative relief to ascertain the reasons for their non-appointment) suggests that as a participant in the process the Law Society ought to be prepared to appropriately justify its consultation both as to the conclusions and the rationale for the conclusions.
191. The Ad Hoc Committee's Discussion Paper resolved that the Chief Justice's only role in the appointment process should be a power to veto recommendations made by the committee. Acknowledging that the role of the Chief Justice in the appointment of Senior Counsel varies from jurisdiction to jurisdiction (ranging from little or no involvement to, as presently is the case in Western Australia, constituting the significant decision maker) it was accurately observed that in any appointment process there is likely to be one or a small group of significant personalities who ultimately make the relevant decision. There was no suggestion from any of those who responded that the Chief Justice have his role in the current process diminished in any way. The Council strongly agreed in considering the point in May 2012.
192. Ultimately it was agreed that the size of the profession in Western Australia does not currently warrant a sophisticated or expensive process for the selection of Senior Counsel in this state. While that is the case it does not appear appropriate to seek the removal of the power of appointment from the Chief Justice.
193. The Law Society advocates what it considers minor changes to the consultative process that simplify the consultation process, thereby saving the Chief Justice's time,

the time of the consultation committee, and the time of the Law Society and others whose opinions are sought.

Recommendations to Council

194. For the reasons articulated in the papers referred to above and this paper the following recommendations are made to Council for the purpose of being adopted as the position of the Law Society on the appointment of Senior Counsel in Western Australia:

1. The Society continue to support the retention of Senior Counsel in Western Australia.
2. The Society continue to support the criteria for appointment listed in paragraph 4 of Practice Direction 10.3. However, the Society recommends that the Chief Justice of Western Australia add a further element of “leadership in the practice and ethics of law” to the list of criteria in the Practice Direction.
3. The Society recommend to the Chief Justice of Western Australia that appointment of Senior Counsel continue to be open to solicitors and barristers and that the criteria for appointment be modified to ensure non-discrimination on the basis of mode of practice.
4. The Society continue to support the current appointment process and recommend to the Chief Justice of Western Australia that the Presidents (or their nominee) of the Law Society of Western Australia, the Western Australian Bar Association and Women Lawyers WA be added to the Chief Justice’s Consultation Committee.
5. The Society recommend to the Chief Justice of Western Australia that paragraph 13 of Consolidated Practice Direction 10.3 be amended to require all applicants to address the criteria in paragraph 4 and to provide at least three referees in their application.
6. The Society amend its Protocol for the Appointment of Senior Counsel to include a member of the Young Lawyers Committee who is also a member of the Law Society Council.

7. The Society recommend to the Chief Justice of Western Australia that unsuccessful applicants be advised by the Chief Justice in writing of the reasons why they were unsuccessful.

Why these Recommendations?

195. Set out below are the reasons for the seven recommendations outlined above.

Recommendation 1: The Society continue to support the retention of Senior Counsel in Western Australia

196. The constitution of the Law Society identifies several objects for the Society that are directed to the improvement and promotion of an honourable legal profession. The promotion of the appointment of Senior Counsel has been in the past, and continues to be, one method to pursue those objects.

197. The question of supporting the appointment of Senior Counsel was the first matter considered by the 2011 Ad Hoc Committee. The Ad Hoc Committee, after consulting and considering the arguments against continuing support for Senior Counsel, firmly resolved that the Law Society should continue to support the appointment of Senior Counsel and promote improvements that are designed to engender respect for the position.

198. The responses to the report by the Ad Hoc Committee did not identify any opposition to this position and firmly embraced continued support for the role of Senior Counsel within the profession.

Recommendation 2: The Society continue to support the criteria for appointment listed in paragraph 4 of Practice Direction 10.3. However, the Society recommends that the Chief Justice of Western Australia add a further element of “leadership in the practice and ethics of law” to the list of criteria in the Practice Direction.

199. The need to add “leadership” to the list of criteria for appointment was not universally acknowledged.

200. The Ad Hoc Committee noted that the role of Senior Counsel was to act as a guide and support to the profession generally. Some comments on the Ad Hoc Committee Discussion Paper affirmed the need to identify for the profession those who were respected in the practice of law.

201. The WA Bar Association did not favour amendments that would include express reference to the question of leadership. The WA Bar Association argued that

leadership was not a core or necessary criterion and would distract from more important criteria.

202. The responses of the wider profession appear to disagree. Many of the submissions received saw leadership as a reason for the position of Senior Counsel and a quality for an applicant.
203. This Paper has outlined above the criteria of the other states and territories of Australia and the criteria used in New Zealand and England and Wales. There is a reference to leadership in the criteria for New South Wales, Victoria, Queensland and the Australian Capital Territory and New Zealand. Those references to leadership are often in the context of eminence in a specialist field of the law.
204. The 2011 Ad Hoc Committee recommended adding leadership within the context of eminence by reference to the areas of law in which the applicant practices.
205. The usefulness of consistency within Australia and international jurisdictions tends to support adding some reference to leadership to the list of criteria. The reference to leadership in relation to ethics is consistent with the practice of Senior Counsel in Western Australia acting (often on a pro bono basis) as a guide or mentor on questions of ethics.
206. One of the difficult aspects for the Law Society's consultation with the Chief Justice on applications for Senior Counsel has been providing meaningful comments on applicants by addressing criteria which are almost exclusively assessable as subjective opinion.
207. The question of leadership as it now appears in the NSW and ACT list of criteria affords some objectivity to the consultation process as it permits a review of the number of times and number of years in which the applicant: has appeared in Superior Courts and relevant Courts of Appeal; appeared as a junior to respected Senior Counsel on complex matters warranting second counsel; appeared with supporting junior counsel; and, is acknowledged as a leader by peers in the work of the profession conducted through specialist committees and associations. That history lends itself to an assessment that is objective and quantitative.
208. To make the recommendation clear in terms of the precise amendment, the Law Society suggests that the Supreme Court of Western Australia's Practice Direction

10.3 be amended by adding a new sub paragraph to paragraph 5 (with appropriate corrections to the punctuation) as follows:

“c) demonstrated leadership in the practice and ethics of law”

Recommendation 3: The Society recommend to the Chief Justice of Western Australia that appointment of Senior Counsel continue to be open to solicitors and barristers and that the criteria for appointment be modified to ensure non-discrimination on the basis of mode of practice.

209. If there is one lesson learned from the review of the Western Australian history set out above, it is that the Law Society has always advocated a selection process open to all participants in the legal profession.

210. The right to practice in Western Australia is not limited or divided. Practitioners can now choose to practice only as a barrister but that is a choice made by the practitioner. There is no prohibition on solicitors practicing as barristers.

211. The profession has, in the past, been small in Western Australia. As discussed above, the Clarkson Committee Report concluded that eminence in fields of practice that do not involve advocacy deserved express acknowledgement. The history of appointment in Western Australia identifies a number of significant Senior Counsel who were appointed while practicing as solicitors. More recently, these men have almost always moved to the independent bar. The WA Bar Association acknowledged this history in its submissions to Society and noted that there is, therefore, no automatic or necessary discrimination in this state.

212. It remains a structural fact in Western Australia that most barristers commence their careers as solicitors. They often remain solicitors for many years before moving to the independent bar. While practicing as both solicitors and barristers, practitioners often appear as counsel at all stages of litigation, including appeals.

213. The promotion of excellence in practice should not be necessarily confined to those practicing at the independent bar.

214. The Practice Direction at paragraph 8 articulates the criteria of “availability” in terms that could be read as suggesting that the applicant must presently be “adopting a mode of practice which ensures that his or her services are available generally ... and are not restricted by client relationships”. Read that way, the paragraph does arguably delineate or discriminate on the basis of a mode of practice.

215. Australian jurisdictions with fused or amalgam professions do not confine appointments to advocates. The Northern Territory expressly recognises that exceptional circumstances will permit the appointment of an applicant who is not a practising advocate.
216. As the history of appointments demonstrates, and as the WA Bar Association notes, this paragraph is construed by reference to the future, rather than the past or present. Nonetheless, there should be clarity on the point and the Law Society should advocate the view that the requirement of “availability” is a question of the future rather than required as necessarily demonstrated in the past or present.
217. Consistent with its constitutional objectives, the Law Society advocates that the opportunity of appointment as Senior Counsel be open to all in the profession. This is faithful to earlier resolutions of the Law Society.

Recommendation 4: The Society continue to support the current appointment process and recommend to the Chief Justice of Western Australia that the Presidents (or their nominee) of the Law Society of Western Australia, the Western Australian Bar Association and Women Lawyers WA be added to the Chief Justice’s Consultation Committee.

218. The Law Society’s support for the appointment of Senior Counsel and its broader objectives to promote an honourable profession make it a natural participant in the process of selecting Senior Counsel. It is only natural that the Law Society, as the peak representative body of the profession in Western Australia, should advocate for itself on behalf of members a central role in the appointment process.
219. That said, the Law Society recognises that the size of the profession in Western Australia is such that the process of appointment ought to be appropriately simple. It is not the desire of the Law Society to add to the work of the Chief Justice or the consultative committee. It was appropriately observed that some of the reforms to the process in England and Wales have added layers of bureaucracy without necessarily delivering an equivalent benefit. Certainly the bureaucracy of larger jurisdictions appears inappropriate to Western Australia.
220. That said, if the Chief Justice were to consider adding to the membership of the consultative committee, the Law Society would advocate for inclusion of a representative from its Executive or Council. The Law Society acknowledges the position and worth of other associations with useful contributions to the process and would support the inclusion of a limited number of other participants.

Recommendation 5: The Society recommend to the Chief Justice of Western Australia that paragraph 13 of Consolidated Practice Direction 10.3 be amended to require all applicants to address the criteria in paragraph 4 and to provide at least three referees in their application.

221. This recommendation seeks to improve the process of applications for appointment.
222. The Ad Hoc Committee emphasised that the importance of the role of Senior Counsel will be enhanced by a respect for the rigour of the selection process. As observed by the Ad Hoc Committee, “as a general rule, good process delivers sound and fair outcomes”.
223. The good outcome here is an improvement to the process of assessment of applicants. This is achieved by the consultative committee having the benefit of the peers of the applicant, rather than it and others merely searching for some familiarity with the applicant, while trying to avoid assessments that are accidental, random or unrepresentative.
224. The creation of a good record of the process will engender further respect for the institution of Senior Counsel and provide good guidance to those who will need to make similar assessments in the future. The Society notes that the provision of referees is a part of the Victorian Bar Discussion Paper proposals and a part of the system in England and Wales.
225. The Law Society has been criticised in the past for failing to sufficiently assist the consultative process of the Chief Justice. In fairness, the consultation process is difficult when the application provides no detail on the selection criteria on which the appointment is made and when the Law Society’s Executive or its consultative committee are not familiar with the applicant.
226. Good process suggests that the record of a successful application should include a clear articulation of the merit of the applicant by reference to the criteria required. People may disagree on whether the applicant meets the criteria, but if appointed the record should at least articulate something addressing the criteria.
227. The applicant’s own assessment is, obviously, less than perfect but it is at least a starting point for those asked to comment.
228. The process of consultation is difficult where the person consulted is simply not familiar with the applicant. It may also miscarry where the connection is random or

unrepresentative of the applicant's skills. The requirement that the applicant nominate a referee is the usual means for checking the veracity of the applicant's claims.

229. Referees can expect to be asked to provide their views frankly and honestly. An applicant could not expect the referee to be less than honest and forthright. The process should not assume otherwise. The extent of any bias can be assessed in talking to the referee. Ignoring referees proffered by the applicant may delay the consultation process, as good practice would require those consulted to first speak to the applicant to obtain their consent to speak to others and to obtain the name and views of a referee.
230. The requirement for a referee has been criticised for fostering a select unofficial group whose word becomes sufficient for appointment. The width of the present consultation process would appear to work against that fear.
231. As with the requirement for applicants to address the criteria, the development of a record that supports an appointment through peer references is an important tool to avoid criticism. Again, people may disagree but at least there is an articulation of the merit of the successful applicant.
232. If an applicant is to be refused, at least the record of the application will show that their peers were consulted and their opinions considered.
233. These improvements to the process would assist the Law Society and no doubt others asked to contribute. In the view of the Law Society this will improve respect for the process by improving the relevance of the consultation, the standing of the administrative record of the process and the outcome.

Recommendation 6: The Society amend its Protocol for the Appointment of Senior Counsel is amended to include a member of the Young Lawyers Committee who is also a member of the Law Society Council.

234. This recommendation has already been implemented by the Law Society. The expansion of the Society's consultative group to those in the profession with less overall experience (but possibly closer experience with a particular applicant) has been as instructive as it was rewarding.
235. In 2012 the member of the Society's Young Lawyers Committee asked to join the Society's Consultation Committee was able to identify young lawyers who could contribute to the consultative process for particular applicants. The young lawyers contacted often provided useful assessments on: the role or merits of the applicant as

a mentor and leader; ethical advice provided; the ability to articulate the law to all levels of the profession; the scope of leadership on a wide range of matters; and, whether the applicant could be considered learned in the law.

236. These assessments from the ground up often provided perspective on an applicant that more senior members of the profession did not notice.
237. It is not suggested that the Chief Justice should consult with members of the Young Lawyers Committee (although they had initially suggested that he should). Rather, it is suggested that the Law Society, in its consultative processes, consider this segment of the legal profession. To date the Law Society has found value in having done that.

Recommendation 7: The Society recommend to the Chief Justice of Western Australia that unsuccessful applicants be advised by the Chief Justice in writing of the reasons why they were unsuccessful.

238. This last recommendation is designed to foster good process, engender respect for the status of Senior Counsel and build a record for review by others that articulates the rationale for appointments.
239. The Law Society acknowledges that the appointment process, while undertaken by the Chief Justice consulting judges, is not a traditional fact finding process and ultimately requires an assessment of character and merit on which opinions will and often do differ. This recommendation is not intended to be a new burden on the Chief Justice or the consultative committee. As the Law Society envisions them, the reasons provided would act as a summary of the outcome of the process for each applicant, protecting those consulted and their confidential contribution, and providing the disappointed applicant with the benefit of that work.
240. The provision of obligatory reasons has been criticised as encouraging response, confrontation and appeal. The Law Society acknowledges that potential but points to the rewards of a clearer basis for decision making. There exists the possibility that further correspondence will be discouraged by appropriate reasons.
241. The process of consultation by the Chief Justice does create a record, as far as the Law Society is aware, and the Chief Justice has provided and can be asked to provide a response to unsuccessful applicants in accordance with the Consolidated Practice Direction at paragraph 25. The preparation of a written response is arguably no new burden.

242. As with the fostering of a record to act as a guide to future consultations, the provision of written reasons for refusing an application will also afford the Chief Justice and the consultative committee who are involved in the process in the future a guide to the process of addressing the merits of past applicants.
243. Articulating reasons for refusal will quell the ability of disaffected parties to criticise the criteria, the process or the merit of other applicants who were successful.