

## **Appointment of Silk in the Australian Capital Territory - 2023**

### **Guide to Practical Aspects**

#### ***Introduction***

1. This is a short guide to some of the practical aspects of the operation of the Senior Counsel Protocol ('the Protocol') which experience has shown may be of interest to members of the Bar. It is written for members of the Bar who are considering making application for appointment as Senior Counsel. It is also intended to provide information to members of the public who wish to better understand the process.
2. The Protocol is published on the Association's website (<https://www.actbar.com.au/barristers/senior-counsel>). It sets out the essential criteria and explains the process for the appointment of Senior Counsel. This guide offers an explanation of how aspects of the Protocol operate in practice.
3. The Protocol is approved by the Bar Council and is the instrument by which Senior Counsel are selected by the Senior Counsel Selection Committee each year. This guide does not amend or re-interpret the Protocol.

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

4. Pursuant to the Protocol, on 1 June each year the Bar Association calls for applications for appointment as Senior Counsel. The closing time and date for applications this year is 5.00pm on 28 July 2023. A final list of applicants is then prepared, distributed to the proposed Selection Committee, feedback received and the final selections are made. Best endeavours will be used to ensure announcement of the appointments of Senior Counsel are made on or before the first Friday in November 2023. All of these tasks are undertaken by the Selection Committee with the assistance of the ACT Bar Association.

#### ***Silks Select Committee***

5. Clause 8 of the Protocol provides
  - a. the President of the ACT Bar Association;
  - b. the Vice President of the ACT Bar Association;
  - c. the President of the Law Society (or nominated solicitor who must have at least 10 years of practising experience);
  - d. one Ordinary Member (Class A) Senior Counsel; and

- e. one non-lawyer community member (the **Selection Committee**).

If a member of the Selection Committee resigns from the Committee before the conclusion of the selection process, the Bar Council will elect a replacement.

- a) The Selection Committee must at all times include at least one female.
- b) If both the President and Vice President of the Bar Association are Junior Counsel, then the Vice President will be replaced on the Selection Committee by a further Ordinary Member (Class A) Senior Counsel.
- c) The Selection Committee will rotate at least 3 of the 5 selected members each year.
- d) The Selection Committee will be decided exclusively each year by the Bar Council.
- e) The Chief Justice will be invited to raise for consideration by the Bar Council any particular concern about the suitability of a proposed Selection Committee member, prior to the Bar Council's finalisation of the composition of the Selection Committee.

#### ***Role of the President***

- 6. The President may at any time inform any member, if requested, of the names of those who have made an application.
- 7. All unsuccessful applicants will offered a meeting to discuss their applications when the result are communicated to them.
- 8. Members considering applying in a particular year often seek advice from senior members of the Bar or the judiciary about whether or not they should apply. However, the President and members of the Selection Committee will decline to advise an individual member of the Bar whether such a member of the Bar is likely to succeed if he or she makes an application.

#### ***Applying***

- 9. Detailed written guidance is not given as to how to fill out the forms. However, a number of matters which may assist applicants with their application forms are mentioned in this Guide.
- 10. Acceptance of applications will close at 5.00pm 31 July in each year. If 31 July falls on a weekend, applications close the preceding Friday at 5.00pm. It is highly recommended that applications be lodged well before the cut-off time, to ensure that no last-minute technical problems delay lodgement of the application.

11. In practice, applicants differ in the ways they provide information to the Selection Committee. The differences tend to reflect both the nature of the practices and the personalities of the applicants. The way that the application is prepared may affect the Committee's overall impression of applicants.
12. An applicant should provide such information in his or her application which the applicant believes will assist the Selection Committee in considering that the applicant has the qualities for appointment as Senior Counsel required as per the Protocol 'Essential Criteria' Clauses 4 and 5. For example, this would include a sufficient description of the experience of each applicant so as to give a clear picture of it to the Selection Committee for the purpose of applying as per the Clauses 4 and 5 of the Protocol. This may include details of an applicant's professional experience before coming to the Bar. Applicants are also asked to include a list of their readers, tutors and the years of such pupillage.
13. Applicants are asked to provide, in table form, in respect of all cases, including contested interlocutory applications (but excluding directions hearings), in which they have appeared in the last 18 months:
  - (a) the name of the case and, if available, its citation (hyperlinked, if possible);
  - (b) the name of the judicial officer, tribunal, arbitrator or CARS assessor before whom they appeared (if outside of Australian Capital Territory, please supply a contact number);
  - (c) the name of any counsel who led them or who they led (if counsel is overseas or outside of Australian Capital Territory, please supply a contact number);
  - (d) the name of opposing counsel (if outside of Australian Capital Territory, please provide a contact number);
  - (e) the name of their instructing solicitor; and
  - (f) a brief description of the nature of the proceedings.

Applicants are at liberty to provide details of relevant matters that they have been involved in outside of the last 18 months. It is recognised that changes in the provision of legal services occur from time to time. The Selection Committee takes into account the effect these changes have on the practice of barristers and the opportunities for barristers to engage in oral advocacy varies significantly and from time to time. The Selection Committee has regard to the importance of the work performed by 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.

14. Some applicants who practise overseas, have an extensive interstate practice, have been caught up in a long-running case, practise in fields which involve substantial chambers practices, have had a recent period of maternity or parenting leave, who practise part-time for any reason, or where (because of the size of the cases) they are almost invariably led, should note that in their applications so that appropriate attention can be given to these special circumstances. A part-time or flexible practice is not a bar to appointment as Senior Counsel.

15. The seniority of applicants is taken from the applicant's admission to the Australian Capital Territory. Applicants with extensive advocacy experience interstate or overseas before their admission to the Australian Capital Territory may note that previous experience in their applications.
16. Applicants should include in their applications notice of any matter or circumstances, either past or anticipated, which may adversely affect their fitness and propriety to hold an appointment as Senior Counsel. Applicants are required to give their consent to the Selection Committee making inquiries of the ACT Civil and Administrative Tribunal and other regulatory bodies about such matter or circumstances.
17. The Selection Committee does not conduct interviews with applicants. The Selection Committee may communicate with applicants where it is thought that the communication may help to fill a gap in the committee's knowledge or to help resolve an issue about an applicant. The Selection Committee will rely on its own experience of applicants and that of the persons consulted by the committee.

### ***The Consultation Process***

18. The Selection Committee is selected at the invitation of the Bar Council each year pursuant to Clause 11 of the Protocol. The Selection Committee is comprised of
  - The President of the ACT Bar Association
  - The Vice President of the ACT Bar Association
  - The President of the Law Society (or nominated solicitor who must have at least 10 years of practising experience)
  - One Ordinary (Class A) Senior Counsel; and
  - One non lawyer community member
19. Most judges in each of the State and Federal Courts referred to in the Protocol are consulted. Because of the wide range of practice areas of the applicants, judges in many other courts and tribunals have been consulted apart from those specifically identified in the Protocol. Most judges respond to the consultation request made of them.
20. Applicants may nominate not more than three members of the profession who are familiar with their recent work and qualities. They may also provide not more than two written references of not more than three pages each from those they have nominated. The references should not be from judicial officers (refer to Clause 18 of the Protocol).
21. The consultation form requires each member of the consultation group to indicate whether he or she has had direct personal experience of the candidate conducting professional practice either in court or in other identifiable circumstances in recent years. This is to ensure that old information or indirectly acquired information is not unduly influential in the regard given to the opinions provided by the consultation groups.

22. The Chief Justice of Australian Capital Territory does not provide an opinion about individual applicants in the course of the Selection Committee's consideration. Rather, his/her involvement is reserved for the exercise of his/her veto power as provided for by Clause 29 of the Protocol.
23. The Selection Committee works through each application. The application form is the primary source of information available to the Committee. It is the usual practice of the Committee for the barrister members to make inquiries of a group of consultees, and then advise the rest of the Committee of the result of those inquiries. Members of the committee may also make their own separate inquiries. It may not be necessary for all persons nominated as a referee by each applicant to be contacted by a member of the Selection Committee. It is generally assumed that a referee report will be favourable to the applicant. It is the practice that Selection Committee decisions are made by consensus.
24. The collection of information relating to appointment of Senior Counsel is governed by Australian Privacy Principle 6 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.
25. In accordance with Australian Privacy Principle 11, to protect the confidentiality of the material it gathers, the Bar Association destroys or permanently de-identifies all documentation in its possession in relation to the selection process as soon as practicable after the appointments are announced.
26. All applicants for appointment of Senior Counsel will be asked to acknowledge that information collected by the ACT Bar Association in conjunction with their application, including information obtained from third parties, is confidential information in terms of Australian Privacy Principle 12.3(b). 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.
27. 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 that application.