

Senior Counsel Ad Hoc Committee

Report to the Council of the Law Society
of Western Australia

Ad Hoc Committee Discussion Paper for Consideration by the Law Society of Western Australia Council

Note: The Society has not adopted a position in relation to any of the matters traversed in this Report. The Society's Council has resolved only to consult widely from its constituents in relation to the issues and recommendations in this Report."

Note: The Society has not adopted a position in relation to any of the matters traversed in this Report. The Society's Council has resolved only to consult widely from its constituents in relation to the issues and recommendations in this Report.

SENIOR COUNSEL AD HOC COMMITTEE

Report to the Council of the Law Society of Western Australia

Summary of Recommendations

- 1 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.
- 2 The overarching criteria for appointment should be eminence in the practice of law and leadership of the profession.
- 3 Accordingly, the criteria for appointment should include a requirement that the applicant:
 - (a) is a recognised leader within the areas of law in which he or she practises;
 - (b) 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
 - (c) will be available to advise members of the profession on matters of ethics and practice.
- 4 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.
- 5 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).

Note: The Society has not adopted a position in relation to any of the matters traversed in this Report. The Society's Council has resolved only to consult widely from its constituents in relation to the issues and recommendations in this Report.

- 6 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.
- 7 The Chief Justice's only role in the appointment process should be a power to veto recommendations made by the committee.
- 8 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.

Background to the Establishment of the Ad-Hoc Committee

- 1 Prior to 2001, the State Government was responsible for the appointment of Queen's Counsel in Western Australia. In 2001, the Government announced that it would no longer be involved in the appointment of Queen's Counsel and following this announcement it gazetted *The Queen's Counsel (Procedure for Appointment) Repeal Regulations 2001*.
- 2 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 abovementioned regulation.
- 3 The original practice direction was replaced by Practice Direction 10.3 of the Consolidated Practice Directions of the Supreme Court of Western Australia.
- 4 By that Practice Direction the office of Senior Counsel is continued in Western Australia.
- 5 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

Note: The Society has not adopted a position in relation to any of the matters traversed in this Report. The Society's Council has resolved only to consult widely from its constituents in relation to the issues and recommendations in this Report.

(d) Independence.

6 The Practice direction states that Senior Counsel are appointed by the Chief Justice after taking account of the recommendations of a committee which comprises the following persons:

- 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.

7 Clause 18(e) of the Practice Direction also prescribes that the Chief Justice shall consult with the following:

- the President of the Industrial Relations Commission;
- the Chief Magistrate in Western Australia;
- the Solicitor General for the State of Western Australia;
- the President or other nominee of the Law Society of Western Australia;
- the President or other nominee of the Western Australian Bar Association (Inc);
- the President or other nominee of Women Lawyers of WA (Inc);
- representatives of existing Senior Counsel (including Queen's Counsel);
- the President or other nominee of the Criminal Lawyers Association of WA;
- 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.

8 At a meeting of the Council of the Law Society 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 prescribed by clause 18(e).

Note: The Society has not adopted a position in relation to any of the matters traversed in this Report. The Society's Council has resolved only to consult widely from its constituents in relation to the issues and recommendations in this Report.

- 9 At that meeting the Council resolved to establish an Ad Hoc Committee to consider whether it would continue to support and be involved in the consultation process. That Committee was to be chaired by Konrad de Kerloy.

Membership of the Committee

- 10 The Ad Hoc Committee was formed in early 2011. Its membership was intended to be broadly representative of the legal profession.

- 11 The members of the Committee were:

- Konrad de Kerloy – Convenor, Partner, Freehills
- Michael Feutrill – Barrister, Francis Burt Chambers
- John Fiocco – Deputy Convenor Courts Committee, Principal, Fiocco's Lawyers
- Linda Kenyon – Company Secretary, Wesfarmers Ltd (and formerly its Legal Counsel)
- Elizabeth Needham, representing Women Lawyers of WA, Barrister, Francis Burt Chambers
- Jenny Thornton – Partner, Allen Arthur Robinson

- 12 Michael Feutrill resigned from the Committee in April 2011.

- 13 The Ad Hoc Committee were ably assisted by Susie Fresson, Andrea Lace and Lillian Makinda of the Law Society of Western Australia.

Terms of Reference

- 14 At its first meeting the Ad Hoc Committee recommended that it be given 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:
 - (1) what changes to the current procedure should be implemented?

Note: The Society has not adopted a position in relation to any of the matters traversed in this Report. The Society's Council has resolved only to consult widely from its constituents in relation to the issues and recommendations in this Report.

(2) 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 (CP27.10) appropriate and, if not, what changes should be made to it?

15 The executive of the Law Society Council subsequently approved those terms of reference.

Consultation with the Profession

16 The Ad Hoc Committee considered that it should consult widely with the profession as part of its information gathering process.

17 The Committee sought the views of the persons and organisations involved in or concerned about the appointment of Senior Counsel in Western Australia, and of the Law Society's membership about the process and appointment of Senior Counsel in Western Australia.

18 Letters were sent to the Chief Justice, the President of the Court of Appeal, the Senior Puisne Judge, the Federal Court of Australia, the Family Court of Western Australia, State Administrative Tribunal, the Chief Judge of the District Court, the Chief Magistrate, the Solicitor-General, Western Australian Bar Association (Inc), Women Lawyers of WA (Inc), Criminal Lawyers Association, Family Law Practitioners Association (WA) Australian Corporate Lawyers Association and the Insurance Council of Australia.

19 In particular, the Committee was interested to ascertain the recipients' views as to:

- (a) the purpose or purposes which the recipient considered is or are served by the appointment;
- (b) the current criteria for appointment; and
- (c) the process of appointment.

Note: The Society has not adopted a position in relation to any of the matters traversed in this Report. The Society's Council has resolved only to consult widely from its constituents in relation to the issues and recommendations in this Report.

- 20 An item also appeared in Friday Facts seeking the views of members on the role and purpose of silks in WA in 2011. This item appeared in Friday Facts on 15 April 2011, 29 April 2011, and 6 May 2011.

Summary of Responses

- 21 A small number of responses were received from Society members.

Some members of the judiciary provided short responses to the effect that it was not appropriate for them to provide their personal views as they are members of the committee with which the Chief Justice consults.

More detailed responses were received from:

- (1) Women Lawyers of WA
- (2) Criminal Lawyers Association
- (3) WA Bar Association.

Some observations about the Practice Direction

Criteria

- 22 The Practice Direction contains the following justification for the continuation of the office of Senior Counsel.

The office furthers the administration of justice in Western Australia by recognising those counsel who are of outstanding ability and who are dedicated to the pursuit of justice.

- 23 The Practice Direction contains an explanation of each of the four criteria. Notably, none of those criteria require the applicant to demonstrate a dedication to the pursuit of justice.

- 24 The Practice Direction indicates that “the interests of the administration of justice will only be served if appointees are, and are recognised, as persons of conspicuous ability”.

Note: The Society has not adopted a position in relation to any of the matters traversed in this Report. The Society's Council has resolved only to consult widely from its constituents in relation to the issues and recommendations in this Report.

25 No explanation is provided as to how the recognition of persons in this way serves the administration of justice.

26 Although not stated overtly in the Practice Direction, the criteria necessarily restricts appointments to the office of Senior Counsel to barristers practicing independently. This emerges from a combination of the availability criterion and the independence criterion. They provide:

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).

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.

(emphasis added)

27 By clause 12 of the Practice Direction, the criterion of availability is stated as not applying to those counsel holding statutory offices or otherwise employed by the State and its instrumentalities. This express exception indicates that “availability”, in contrast to eminence and integrity, is not a fundamental characteristic of an office established to further the administration of justice.¹

28 Moreover, the availability criterion assumes that barristers have no commercial conflicts and that practitioners in partnerships must have commercial conflicts. Neither assumption is necessarily correct. But the assumption appears to provide the justification for discrimination against practitioners who would otherwise be eminently qualified for the office.

¹ The Ad Hoc Committee notes that on very rare occasions there have been appointments made outside of the availability criterion.

Note: The Society has not adopted a position in relation to any of the matters traversed in this Report. The Society's Council has resolved only to consult widely from its constituents in relation to the issues and recommendations in this Report.

The Appointment Process

29 The Practice Directions makes clear that that the appointment of Senior Counsel shall be by the Chief Justice. He is not bound by any recommendation of the committee although he is obliged to take their recommendations into account in deciding who to appoint.

30 There is no formal structure to the consultation process. Clause 22 of the Practice Direction provides that:

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.

Should the Law Society of Western Australia support the appointment of Senior Counsel in the State of Western Australia?

31 As to the purpose or purposes which is or are served by the appointment, leadership of the profession emerged as a common theme.

32 Two main reasons emerged for continuing to support the appointment of senior counsel in Western Australia.

33 Firstly, barristers in Western Australia would be put at a disadvantage to barristers in other Australian jurisdictions which continued to make such appointments because clients sought to retain barristers with the post nominal of "SC" and because there were many contractual provision which contained a clause which directed that only persons of the rank of Senior Counsel be used to resolve issues and disputes concerning the contract.

34 Second, it provides a means of recognition for barristers who practice independently.

Note: The Society has not adopted a position in relation to any of the matters traversed in this Report. The Society's Council has resolved only to consult widely from its constituents in relation to the issues and recommendations in this Report.

35 The Committee considered a number of the arguments against continuing to support the appointment of Senior Counsel in Western Australia. These included:

- (a) the appropriateness of the judiciary being involved in the process of appointment;
- (b) the discriminatory nature of the criteria for appointment; and
- (c) the opaqueness of the process of appointment.

36 Many of these arguments have been well publicised. They relate to the flaws in the current system of appointment not to the position itself or the role of Senior Counsel in the profession and at large. The Ad Hoc Committee believes that these flaws provide a powerful reason for reforming the process of appointment but they are not a reason to abolish the office altogether.

Recommendation

37 The Ad Hoc Committee accepts that unilateral abolition of the appointment would place Western Australian lawyers at a disadvantage to their eastern states counterparts.

38 Accordingly, 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.

Are the current criteria and the procedure for the appointment of Senior Counsel, as set out in Practice Direction 10.3, satisfactory?

Process

39 The general theme of the submissions received by the Ad Hoc Committee and the Ad Hoc Committee's own view is that the current process of appointment is unsatisfactory in three important respects.

40 First, based on submissions received by the Ad Hoc Committee, the selection process is opaque. This appeared to be a widely held opinion within the profession (but not amongst the judges who responded to the Committee's enquiries).

Note: The Society has not adopted a position in relation to any of the matters traversed in this Report. The Society's Council has resolved only to consult widely from its constituents in relation to the issues and recommendations in this Report.

41 The Practice Direction does not specify how wide or rigorous or fair the consultation within courts or organisations is to be. This is left very much to chance, hope and the expectation that the Chief Justice's secret soundings "will get it right". But the process is surrounded by a great deal of secrecy and by its very nature does not ensure either rigour, transparency or fairness. The whole system is administered ad hoc.

42 The absence of any formal structure to the consultation process is a serious flaw. As a general rule, good process drives sound and fair outcomes.

43 In England the system of appointment of Queen's Counsel has been completely reformed largely as a result of the extensive criticism of the "secret soundings" of judges and other establishment legal figures upon which the old system was based, which was said to be inappropriate and unfair given the size of the modern profession in England and Wales.

44 Even though the profession in Western Australia is considerably smaller, an ad hoc system of consultation cannot ensure that all applications for appointment are fairly and rigorously dealt with. 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.

45 Second, the decision to appoint is ultimately at the sole discretion of the Chief Justice. There are a number of issues with this model:

- (a) it is not at all clear whether the Chief Justice, or indeed the Supreme Court, has the power to confer titles on legal practitioners. As a superior court of record of unlimited jurisdiction, the Supreme Court has power to regulate its procedure by issuing practice directions, as long as they are not inconsistent with statute law or statutory rules of court. But what procedure of the court does Practice Direction 10.3 seek to regulate? The administration of justice is

Note: The Society has not adopted a position in relation to any of the matters traversed in this Report. The Society's Council has resolved only to consult widely from its constituents in relation to the issues and recommendations in this Report.

not enhanced because arguments are presented by lawyers with post nominals "SC". As Justice McKechnie has observed²:

Judges do not decide cases according to the eminence of the practitioner but according to the cogency of the argument.

The administration of justice will not falter if there are no further appointments.

- (b) even if such power exists, the involvement of the judges in the process of selection and of the Chief Justice as the ultimate arbiter is not without controversy. One consequence of the Chief Justice's central role in the appointment of Senior Counsel is that it exposes the Chief Justice to threats of litigation over his or her failure to appoint aggrieved applicants. It also exposes the Chief Justice to allegations, whether well founded or not, of bias or animus towards applicants. This has the potential to spill into how cases are presented before the Chief Justice. Justice McKechnie has argued that the judges' involvement in the selection process "is inconsistent with the independence of the judiciary" because it involves them in matters which are essentially private concerns of the legal profession³;
- (c) the risk of the Chief Justice and others involved in the selection process being drawn into legal proceedings concerning unsuccessful applications has increased with the recent decision of the Federal Court in *Smallbone v New South Wales Bar Assn* [2011] FCA 1145. In that case Yates J ordered that pursuant to s 98 of the *Privacy Act* 1988 (Cth) the New South Wales Bar Association to provide Smallbone, an unsuccessful applicant for appointment as Senior Counsel, with access to the personal information about him that the Association had collected in relation to Smallbone's application for appointment, including responses that it had collected about Smallbone from members of the consultation groups established under the Senior Counsel Protocol dated June 2011 published by the Association;

² Paper published in the February 2007 of Brief entitled "Cutting a swathe through silk"

³ *ibid.*

Note: The Society has not adopted a position in relation to any of the matters traversed in this Report. The Society's Council has resolved only to consult widely from its constituents in relation to the issues and recommendations in this Report.

- (d) the limited number of silks practising in family law, crime, medical and other negligence and employment law was noticed by the Ad Hoc Committee;
- (e) a system of appointment based on the discretion of the Chief Justice is not and cannot be regarded as being open and transparent. The UK Bar Council published a paper⁴ in which it reviewed the process of appointment of silks in other Commonwealth jurisdictions. In relation to the system in Western Australia the Bar Council observed:

A system based on the discretion of the chief justice, or his equivalent, is clearly not appropriate in England and Wales where it is imperative that the system of appointment is regarded as open and transparent.

- 46 Third, the Committee which makes recommendations to the Chief Justice is unrepresentative of the legal profession being comprised entirely of judges. They are necessarily privy only to advocacy and written submissions of the advocates who appear before them and not to the many other aspects which make a lawyer excellent, such as negotiation skills, written advice, advice in conference, availability, timeliness, commerciality and common sense, or to use the words which are within one of the criteria of appointment, a lawyer's:

perception, courage and experience to make decisions which serve the best interests of the client;

maturity of judgment and balance based on many years of practice of the law.

- 47 Outstanding forensic legal advisers provide advice and negotiation skills and many clients are likely to go to them for such advice in the first instance with the individual's advocacy skills barely being relevant to that choice.

- 48 Justice McKechnie has observed⁵, with considerable force:

It has always been a mystery that a profession, which above others prides itself on independence, should all have allowed the government to select its top professional for many years. Indeed this independent profession continues to allow outsiders to make the choices.

⁴ Paper entitled "Appointment of Silks in Other Jurisdictions" – Responses to Consultation Papers 2007

⁵ Paper published in the February 2007 of Brief entitled "Cutting a swathe through silk"

Note: The Society has not adopted a position in relation to any of the matters traversed in this Report. The Society's Council has resolved only to consult widely from its constituents in relation to the issues and recommendations in this Report.

Criteria

- 49 The Ad Hoc Committee considers that the criteria for appointment is deficient in a number of respects.
- 50 First, capacity to lead the profession, a demonstrated commitment to equality of opportunity and fair and unbiased treatment of fellow practitioners irrespective of gender, race, sexual orientation or religion and availability to advise members of the profession on matters of ethics and practice, which should be central purposes of the office, are not pre-requisites of appointment.
- 51 Second, the criteria is discriminatory in that appointment to the office is open only to barristers practising independently and to counsel holding statutory offices or otherwise employed by the State and its instrumentalities.
- 52 There is no difficulty with this if the purpose is primarily a means of recognition of excellence in written and oral advocacy for barristers who practice independently. In that case, the process of appointment should be primarily a matter for the WA Bar Association, as it is in New South Wales.
- 53 In New South Wales, the NSW Bar Council adopted a protocol after the decision of the New South Wales Government in 1992 to no longer appoint Queen's Counsel. The New South Wales system has the advantage that the independent Bar selects its own leaders, subject only to the operation of clause 26 of the protocol. Clause 26 prevents the appointment of any applicant in the Selection Committee's final selection whose appointment the Chief Justice opposes. This clause only has the potential to operate in the event that the Selection Committee makes a final selection that is unacceptable to the Chief Justice. Control of the process by the independent Bar, itself, ensures that the Bar's future leadership is moulded by the Bar itself.
- 54 If, however, the purpose is to recognise eminence in the practice of law and leadership of the profession, then there is no reason for the criteria to restrict appointments to barristers practicing independently.

Note: The Society has not adopted a position in relation to any of the matters traversed in this Report. The Society's Council has resolved only to consult widely from its constituents in relation to the issues and recommendations in this Report.

55 The distinction between barristers and solicitors is not, and has never been, part of the law in Western Australia. In Western Australia, rights of audience in the higher courts have not been restricted, either by the law or by convention, to a legal practitioner practising solely as a barrister.

56 In England and Wales, such centuries old restriction has been abolished and the award of Queen's Counsel is now open to all advocates, whether practicing at the Bar, as barristers, or within firms, as solicitor advocates, who can demonstrate the appropriate level of excellence in written and oral advocacy in the higher courts and competency in other specified areas.

57 The Ad Hoc Committee agrees with Justice McKechnie's observation⁶ that:

Under the present system eminent and learned solicitors, who contribute much to the profession and community are not able to be recognised. Although some lawyers choose to practice exclusively as barristers and others as solicitors, the product of this choice should not be a continuation of a distinction that discriminates among practitioners and adversely to solicitors.

Recommendations

58 It is imperative that the system of appointment is, and is regarded as being, open and transparent. The current criteria and the procedure for the appointment of Senior Counsel, as set out in Practice Direction 10.3, is unsatisfactory. The Law Society should seek to have both reformed.

59 The overarching criteria for appointment should be eminence in the practice of law and leadership of the profession.

60 Accordingly, the criteria for appointment should include a requirement that the applicant:

- (a) is a recognised leader within the areas of law in which he or she practises;

⁶ Paper published in the February 2007 of Brief entitled "Cutting a swathe through silk"

Note: The Society has not adopted a position in relation to any of the matters traversed in this Report. The Society's Council has resolved only to consult widely from its constituents in relation to the issues and recommendations in this Report.

- (b) demonstrates a commitment to equality of opportunity and fair and unbiased treatment of fellow practitioners irrespective of gender, race, sexual orientation or religion; and
- (c) will be available to advise members of the profession on matters of ethics and practice.

61 The criteria for appointment should not discriminate between practitioners practicing at the Bar and those practicing 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.

62 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).

63 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 candidate.

64 The Chief Justice's only role in the appointment process should be a power to veto recommendations made by the committee.

Should the Society continue to participate in the consultation process envisaged in paragraph 10.3 (18)(d) of the Practice Direction?

65 The current system of appointment under paragraph 10.3 of the Practice Direction is seriously flawed. The Law Society should not be a party to a flawed system.

Note: The Society has not adopted a position in relation to any of the matters traversed in this Report. The Society's Council has resolved only to consult widely from its constituents in relation to the issues and recommendations in this Report.

Recommendation

- 66 The Law Society should not continue to participate in the consultation process envisaged in clause 10.3(18)(d) of the Practice Direction whilst it remains flawed.

Konrad de Perloy

Convenor

(Referred to Law Society Council 13 December 2011)

Ad Hoc Committee Discussion Paper for Consideration by the Law Society of Western Australia Council