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5 October 2021

The Hon Peter Quinlan
Chief Justice of Western Australia
Chief Justice's Chambers
Supreme Court of Western Australia
Barrack Street
Perth WA 6000

Ms Jocelyne Boujos
President
Law Society of Western Australia
PO Box Z5345
Perth WA 6831

Mr Anthony Elliott
President
The Criminal Lawyers Association of WA
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Dear Chief Justice and Presidents

The criteria and process for the appointment of Senior Counsel in Western Australia

It is my respectful opinion that the criteria and process for the appointment of Senior Counsel are in need of review and reform.

Having experienced the system as an applicant for some 7 years, and having heard from various reliable sources (primarily Judges and former Judges), I consider the system to be far too ad hoc, opaque and susceptible to inappropriate and unfair influence by persons outside of those who are referred to in the existing Practice Direction as parties with whom the Chief Justice is to confer.

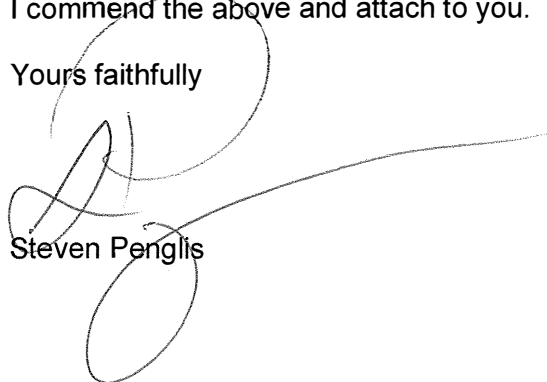
I presently say nothing further about my views: they will be the subject of an article I am presently writing for publication in Brief. Rather, the purpose of this letter is to propound the proposition that there should be a formal review of the criteria and process for the appointment of Senior Counsel in Western Australia. Indeed, in my respectful opinion, such a review is long overdue.

In my opinion, any such review should be undertaken by a committee, to be appointed by the Chief Justice, comprising of (at least) representatives of the Courts, Senior Counsel, Junior Counsel, the Bar Association, the Law Society, the Women Lawyers Association, the Criminal Lawyers Association, the Family Law Practitioners Association and, importantly, members of the Amalgam.

In this regard I note that I am unaware of any formal review of the criteria and process for the appointment of Senior Counsel in Western Australia having occurred this century. This is so notwithstanding that there have been significant and important reforms in other jurisdictions during that time. In this regard I note that I had my (law student) son, Tom, prepare some notes as to the criteria and process in other jurisdictions: see attached. From this material you will observe that the processes adopted in other jurisdictions are in large part far more formalised and transparent than the process in Western Australia.

I commend the above and attach to you.

Yours faithfully



Steven Penglis

NEW SOUTH WALES

AS AT 25 September 2021

CRITERIA¹

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.

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/or 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 applicants' 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 conducting or appearing in arbitration and mediation;
- vii. Experience in sitting on courts or tribunals.

¹ https://nswbar.asn.au/uploads/pdf-documents/Protocol_2020.pdf, page 1-3, para 5-7

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.

APPOINTMENT PROCESS²

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) four 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;
- (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; and
- (e) one non-lawyer community member.

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 online in a form approved by the Bar Council 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.

² [SENIOR COUNSEL PROTOCOL \(nswbar.asn.au\)](https://www.nswbar.asn.au) , page 3-7

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 are required to provide, as part of their application, a list of their readers/tutors and the years of such pupillage.

14. 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.

15. Applicants may, if they wish, nominate not more than three 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 those they have nominated. The references should not be from judicial officers.

16. Applicants are requested to submit a photograph with their application (this will assist the Committee members in recognising and placing an applicant whose name is not known to them but whom they recognise).

17. 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

18. The opinions of all consultees should be kept confidential. Confidentiality shall extend not only to the consultation form responses, but also to any discussions with Committee members.

19. 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.

20. In accordance with Australian Privacy Principle 11, 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.

21. 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 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.

22. 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.

23. 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

24. The Selection Committee may determine that any application which it is satisfied does not warrant further consideration should be put aside in a preliminary selection.

25. 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.

26. 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) All members of the New South Wales judiciary, including the Chief Magistrate, but not necessarily all members of the Local Court;
- (b) All members of the Federal judiciary based in New South Wales;
- (c) 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;
- (d) The Chief Justice of the Federal Court of Australia;
- (e) The Chief Justice of the Family Court of Australia;
- (f) The Chief Judge of the Federal Circuit Court; and
- (g) 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.

27. 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.

28. 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.

29. The Selection Committee shall, after taking into account all comments received, make its final selection of the proposed appointees.

30. 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.

31. The President shall not appoint any applicant included in the Selection Committee's final selection whose appointment the Chief Justice opposes.

32. 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.

33. 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.

34. After publication of the list of successful applicants, any unsuccessful applicant may discuss his or her application with the President.

LAST REVIEW

The most recent review of the process was made by the Bar Council in 2021.³

³ [Appointment of Silk in New South Wales \(nswbar.asn.au\)](https://nswbar.asn.au)

VICTORIA

As at 25 September 2021

CRITERIA⁴

The criteria for appointment as Senior Counsel are as follows:

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. Senior Counsel should exhibit the following:

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:

- (a) experience in contested matters, especially trials;
- (b) experience in arguing cases on appeal;
- (c) experience in conducting major cases in which the other party is represented by Senior Counsel;
- (d) experience in conducting cases with a junior;
- (e) considerable practice in giving advice in specialist fields of law; and
- (f) a position of leadership, either generally or in a specialist jurisdiction.

3. Integrity, honesty and good character:

Senior Counsel must:

- a) 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;
- b) be of good character; and
- c) demonstrate professional respect for and courtesy towards others.

4. Independence:

⁴ https://www.supremecourt.vic.gov.au/sites/default/files/assets/inline-files/Summary%20of%20Process%20for%202020_0.pdf, page 1-2

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.

APPOINTMENT PROCESS⁵

In exercising responsibility for the appointment of Senior Counsel, the Chief Justice of the Supreme Court of Victoria is to be assisted by a preliminary evaluation 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. The list to be prepared by the committee will be advisory only.

To enable the committee to undertake this preliminary evaluation the Chief Justice will refer to the committee for preliminary evaluation the entire list of applicants and copies of their application forms on a confidential basis.

The committee is to be styled the 'Preliminary Evaluation Committee' with its composition comprising:

- The President and the Vice-Presidents of the Bar Council;
- Two retired superior court Judges;
- Six Senior Counsel, with the objective that they represent practice areas not covered by the President and Vice-Presidents;
- Three solicitors, with the objective that they represent different practice areas.

Following the preliminary evaluation stage, the Chief Justice will be assisted by a Silks Advisory Committee to be established by her. Its composition will comprise:

- A judge of the Supreme Court of Victoria (who will act as chair of the committee);
- A judge of the Federal Court of Australia (to be nominated by the Chief Justice of the Federal Court of Australia);
- A judge of the County Court (to be nominated by the Chief Judge of the County Court);
- The President or immediate past President of the Victorian Civil and Administrative Tribunal (or the President's nominee).

The Chief Justice will provide to the Silks Advisory Committee the list of applicants, their applications, references, information gained through the consultation process and the Preliminary Evaluation Committee's shortlist of applicants for appointment. The members of

⁵ [APPLICATIONS FOR SILK 2012 \(supremecourt.vic.gov.au\)](https://www.supremecourt.vic.gov.au/applications-for-silk-2012)

the Silks Advisory Committee may consult others within their respective Courts or Tribunal on a confidential basis.

The Chief Justice will consult:

- The Chief Justice of the Family Court of Australia (or nominee);
- The President of the Fair Work Commission (or nominee);
- The judges in the Supreme Court of Victoria (if any) who sit in the main areas of practice nominated by the applicant;
- The President of the Victorian Bar Association (or nominee);
- The President of the Law Institute of Victoria (or nominee);
- The Commonwealth Director of Public Prosecutions (or nominee);
- The Victorian Director of Public Prosecutions (or nominee);
- The Victorian Chief Crown Prosecutor (or nominee);
- The Commonwealth Solicitor General (or nominee);
- The Solicitor General for Victoria (or nominee);
- The chair of the Commercial Bar Association (or nominee);
- The chair of the Common Law Bar Association (or nominee);
- The chair of the Criminal Bar Association (or nominee).
- The convenor of the Women Barristers Association (or nominee)
- The chair of Victorian Women Lawyers (or nominee);
- The chair of the Victorian Bar's Equality & Diversity Committee (or nominee);
- The Victorian Legal Services Board and Commissioner.

Those consulted by the Chief Justice may seek the views of others within their court or organisation on a confidential basis and, for that purpose, may disclose the identity of one or more applicants as applicants.

All references will be sought and consultations conducted by asking on a sliding scale whether the applicant satisfies each criterion for appointment with an opportunity to amplify why each grading has been given and why the applicant should or should not be appointed as Senior Counsel.

Where a specific allegation adverse to an applicant has been made during the consultation process or in a reference, the applicant will be given the opportunity to respond to the allegation, either in writing or, with the permission of the Chief Justice, personally. For example, if an allegation is made that the applicant lacks integrity which is said to be demonstrated by specific identified conduct, that allegation will be put to the applicant. Non-specific allegations which are adverse to an applicant will not be taken into account by the Chief Justice unless the applicant is first given an opportunity to respond to them.

Following completion of the consultation process, the Chief Justice may interview one or more applicants.

Applicants should note that, due to the preliminary evaluation and consultation process, it may not be possible to keep confidential the fact that the applicant has applied to be appointed as Senior Counsel.

Following the completion of the appointment process, an applicant may obtain feedback on his or her application by approaching the President of the Victorian Bar. Applicants will be informed at this stage whether or not they were included in the Preliminary Evaluation Committee's list. The President may provide feedback based on the consideration of the application by the Preliminary Evaluation Committee. The President will communicate with

the Chief Justice and if authorised to do so by the Chief Justice, provide feedback to the applicant in relation to his or her application.

LAST REVIEW

Changes have been made to the 2021 guidelines – namely:

- Insertion of criteria 3(b)-(c): Addition of good character and professional respect and courtesy requirements.
- Altering Preliminary Evaluation Committee from one retired superior court judges to two retired superior court judges.
- Requiring that the Chief Justice must consult:
 - a) The convenor of the Women Barristers Association (or nominee)
 - b) The chair of Victorian Women Lawyers (or nominee);
 - c) The chair of the Victorian Bar's Equality & Diversity Committee (or nominee);
 - d) The Victorian Legal Services Board and Commissioner.

QUEENSLAND

As at 25 September 2021

CRITERIA⁶

These Criteria for Appointment and the Appointment and Consultation Process have been approved by the Council of the Bar Association of Queensland after consultation with the Chief Justice of Queensland. The Criteria for Appointment and the Appointment and Consultation Process form the basis for determining who the Chief Justice will recommend for appointment as Queen's Counsel.

As a recognition based on the opinions of those best placed to judge barristers' qualities, the designation of Queen's 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 Queen's Counsel will be restricted to practising barristers.

3. The qualities required to a high degree before appointment as Queen's Counsel are skill and learning, integrity and honesty, independence, diligence and experience.

- a. Queen's 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. Queen's 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. Queen's 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. Queen's 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. Queen's Counsel must have a history of honesty, discretion and plain dealing with professional colleagues, lay and professional clients and the courts.
- e. Queen's 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. Queen's 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.

⁶ <https://qldbar.asn.au/baq/v1/viewDocument?documentId=38>; NOTE this was last updated 2013

- g. Queen's 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. Queen's Counsel must have the perspective and knowledge of legal practice acquired over a considerable period.
- i. Queen's 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 Queen's 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.

4. A barrister who practises as a barrister in a country outside Australia may be recommended for appointment as Queen's Counsel if the Chief Justice is satisfied that the barrister satisfies the Criteria for Appointment, taking into account the Barrister's practice overseas.

APPOINTMENT PROCESS⁷

1. At the meeting of the Bar Council in May of each year the Queen's Counsel Consultation Group (QCCG) shall be appointed. The QCCG shall consist of: the President, the Vice President, and six Queen's Counsel or 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. Ordinarily, each of the six Queen's Counsel or Senior Counsel shall have had more than five (5) years post appointment to Queen's Counsel or Senior Counsel.

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. A full list of all those who have sought appointment will be made available to any member who wishes to see it.

4. On the first working day after the final date on which late applications may be accepted by the President, the Secretary shall provide to each member of the QCCG a complete copy of all applications which were made in accordance with these provisions.

5. The members of the QCCG 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) Queen's Counsel and Senior Counsel in actual practice;
- b) Junior counsel in actual practice who have not made application for silk during the year in question; and

⁷ <https://qldbar.asn.au/baq/v1/viewDocument?documentId=37>; NOTE this was last updated 2019

- c) Members of courts and tribunals (whose comments may be sought through the senior judge or member of the court or tribunal concerned).
- 6. The QCCG shall only seek, and have regard to, comment based upon personal knowledge of the applicant.
- 7. A member or members of the QCCG 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 QCCG accordingly.
- 8. The QCCG 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.
- 9. If there is raised against any applicant a matter or matters regarding character and if, after considering the application, the QCCG is of the view that absent the matter or matters regarding character it would be inclined to conclude that the applicant satisfied sufficient of the Criteria for Appointment to be suitable for consideration for appointment, the QCCG will give to the applicant a reasonable opportunity to understand and respond to the matter or matters raised, and shall consider any response in its further consideration of the application.
- 10. By no later than 30 September, the QCCG 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 QCCG the President shall provide the Chief Justice with:
 - a) a list of all applicants (together with their applications); and
 - b) the list provided by the QCCG.
- 12. Upon receipt of that information the Chief Justice shall consider:
 - a) whether any additional Queen's Counsel in and for the State of Queensland should be recommended by the Chief Justice for appointment as Queen's Counsel in that year; and
 - b) if any such recommendations are to be made, who should be recommended for appointment as Queen's Counsel.
- 13. Before making either of the decisions referred to in paragraph 12 hereof, 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. The Chief Justice of the Federal Court and the judges of the Supreme Court will be provided in advance of such consultations with:
 - a) the lists referred to in paragraph 11(a) and 11(b) hereof;
 - b) a copy of the Protocol for Appointment and Consultation;
 - c) a copy of the Criteria for Appointment; and
 - d) convenient access to all applications.
- 14. 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.
- 15. In making a decision to recommend an applicant for appointment as Queen's Counsel the Chief Justice shall take into account the Criteria for Appointment.

16. By the third Wednesday in November the Chief Justice shall:

- a) write to the Attorney-General providing a list of barristers who are recommended by the Chief Justice for appointment as Queen's Counsel; and
- b) provide the President of the Bar Association with a list of those names.

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 Queen's Counsel, the President shall upon the request of the applicant discuss with the applicant his or her application.

LAST REVIEW

Criteria: 2013

Process: 2019

SOUTH AUSTRALIA⁸

Current to 25 September 2021

CRITERIA⁹

(1) A person admitted by the Court to the office of Senior Counsel in accordance with this Part is a person whom the Court regards as having proven themselves to be an advocate of high skill, integrity, professional judgment, and independence justifying an expectation on the part of the public and the judiciary generally that, as Senior Counsel, they will provide outstanding service in the course of the administration of justice.

(2) Senior counsel should exhibit—

- a) eminence in the practice of the law, especially in advocacy, where eminence is to be understood as including—
 - (i) the possession of a high intellectual capacity, comprehensive and up to date knowledge of the law and procedures in his or her chosen field of practice, and of legal method, and a demonstrated commitment to the provision of the highest level of service and the pursuit of excellence;
 - (ii) the possession of proven skill and judgment in the presentation and testing of litigants' cases in adversarial proceedings, so as to enhance the likelihood of just outcomes and serve the public interest;
 - (iii) a perspective and knowledge of legal practice usually acquired over a considerable period derived from a practice that evidences: experience in contested matters, especially trials; experience in arguing cases on appeal; 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 a position of leadership, either generally or in a specialist jurisdiction;
- b) standing and leadership, evidenced by—
 - (i) contribution to the legal profession, its organisations and institutions and the administration of justice more generally;
 - (ii) the making of a significant contribution to legal education;
 - (iii) a practice of mentoring junior members of the profession;
 - (iv) the making of a significant contribution to the community as a legal practitioner;
- c) integrity evidenced by—
 - (i) a history of honesty, candour, discretion and plain dealing with the courts, professional colleagues and clients;
 - (ii) independence of mind and moral courage;
 - (iii) 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;
 - (iv) maturity of judgment and balance based on many years practice of the law;
- d) independence including objectivity and detachment and the ability and courage to give advice and to make decisions that serve the best interests of the client and the administration of justice;

⁸ This system came into effect in 2018 through the *Supreme Court Civil Supplementary Rules 2014 (Amendment No 9)* and has been transplanted into the recently reformed *Uniform Civil Rules 2020 (SA)* (see Part 13).

⁹ *Uniform Civil Rules 2020 (SA)* r 263.2.

- e) availability in that they have adopted a mode of practice that ensures that their services are available generally to prospective clients and are not unduly restricted by client or business relationships; where—
 - (i) this does not preclude the acceptance of a general or special retainer on behalf of a client.
 - (ii) Senior Counsel must honour the duty to accept briefs to appear within their area of practice and for which they are available, regardless of personal opinions about the parties or about the causes, and subject only to exceptions relating to appropriate fees and conflicting obligations.
 - (iii) 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;
- f) a commitment to fairness and equity in the affairs of the legal profession evidenced by—
 - (i) a practice of advancing the provision of equal opportunities to all members of the legal profession;
 - (ii) a practice of providing legal assistance on a pro bono or similar basis or other legal related community service.

APPOINTMENT PROCESS¹⁰

(1) As soon as practicable after 30 June in each year or such other date as the Chief Justice determines, the Chief Justice will—

- a) provide a list of the current year's applicants and copies of the relevant applications, including revised applications, to—
 - (i) the Attorney-General;
 - (ii) Judges and Masters of the Supreme Court;
 - (iii) the senior resident Judge of the Federal Court of Australia;
 - (iv) the senior resident Judge of the Family Court of Australia;
 - (v) the senior resident Judge of the Federal Circuit Court;
 - (vi) the Chief Judge of the District Court;
 - (vii) the President of the South Australian Employment Tribunal;
 - (viii) the Chief Magistrate of the Magistrates Court;
 - (ix) the Deputy President of the Administrative Appeals Tribunal;
 - (x) the National President, Australian Association of Women Judges;
 - (xi) the Solicitor-General;
 - (xii) the Director of Public Prosecutions;
 - (xiii) the Chief Counsel of the Legal Services Commission;
 - (xiv) the President of the South Australian Bar Association;
 - (xv) the President of the Law Society of South Australia;
 - (xvi) the President of the Women Lawyers' Association of SA Inc;
 - (xvii) the Chair of the Women at the Bar Committee of the South Australian Bar Association;
- b) assemble an advisory committee (the advisory committee) constituted of three justices of the Supreme Court appointed by the Chief Justice at least one of whom must be female;

¹⁰ *Uniform Civil Rules 2020 (SA)* r 263.6.

- c) upon receiving the report referred to in rule 263.6(2) from the advisory committee convene a meeting of the Judges and Masters of the Court to consider the report and determine which applicants shall be appointed to the office of Senior Counsel.

(2) The advisory committee—

- a) may reject any applications not received by 5.00pm on 30 June, or such other date as the Chief Justice determines, in the year in which the application is to be considered;
- b) may reject any applications in respect of which any fee payable as referred to in rule 263.5 has not been paid by 5.00pm on 30 June, or such other date as the Chief Justice determines, in the year in which the application is to be considered;
- c) will consult with:
 - (i) the Attorney-General, the Solicitor-General, the Director of Public Prosecutions, the Chief Counsel of the Legal Services Commission, the South Australian nominee of the National President, Australian Association of Women Judges, the President of the Women Lawyers' Association of SA Inc, the Chair of the Women at the Bar Committee of the South Australian Bar Association;
 - (ii) the Chief Magistrate, the senior resident Judge of the Federal Circuit Court, the senior resident Judge of the Family Court of Australia, the President of the South Australian Employment Tribunal, the Deputy President of the Administrative Appeals Tribunal;
 - (iii) the Judges and Masters of the District Court;
 - (iv) the resident Judges of the Federal Court of Australia;
 - (v) any other judicial officer referred to by an applicant not included above or with whom, having regard to an applicant's application, the advisory committee considers it appropriate to consult;
 - (vi) the President of the South Australian Bar Association and the President of the Law Society of South Australia; together or separately as the advisory committee sees fit.
- d) must report in writing to the Chief Justice by 30 September, or such other date as the Chief Justice determines, on the outcome of the consultation process and the suitability of all applicants for appointment to office of Senior Counsel;
- e) may seek further information from an applicant but only if it is necessary to an understanding of any part or parts of an application or it is considered necessary to provide the applicant with procedural fairness;
- f) may consult further with any of those referred to in (c) above if the advisory committee thinks it appropriate.

(3) It is expected that the following persons will consult as specified in the following subparagraphs:

- a) in the case of each of the Presidents of the South Australian Bar Association, the Law Society of South Australia and the Women Lawyers' Association of SA Inc, and the Chair of the Women at the Bar Committee of the South Australian Bar Association - his or her council or executive and such other members as he or she considers appropriate;
- b) in the case of each head of another jurisdiction with the exception of the Federal Court of Australia and the District Court — judicial officers of that jurisdiction before whom the applicant has appeared.

(4) All consultations will be undertaken with discretion, respecting as far as possible the privacy of applicants, and will be made for the purpose of answering the question whether,

having regard to the criteria set out in rule 263.2, the applicant is a suitable person for appointment to the office of Senior Counsel.

APPOINTMENT¹¹

(1) Appointments of Senior Counsel will be decided by resolution of the Judges and Masters of the Supreme Court convened to consider the applications for Senior Counsel.

(2) Appointments will be executed by an instrument in writing bearing the seal of the Supreme Court by the Chief Justice on behalf of the Supreme Court under the hand of the Chief Justice and will, if practicable, be executed no later than 31 October, or such other date as the Chief Justice determines, of each year.

(3) The Chief Justice will inform each applicant in writing of the outcome of her or his application.

(4) The appointment of Senior Counsel will be announced publicly, and will be published in the South Australian Government Gazette.

LAST REVIEW¹²

Major changes include:

CRITERIA:

Significant changes to criteria for appointment, including more detail of each criterion.

DETERMINATION

Amended the details to be included in the form, and specified the requirements of the form in the rules. Introduced the three Justice advisory committee – previously the Chief Justice was tasked individually with the committee's current responsibilities. Added people who must be consulted, including the Chair of the Women at the Bar Committee of the South Australian Bar Association must be consulted.

Previously the Chief Justice would consider the information obtained from consultations and make a decision – now the advisory committee reports in writing to the Chief Justice on the outcome of the consultation process and the suitability of all applicants for appointment.

Previously, the Chief Justice alone made the ultimate decision. Now, appointments are decided by resolution of the Judges and Masters of the Supreme Court convened to consider the applications for Senior Counsel.

¹¹ *Uniform Civil Rules 2020* (SA) r 263.7.

¹² 2018 (as above). For the previous system, see [No. 69 - Thursday, 11 September 2014 \(pages 4355-4890\)](#) (governmentgazette.sa.gov.au), 4631-4635.

AUSTRALIAN CAPITAL TERRITORY

As at 25 September 2021

CRITERIA¹³

4. 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 foreshadows, their ability to provide exceptional service as advocates and advisers in the administration of justice.

5. 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, application, and development of the law.
- b) **skill:** Senior Counsel must be skilled in the presentation and testing of litigants' cases and accomplished in the giving of advice (including in complex or difficult matters).
- c) **integrity and honesty:** Senior Counsel must display integrity, honesty, and candour: Senior Counsel must demonstrate these qualities and be worthy of confidence and trust by the judiciary, their colleagues and clients at all times, so as to advance the administration of justice.
- d) **independence:** Senior Counsel must be committed to the discharge of their duty to the court, especially in cases where that duty may conflict with clients' interests.
- e) **disinterestedness:** Senior Counsel must have the objectivity and temperament to make sound judgements in difficult or complex situations. Senior Counsel who are in private practice must also 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 their causes, and subject only to exceptions related to appropriate fees and conflicting obligations.
- f) **diligence:** Senior Counsel must be dedicated to the pursuit of excellence and the advancement of their clients' interests.
- g) **experience:** Senior Counsel must have a deep understanding and knowledge of legal practice.
- h) **professional standing:** Senior Counsel should command a high measure of respect amongst the legal community, particularly amongst their peers and the Judiciary.

It is expected (without being exhaustive) that applicants' practices will demonstrate some of the following:

- i. experience in arguing cases, both at first instance and on appeal;
- ii. 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 the provision of advice in specialist and difficult fields of law;
- vi. experience and practice in alternative dispute resolution, including arbitrations and mediations.

¹³ <https://1tkqcs2ab6vj41r8lk3870qi-wpengine.netdna-ssl.com/wp-content/uploads/2019/12/SENIOR-COUNSEL-PROTOCOL-2020-1.pdf>, pp 1-2.

6. Senior Counsel must demonstrate leadership in:

- a) developing the community of the Bar;
- b) contributing to society as a barrister.

APPOINTMENT PROCESS¹⁴

SELECTION AND APPOINTMENT

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

7. All steps towards the selection of appointees are to be conducted by a committee comprising:

- 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.

8. The Selection Committee must at all times include at least one female.

9. 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.

10. The Selection Committee will rotate at least 3 of the 5 selected members each year.

11. The Selection Committee will be decided exclusively each year by the Bar Council.

12. 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.

13. The President may at any time inform any member, if requested, of the names of those who have made an application.

SUBMISSION OF APPLICATION

14. Applications for appointment are to be made in writing to the President by junior counsel with a full unrestricted practising certificate who wish to be considered for appointment as Senior Counsel, during periods as notified from time to time by the President. Applications for appointment as Senior Counsel may also be accepted from Government Practising Certificate Holders issued by the ACT Bar Association. The appointment of Senior Counsel takes effect from the date of appointment, unless otherwise stated in the notice of appointment.

¹⁴ <https://1tkqcs2ab6vj41r8lk3870qi-wpengine.netdna-ssl.com/wp-content/uploads/2019/12/SENIOR-COUNSEL-PROTOCOL-2020-1.pdf>, pages 3-7

15. Applicants must provide, in table form, in respect of all cases, including contested interlocutory applications (but excluding directions hearings), in which they have appeared in the preceding 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 New South Wales, 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 the Australian Capital Territory, please supply a contact number);
- d. the name of opposing counsel (if outside of the 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.

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

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 that the opportunities for barristers to engage in oral advocacy may vary significantly 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 proceedings including arbitrations and mediations.

16. Applicants must provide, as part of their application, a list of their readers/tutors and the years of such pupillage.

17. 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.

18. Applicants may, if they wish, nominate as referees not more than three members of the profession who are familiar with their recent work and qualities and who are not serving members of the judiciary. They may also, if they wish, provide not more than two written references from those they have nominated.

19. Any application not conforming with the requirements in clause 16(a)-(f) of this Protocol will be rejected. No application will be considered which is received later than 31 July, except in cases of accident or other special circumstances, and only then at the discretion of the President.

CONFIDENTIALITY

20. The collection, use, disclosure, storage of personal information relating to appointment of Senior Counsel is governed by Australian Privacy Principles 3, 5 6, 10, 11, and 12; and information collected will not be used or disclosed for a purpose other than the selection of Senior Counsel and the giving of feedback by the President to unsuccessful applicants.

21. In accordance with Australian Privacy Principle 11, 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.

22. 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

23. The Selection Committee must seek comments on each applicant from the following members of the ACT bar and the judiciary:

- a. All local currently practicing Senior Counsel and Queens Counsel;
- b. The Chief Justice of the Supreme Court of the ACT;
- c. Judges of the Supreme Court of the ACT;
- d. Any Associate Justice of the Supreme Court of the ACT;
- e. The Chief Magistrate of the ACT Magistrates Court;
- f. The Chief Justice of the Federal Court of Australia;
- g. The Chief Justice of the Family Court of Australia;
- h. The ACT Solicitor-General of the ACT Government Solicitor;
- i. The Director of Public Prosecutions (ACT);
- j. Such other members of other courts or tribunals in which the Selection Committee considers the applicant to have practised to a substantial extent.

24. The Selection Committee may, at its discretion, consult with any of the persons for whom comments have already been received, for the purposes of further discussion and clarification in considering the applications.

25. The Selection Committee shall, in evaluating any comments received, place significantly greater weight on any comments which are based upon personal and direct knowledge of an applicant.

26. The Selection Committee will use its best endeavours to consult with each nominated referee.

27. The Selection Committee shall, after taking into account all comments and responses received, make a final selection of any proposed appointee who is considered suitable having regard to the qualities and attributes set out in paragraphs 5 and 6 hereof.

28. The President shall inform the Chief Justice of the Supreme Court of the ACT of the Committee's proposed selection and seek the views of the Chief Justice on the proposed appointment as Senior Counsel.

29. The President shall not appoint any applicant whose appointment the Chief Justice opposes following the procedure set out in the preceding paragraphs.

30. The process of selection is to be completed so that a public announcement of the successful applicant/s may be made by the first week of November or at a suitable date and at the discretion of the President.

31. The President shall publish the name/s of the successful applicants for appointment as Senior Counsel for that year in order of intended seniority.

32. After publication of the list of successful applicants, any unsuccessful applicant shall be invited to discuss his or her application with the President (or his or her nominee) and one other member of the committee.

33. Any such discussion shall proceed in a manner which does not involve a real risk of disclosure of the identity of any person who provided information to the Selection Committee on a confidential basis.

LAST REVIEW

2019

Major changes include:

CRITERIA:

- ✓ Added professional standing in (h) and included honesty in (c)
- ✓ Removed clause 5 (vii): expectation for applicant to have experience sitting on courts or tribunals

SELECTION

- ✓ Introduced the Selection Committee

DETERMINATION

- ✓ Amended to whom advice is sought from. E.g. removed President of the Court of Appeal, added specifically the Director of Public Prosecutions (DPP)

NORTHERN TERRITORY¹⁵

Current to 25 September 2021

CRITERIA

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.

APPLICATION

(1) A legal practitioner 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 subrule (4) may make it available for inspection by anyone else.

APPOINTMENT PROCESS¹⁶

(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 Supreme Court Judges; and
- (iii) the Law Society and Northern Territory Bar Association Incorporated; and
- (iv) anyone else the Chief Justice considers appropriate.

¹⁵ *Supreme Court (Senior Counsel) Rules 2007* (NT); *Legal Profession Act 2006* (NT) s 21.

¹⁶ *Legal Profession Act 2006* (NT) s 21.

- (3) The practitioner must pay the Territory the fee prescribed by the regulations.
- (4) The consultation required under section 21(2)(b) of the *Legal Profession Act 2006* is to be conducted as the Chief Justice considers appropriate.
- (5) The Chief Justice may (but is not obliged to) refer adverse comments made about an applicant to the applicant for a response.
- (6) 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) The Chief Justice must notify an applicant of the Chief Justice's decision regarding the applicant's application.
- (8) The Chief Justice is not obliged to give reasons for the decision.

LAST UPDATED

29 March 2017.

However, the effect of this amendment was to solely preclude the appointment of Queen's Counsel.¹⁷ The process has not been substantively amended since its introduction in 2007.

¹⁷ *Supreme Court (Senior Counsel) Amendment Rules 2007* (NT) (SL No. 5, 2017).

TASMANIA

Current to 25 September 2021

CRITERIA¹⁸

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 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 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.

¹⁸ <https://www.supremecourt.tas.gov.au/wp-content/uploads/2019/09/Practice-Direction-No-3-of-2019-Senior-Counsel-Protocol.pdf>, page 1-2

APPOINTMENT PROCESS¹⁹

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. The applicant must give details of any outstanding disciplinary complaints, pending disciplinary proceedings, or adverse findings and penalties in past disciplinary proceedings relating to him or her.
- 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.

LAST REVIEW

2019, replacing directive 2/2012

Inserted in 2 (iii) that "The applicant must give details of any outstanding disciplinary complaints, pending disciplinary proceedings, or adverse findings and penalties in past disciplinary proceedings relating to him or her."

¹⁹ <https://www.supremecourt.tas.gov.au/wp-content/uploads/2019/09/Practice-Direction-No-3-of-2019-Senior-Counsel-Protocol.pdf>, page 2-3

ENGLAND & WALES

As at 25 September 2021

CRITERIA²⁰

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.

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

Subject to the advocate's duty to the court, 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.

²⁰ <https://qcappointments.org/wp-content/uploads/2020/02/Competency-Framework-2020.pdf>

- ✓ 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

Uphold the standards of behaviour expected of advocates and 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 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, respects the needs and cultural wishes of others 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.

APPLICATION

It should be noted that considerable guidance is given each year to assist applicants in completing their applications.²¹

- 1) Applicants will be required to complete an application form, to include a "self-assessment", allowing the applicant to provide his or her own evidence against published competencies. The form will also require applicants to disclose criminal convictions or findings of professional misconduct. The Selection Panel takes the view that under the Rehabilitation of Offenders Act 1974 an applicant need not disclose a spent conviction and the Panel will not take a spent conviction into account when considering an applicant.
- 2) Those who anticipate applying in the future will be encouraged to make contemporaneous notes about their work in order to help them complete the self-assessment when the time came for their applications to be made

APPOINTMENT PROCESS

1) Composition of the Selection Panel

1.1 The Selection Panel will be independent, will act in the service of the public interest, will include "lay" (non-lawyer) membership and must command respect.

1.2 The Selection Panel will consist of a minimum of nine members, including one or two retired or serving senior judges, senior lawyers, (among whom there should be both barristers and solicitors), and distinguished lay people. There should be at least as many lay people as lawyers (excluding any judicial members).

1.3 The Selection Panel will be chaired by a distinguished lay person.

²¹ See [FINAL-Guidance-for-Applicants-2021.pdf \(qcappointments.org\)](#)

1.4 Members of the Selection Panel will be remunerated at a rate that reflects the importance and seniority of their positions.

1.5 Decisions of the Selection Panel will be valid notwithstanding any vacancy or the absence of a Panel member from a meeting or meetings.

1.6 The appointments to the Selection Panel will be made as follows:

(a) the chair, initially by joint nomination of the Chair of the Bar and the President of the Law Society;

(b) the other lay members, by open competition;

(c) the judicial, barrister and solicitor members, by nomination by the Chair of the Bar (for the barrister members), the President of the Law Society (for the solicitor members), and the Chair of the Bar and the President of the Law Society jointly (for the judicial member(s)).

1.7 Each open competition for the members of the Selection Panel will be conducted by an appointment panel. The appointment panel will comprise three members, two nominated respectively by the Chair of the Bar and the President of the Law Society, the third being nominated by the other two members.

1.8 The Selection Panel will also have the responsibility of reviewing cases where cause was shown why an individual appointed to the rank QC under this scheme should lose the designation, and advising the Lord Chancellor on the matter.

2) Professional Conduct Checks

2.1 The list of applicants will go, confidentially, to the senior member of staff with responsibility for professional conduct at each of the professional bodies.

2.2 This will be to ensure any findings, or pending complaints, of misconduct are identified.

2.3 Where a finding or complaint had not been identified or addressed by the applicant in the application form, the applicant will be given an opportunity to address in writing

(a) any question of non-disclosure by the applicant of the finding or complaint and

(b) the materiality of the finding or complaint to the applicant's application.

2.4 Guidance has been prepared by the Selection Panel about the extent to which previous criminal convictions or findings of professional misconduct should be taken into account in assessing an applicant's suitability.

2.5 The list of applicants will go to the following judges: the Lord Chief Justice, the Master of the Rolls, the Senior Presiding Judge for England & Wales, President of the Queen's Bench Division, the Chancellor of the High Court and the President of the Family Division, and the Presidents of the Upper Tribunal.

2.6 Where one of those judges has reason to believe that an issue concerning integrity as it related to the competency framework was known to another judge, they will be entitled to invite the Selection Panel to seek comments from the judge concerned.

2.7 Where comments are sought from the judge concerned, the comments will be directed at the integrity element of the competency framework. Concerns will have to be fully particularised.

2.8 Concerns about integrity identified in this way will be put to the applicant concerned, so that the applicant has an opportunity to provide an explanation to the Selection Panel on the matter.

2.9 It will be for the Selection Panel to decide what weight to give to the comments made by the judge, taking into account the applicant's explanation and the rest of the information available to the Selection Panel.

3) Listing of Cases

Applicants will be expected to list 12 cases of substance, complexity or particular difficulty or sensitivity in which they have been engaged as advocate over the previous three years. Where an applicant is unable to list 12 such cases over the previous three years, he or she may list cases from earlier

4) Assessments from judges and arbitrators

4.1 Four assessments will be taken in writing.

4.2 Applicants will be required where possible to list a judge or arbitrator from each of their listed cases.

4.3 Applicants will be asked to nominate two judges from those listed, numbering them in order of preference. The applicant's first choice will be asked to give a confidential written assessment. If the applicant's first choice of nominated judge is unable to provide an assessment, then the applicant's second choice will be invited to do so instead.

4.4 The Selection Panel will select a further three judges or arbitrators from the list (in addition to the first nominated judge) for confidential written assessments. The selection will be made to provide a range of types of exposure and having regard to the ability of the judge to be able to address with authority the applicant's demonstration of the competencies. The selection will normally include

- (i) (where applicable) a senior judge with experience of the applicant's specialism(s) and

- (ii) the judge (or arbitrator) before whom the applicant had appeared most frequently, except where those judges do not appear to have had sufficient exposure to the applicant to address the applicant's demonstration of the competencies.

4.5 To assist their contribution, the judges or arbitrators selected will be given information provided by the applicant about the name and date of the case(s) in which they appeared before the assessor, and the brief account given by the applicant of his/her degree of exposure to the assessor.

5) Assessments from Fellow Advocates

5.1 Three assessments will be taken in writing.

5.2 Applicants will be required to identify a practitioner against whom they have appeared or by whom they have been led (or, if applicable, whom they have led), in each of their listed cases.

5.3 Applicants will be asked to nominate two practitioners from those listed, numbering them in order of preference. The applicant's first choice will be asked to give a confidential written assessment. If the applicant's first choice of nominated practitioner is unable to provide an assessment, then the applicant's second choice will be asked to do so instead.

5.4 The Selection Panel will select a further two from those identified by the applicant (in addition to the first nominated practitioner) for confidential written assessments. The selection will be made to provide a range of types of exposure and having regard to the ability of the practitioner to be able to address with authority the applicant's demonstration of the competencies.

5.5 To assist their contribution, the practitioners selected will be given information provided by the applicant about the name and date of the case(s) in which they appeared, and the brief account given by the applicant of his/her degree of exposure to the assessor.

6) Assessments from professional clients and clients (or client proxies)

6.1 Two assessments will be taken in writing.

6.2 Applicants will be required to identify at least six individuals who have been (in their own right or on behalf of their firm or employer) professional clients, clients or client proxies, in one of their 12 listed cases

6.3 Applicants will be asked to nominate two individuals from those listed, numbering them in order of preference. The applicant's first choice will be asked to give a confidential written assessment. If the applicant's first choice of nominated client assessor is unable to provide an assessment, then the applicant's second choice will be asked to do so instead.

6.4 The Selection Panel will select another person (apart from the first nominated client assessor) from those identified by the applicant, for a confidential written assessment. The selection will be made to provide a range of types of exposure and having regard to the ability of the prospective assessor to address with authority the applicant's demonstration of the competencies.

7) Consideration of assessments

7.1 Before any decision to interview, it will be open to the Selection Panel members (or senior members of the Secretariat under their direction) to approach assessors where on the face of it the assessment appears to be lacking in evidence.

8 Decision making by the Selection Panel

8.1 Each application, with the self-assessment and all assessments, will be read by two Selection Panel members (one lay; one professional) in preparation for interview. Any application which appears to the Panel members on the information available not to demonstrate the competencies sufficiently to make them at that stage a credible candidate for appointment in the instant year may be put to the full Selection Panel for a decision to treat the application as unsuccessful.

8.2 The full Selection Panel will then conduct a review of these decisions, including collective moderation of any borderline cases.

8.3 All applicants whose application is not to be treated as unsuccessful at this stage will be interviewed by two members of the Selection Panel (one lay and one professional). The interview will be directed at the competencies with a view to adducing further evidence as to their demonstration by the applicant, and resolving any questions over the application.

8.4 Following interview, those Selection Panel members will grade the applicant.

8.5 The full Selection Panel will then conduct a review of these initial grades. There will then be collective moderation, scrutiny of borderline cases, and the list of successful applicants will be finalised. It will not be open to the Selection Panel to call any applicant for further interview.

8.6 Written feedback comments will be prepared for each unsuccessful applicant.

9) Feedback²²

9.1 All applicants will be notified of the outcome of their application before the conclusion of the competition. Where an application is unsuccessful, feedback will be provided.

9.2 The feedback will be designed to assist focus on improvement, by identifying the areas in which the applicant needed to demonstrate more evidence, or to improve his/her standard further.

10) Complaints

10.1 Concerns or complaints about the operation of the system will be addressed by a complaints committee comprising a senior judge (nominated by the Lord Chief Justice), a lay person (appointed through public competition), a senior barrister (nominated by the Chair of the Bar) and a senior solicitor (nominated by the President of the Law Society).

10.2 In the event that the complaints committee upholds a complaint by an unsuccessful applicant, that will not mean that the candidate will automatically receive the award; instead the question whether the award should be made will be referred back to the Selection Panel for decision in light of the findings of the complaints committee.

The process is detailed at greater length in annual guidance documents for applicants.²³ The guidance given to applicants and the manner in which applicants are considered the panel are considerably more detailed than any other jurisdiction.

LAST REVIEW

Each year.

²² Note that provision of feedback is mandatory.

²³ [FINAL-Guidance-for-Applicants-2021.pdf \(qcappointments.org\)](#)

NEW ZEALAND²⁴

As at 25 September 2021

CRITERIA²⁵

Excellence: this is the overarching requirement. The standard for appointment is high and in most cases requires considerable length and depth of experience.

Knowledge of the law: expert, up to date, legal knowledge.

Commitment to improving access to justice: a history of making a personal contribution to advancing better access to justice for those who need it, for example by undertaking criminal/civil legal aid work, supporting community-based law centres, or through honorary positions or pro bono work.

Oral and/or written advocacy: superior skill in oral and/or written persuasive argument, including presentation and testing of litigants' cases.

Independence: the ability to devote him or herself to the client's interests, free of other influences.

Integrity and honesty in all dealings with clients, the judiciary and fellow practitioners.

Leadership in setting and maintaining the standards of the profession.

APPLICATION²⁶

Every application for appointment as Queen's Counsel must be made in the prescribed form. Information includes:

Professional information

The form requires information about the candidate's professional details, career history and any publications. The form also requires a brief description of your current practice, including any areas of specialism and an overview of the main types of matters you have been involved in over the past five years. In another section you are asked to identify up to ten matters you consider most significant in the past three years. These matters may also be referred to as evidence of your attainment of the criteria. Ordinarily these would be substantive trials or appeals. By way of example, a major or significant matter may have the following features: - referred to by the Judge as important, complex, significant or similar term; - is a test case or set a precedent; - has been reported or has been the subject of academic comment; - a serious fraud or criminal case; - a complex commercial or civil case (including family law cases).

Addressing the appointment criteria

In this section of the application form you must set out your assessment of how you meet the criteria. To the extent possible you should refer to particular instances which demonstrate your attainment of the criteria. You may draw examples from the matters

²⁴ *Lawyers and Conveyancers Act (Lawyers: Queen's Counsel) Regulations 2012* (NZ); Queen's Counsel – Guidelines for Candidates 2021.

²⁵ Queen's Counsel – Guidelines for Candidates 2021, p 2.

²⁶ Queen's Counsel – Guidelines for Candidates 2021, p 2-3. See [Microsoft Word - 5314741_2019_Application form for appointment as Queen's Counsel \(nzbar.org.nz\)](#).

you have identified in the summary description of your practice or from your work generally. Candidates are allowed approximately 450 words to address each criterion. This limit should be closely observed.

Other factors that may affect suitability for appointment

In this section candidates are asked to disclose any other details that may affect appointment. You are also required to provide consent for the New Zealand Law Society to provide information about any complaints that have been made relating to you, the outcome of the complaints and any disciplinary proceedings and whether there are any outstanding complaints.

Referees

Candidates often ask whether they should nominate referees to support their applications. Candidates may provide the names of referees but are not required to do so. Members of the judiciary are not to be named as referees. If the Solicitor-General or a delegate contacts a referee it will be to obtain comments on how the candidate meets the selection criteria.

APPOINTMENT PROCESS²⁷

Before making a recommendation, the Attorney-General must consult, on candidates for appointment as Queen's Counsel,—

- (a) the New Zealand Law Society; and
- (b) the New Zealand Bar Association.

The Attorney-General will consult with the Chief Justice on the candidates whose appointment is to be recommended to the Governor-General.

Appointments to Queen's Counsel are made by the Governor-General, by Letters Patent, under the Royal prerogative. Appointments are made on the recommendation of the Attorney-General and with the concurrence of the Chief Justice of New Zealand.

The Governor General can appoint Queen's Counsel at their discretion without the need for application of nomination.

LAST REVIEW

Guidelines seem to be released annually, however it is unclear when consideration was last given to substantively amending the process.

However, in 2019 a new criterion of commitment to improving access to justice was added to the guidelines.²⁸

²⁷ *Lawyers and Conveyancers Act (Lawyers: Queen's Counsel) Regulations 2012* (NZ) r 4, 8; Queen's Counsel – Guidelines for Candidates 2021, p 3-4.

²⁸ [Eight Queen's Counsel appointed under new criterion | Scoop News](#)