



NEW SOUTH WALES  
BAR ASSOCIATION

### SENIOR COUNSEL PROTOCOL – As at 27 April 2023

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

1. The designation as Senior Counsel of certain practising advocates by the President of the Bar Association, in accordance with the following principles and under the following system, is intended to serve the public interest.
2. The designation of Senior Counsel provides public identification of a barrister whose standing and achievements justify an expectation, on the part of those who may need their services as well as on the part of the judiciary and the public, that they can provide outstanding services as advocates and advisers, to the good of the administration of justice.
3. As an accolade awarded on the basis of the opinions of those best placed to judge barristers' qualities, the designation of Senior Counsel also provides a goal for junior counsel, and should encourage them to improve and maintain their professional qualities.
4. Appointment as Senior Counsel should be restricted to practising advocates holding a current New South Wales unrestricted practising certificate (that is, a practising certificate which does not have discretionary conditions imposed on it under the *Legal Profession Uniform Law* (NSW)), with acknowledgment of the importance of the work performed by way of giving advice, as well as appearing in or sitting on courts and other tribunals; or conducting or appearing in alternative dispute resolution, including arbitrations and mediations.

#### ESSENTIAL CRITERIA

5. The system for the designation of Senior Counsel must be administered so as to restrict appointment to those Counsel whose achievement of the qualities set out below displays their ability to provide exceptional service as advocates and advisers in the administration of justice.
6. The qualities required to a high degree before appointment as Senior Counsel are:
  - (a) **learning:** Senior Counsel must be learned in the law so as to provide sound guidance to their clients and to assist in the judicial interpretation and development of the law.

- (b) **skill:** Senior Counsel must be skilled in the presentation, testing, evaluation and/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 cabrank 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 their 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.

7. Senior Counsel will have demonstrated leadership in:

- (a) developing the diverse community of the Bar; or
- (b) making a significant contribution to Australian society as a barrister.

### SELECTION AND APPOINTMENT

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

8. All steps towards the selection of appointees are to be conducted by a Selection Committee (the ‘Selection Committee’) comprising:
  - (a) the President of the New South Wales Bar Association;
  - (b) the Senior Vice President of the New South Wales Bar Association;
  - (c) four other senior counsel (King’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 (King’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 who hold a current NSW unrestricted practising

certificate who wish to be considered for appointment as Senior Counsel. The appointment of Senior Counsel takes effect from the date of appointment, unless otherwise stated in the notice of appointment.

12. Applicants must provide a table 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, listing:
  - (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 5pm on the last Friday in July (28 July 2023), except in cases of accident or other special circumstances, and then at the discretion of the President.

## Confidentiality

18. Subject to clause 21 of this Protocol, information (including opinions) about an applicant including:
  - (a) information obtained from other persons (including members of the Consultation Group, as recorded in consultation responses and in discussions with the Selection Committee);
  - (b) information discussed as between the Selection Committee; and
  - (c) information produced in writing by the Selection Committee;will be kept confidential and will not be made available to persons outside the Selection Committee and its secretariat.
19. The collection of information relating to appointment of Senior Counsel is governed by the *Privacy Act 1988* (Cth), including in particular 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 collects, the Bar Association will destroy or permanently de-identify all documentation that it holds in relation to the selection process as soon as practicable after each year's appointments are announced. The members of the Selection Committee will also destroy all documentation they hold in relation to the selection process as soon as practicable after each year's appointments are announced.
21. Applicants are to be made aware that the fact of 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

22. 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.
23. The Selection Committee must seek comments on all applicants remaining after the preliminary selection from relevant members of the Consultation Group, to the extent to which they are able and wish to assist.

24. The Selection Committee must seek comments on each applicant remaining after the preliminary selection from relevant members of the judiciary, 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 Federal Circuit and Family Court of Australia; and
  - (f) 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.
- (the 'Judicial Consultation Group').
25. 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.
26. 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.
27. The Selection Committee shall, after taking into account all comments received, make its final selection of the proposed appointees.
28. 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.
29. The President shall not appoint any applicant included in the Selection Committee's final selection whose appointment the Chief Justice opposes.
30. 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.

31. 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.
32. After publication of the list of successful applicants, any unsuccessful applicant may discuss his or her application with the President.

#### ATTIRE AND POST NOMINALS

33. Subject to the approval of the Chief Justice of New South Wales, and subject to the requirements and permission of particular courts, tribunals and other jurisdictions, appointees as Senior Counsel shall wear the court dress worn by King's Counsel.
34. Appointees as Senior Counsel shall be entitled to describe themselves as 'Senior Counsel', to be abbreviated 'SC'.

#### UNDERTAKING

35. Senior Counsel, by seeking and achieving appointment, undertake to use the designation only while they remain practising barristers in private practice or retained under statute by the Crown, or during temporary appointments in a legal capacity to a court, tribunal or statutory body.
36. Subject to clause 37, a Senior Counsel who returns to legal practice as a barrister is entitled to resume the use of the designation.

#### CESSATION OF APPOINTMENT

37. Appointment as Senior Counsel is restricted to barristers who hold a current NSW unrestricted practising certificate.
38. A Senior Counsel:
  - (a) whose name has been removed from the roll of persons admitted as lawyers in any Australian or foreign jurisdiction; or
  - (b) whose practising certificate has been cancelled; or
  - (c) against whom a finding of professional misconduct has been made by a competent court or tribunal; or
  - (d) who has been convicted of a serious offence as defined in the *Legal Profession Uniform Law* (NSW),ceases to hold the appointment and is not permitted to retain or use the title of Senior Counsel.

39. Where the Bar Council believes that, having regard to the essential criteria for Senior Counsel appointment, the person is not fit to retain the title of Senior Counsel it may, by resolution, terminate the appointment of Senior Counsel in the following circumstances:
- (a) a finding of unsatisfactory professional conduct has been made against the appointee by a competent court or tribunal; or
  - (b) the appointee has discretionary conditions imposed on his or her practising certificate pursuant to the *Legal Profession Uniform Law* (NSW).
40. Reinstatement of a practising certificate does not result in reinstatement of an appointment as Senior Counsel following termination of the appointment under clause 38 or 39. A barrister will not however be prevented from re-applying for appointment as Senior Counsel other than where the termination of the designation followed the removal of the lawyer's name from the roll.

27 April 2023